

Update on the GDPR— EU perspective

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Presenting today



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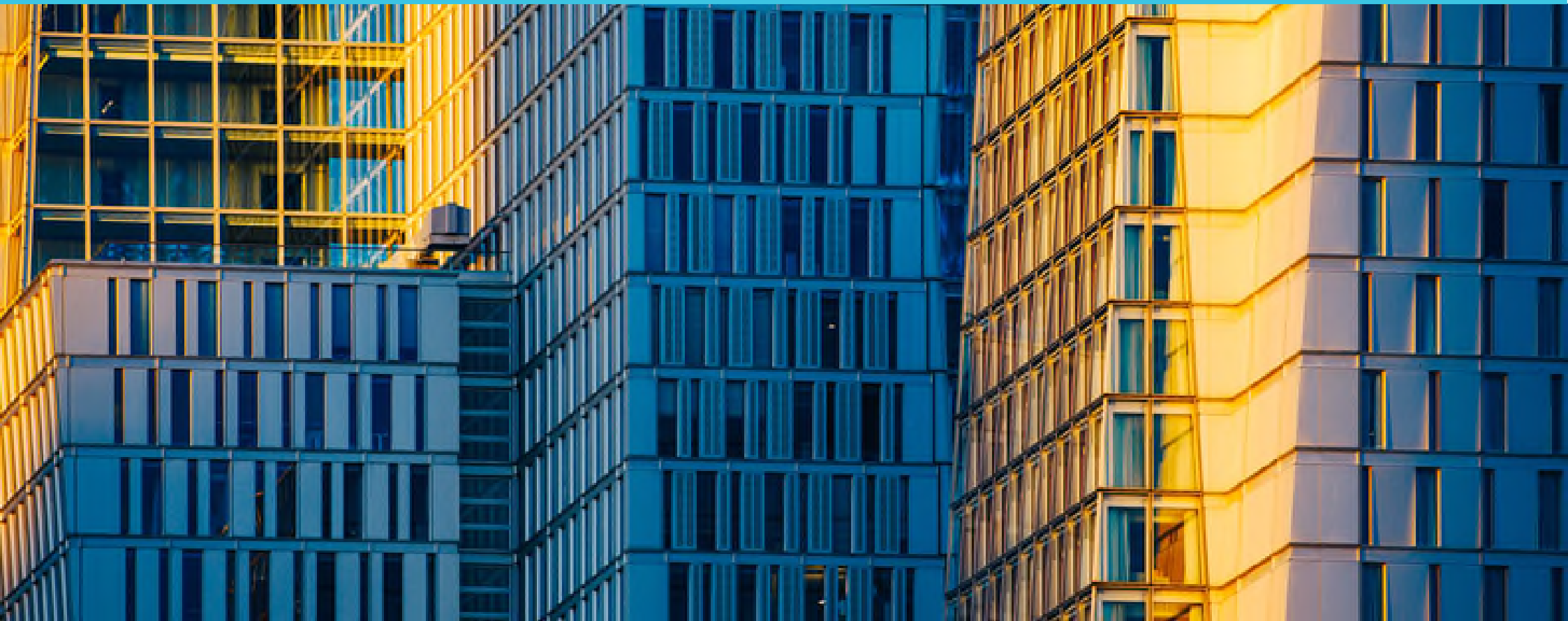
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Update on the GDPR — Germany



Agenda (Germany)

- Update on the right to compensation and liability (Art. 82 GDPR)
- Update on administrative fines (Art. 83 GDPR)
- What is considered an international data transfer (Art. 44 GDPR)?

Right to compensation and liability (Art. 82 GDPR) (1 of 5)

- CJEU – Case C-300/21 (Österreichische Post)
 - Mere infringement of GDPR not sufficient to confer right to compensation
 - Infringement
 - Material or non-material damage
 - Causal link between infringement and damage (“suffered ... as a result of ...”)
 - Non-material damage does not need to meet certain threshold of seriousness

Right to compensation and liability (Art. 82 GDPR) (2 of 5)

- CJEU – Case C-340/21 (Natsionalna agentsia za prihodite)
 - Controller bears burden of proof that security measures are appropriate pursuant to Art. 32 GDPR
 - Exemption from liability only if controller proves that it is no way responsible for the event giving rise to the damage
 - Fear of possible misuse of personal data may constitute non-material damage but court needs to verify that fear is well-founded under specific circumstances and with regard to data subject

Right to compensation and liability (Art. 82 GDPR) (3 of 5)

- CJEU – Case C-456/22 (Gemeinde Ummendorf)
 - Loss of control over data for a short period of time due to publication on the internet may constitute non-material damage
 - Confirms that damage differs from mere infringement of GDPR
 - Confirms that non-material damage does not need to meet ‘*de minimis threshold*’
 - Confirms that data subject needs to demonstrate that negative consequences constitute non-material damage

Right to compensation and liability (Art. 82 GDPR) (4 of 5)

- CJEU – Case C-667/21 (Krankenversicherung Nordrhein)
 - Claim for damages has only a compensatory function (not a dissuasive or punitive function)
 - Degree of fault is not taken into consideration when setting the amount of the compensation
 - Confirms that controller's fault is assumed unless it proves that it is no way responsible for the event giving rise to the damage

Right to compensation and liability (Art. 82 GDPR) (5 of 5)

□ CJEU – Case C-687/21 (MediaMarktSaturn)

- Well-founded fear of dissemination or misuse of data in the future may constitute non-material damage
- Claimant must demonstrate damage
 - Purely hypothetical risk of misuse is not sufficient
 - No risk where no third party became aware of personal data at issue

Update on administrative fines (Art. 83 GDPR) (1 of 2)

□ CJEU – Case C-807/21 (Deutsche Wohnen)

- Fines may be imposed directly on legal persons
 - Liability for infringements committed by any person acting in the course of their business and on their behalf (not just representatives, directors or managers)
 - No need to identify infringing natural person
- No strict liability
 - Negligent or intentional infringement is required (apparently low threshold)
 - Action or knowledge of the management body is not necessary

Update on administrative fines (Art. 83 GDPR) (2 of 2)

- CJEU – Case C-683/21 (Nacionalinis visuomenės sveikatos centras)
 - Fine may be imposed on a controller in respect of processing operations performed by a processor on behalf of that controller
 - Exceptions may apply in situations where processor has carried out processing for its own purposes or contrary to the controller's instructions or in such a manner that it cannot reasonably be considered that the controller consented to such processing

What is considered an international data transfer (Art. 44 GDPR)? (1 of 3)

- Public Procurement Tribunal Baden-Württemberg – Case - 1 VK 23/22
 - Use of a cloud provider situated in the EU with a US parent company may in itself constitute a transfer to a third country
 - Location of servers is irrelevant
 - No actual access to data from the US required
 - US nexus creates "latent risk of access" by US authorities (purportedly confirmed by "legal process" language in cloud provider's T&Cs)

What is considered an international data transfer (Art. 44 GDPR)? (2 of 3)

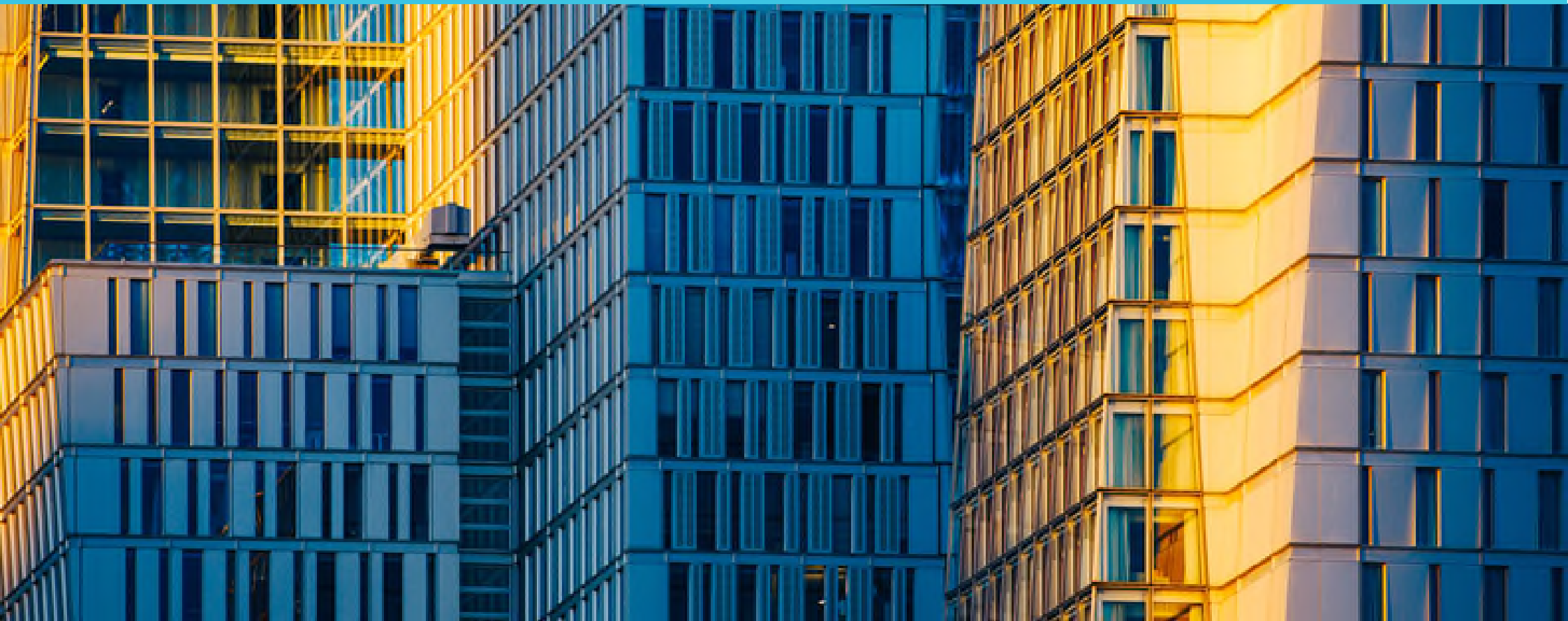
- Overruled by Higher District Court Karlsruhe – Case – 15 Verg 8/22
 - Mere existence of US parent company not sufficient to assume a transfer to a third country if no indications that personal data is processed in violation of controller’s instruction to process the data only within the EU

- See also Bundeskartellamt – Case – VK 2-114/22
 - Mere fact that company has a parent company in the US does not lead to processing in the US

What is considered an international data transfer (Art. 44 GDPR)? (3 of 3)

- European Data Protection Board (Guidelines 05/2021, v2.0, adopted 14 February 2023)
 - Three cumulative criteria for a data transfer to a third country
 - Data exporter is subject to GDPR
 - Data exporter discloses by transmission or otherwise makes available personal data to data importer
 - Data importer is in a third country / non-EAA country
 - If processing does not constitute such transfer, controller may still need to implement appropriate safeguards to ensure compliance

Update on the GDPR — France



Agenda - What's new in France?

- What happened in France in 2023?
- Overview of the CNIL's strategy for 2024



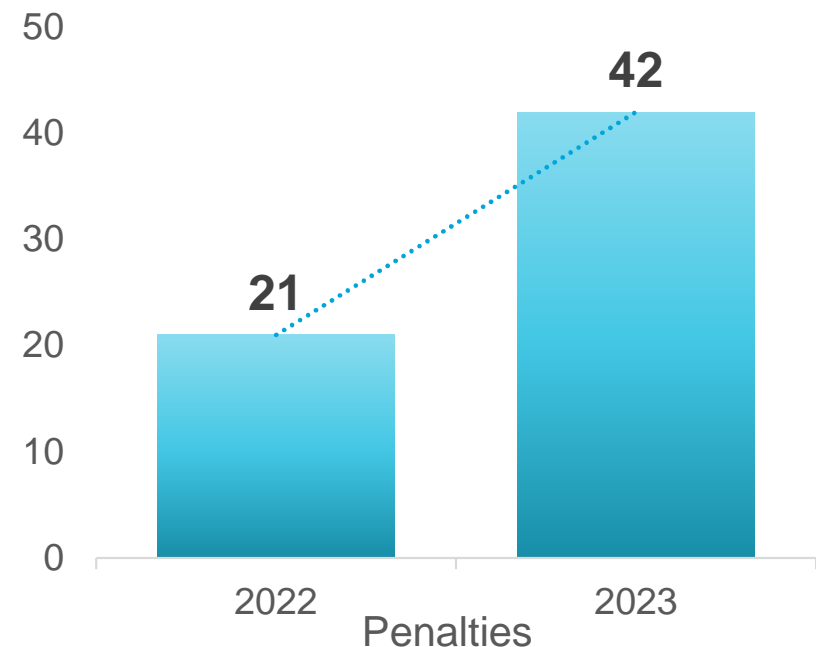
What happened in France in 2023?

- Sanctions
- Guidance
- A contested authorization
- Rules of evidence



The CNIL increased the scope of its repressive action in 2023

- 2023: 340 controls, 42 penalties and a total of €89,18M
- Result of the introduction of a simplified penalty procedure:
 - A fast and efficient procedure that focuses on the least complex cases
 - Analyzes the most common breaches



Publication by the CNIL of three new key guidelines



- A consolidated version of its doctrine
 - Publication of key national and European case law
 - Ensures the predictability in the application of the RGPD and the Data Protection Act
- TIA (Transfer Impact Assessment)
 - Assesses the level of data protection offered by local legislation
 - Takes into the practices of authorities in the third country
- IA guidelines
 - Answer to the legal and technical issues raised by AI
 - Clarify the rules applicable to scientific research and the re-use of datasets



A key authorization relating to the hosting of health data



- EMC2 data warehouse: automated health data processing and hosted on the Microsoft cloud
- GDPR issues raised by the CNIL:
 - Article 9(2) GDPR: Processing of sensitive data
 - Article 48 GDPR: Data transfers or disclosures not authorized by EU law
 - The lack of data sovereignty in Europe



French courts' decision on evidence used in relation to data protection



- *Supreme Court, December 22, 2023, no. 20-20.648*
 - Unfair evidence, obtained in violation of the law or infringing certain rights, can be admissible
 - Proportionality control by the judge:
 - The production of unfair evidence must be indispensable to the exercise of the right to evidence,
 - And the infringement of the opposing party's rights must be strictly proportional to the nature of the evidence.

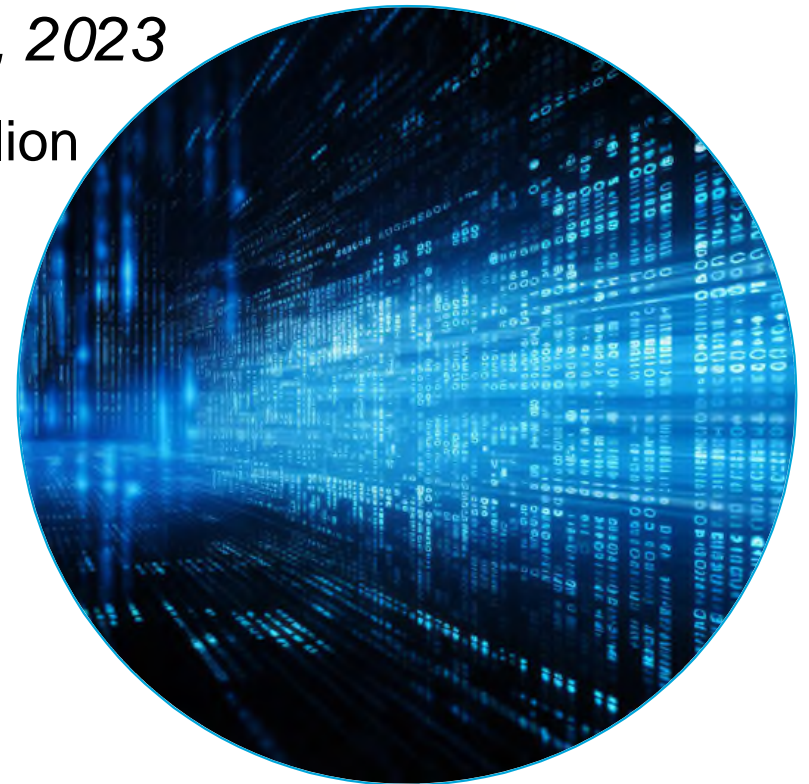


Control of the CNIL on the use of employees' data



□ *Decision SAN-2023-021 of December 27, 2023*

- A large logistic company was fined 32 million euros for monitoring employees without information and with insufficient security
- GDPR issues raised by the CNIL:
 - Data minimization principle
 - Lawfulness of processing
 - Information obligation
 - Transparency obligation



Overview of the CNIL's strategy for 2024

- ❑ Olympic Games
- ❑ Minors data
- ❑ Right of access



The Olympic Games



- The use of data during Olympic and Paralympic Games:
 - In order to continue the controls initiated the previous year, the CNIL announces that it will pay special attention to the use of:
 - QR codes for restricted access areas;
 - Access authorizations;
 - Augmented cameras.
- The use of AI for video protection :
 - Law No. 2023-380 of 19 May 2023 specific to the 2024 Olympic and Paralympic Games
 - Allows the use of smart cameras as an experimentation during the games
 - Article 9: Information of the public about the processing of data and their rights exercise



b. Other priority topics

- Minors data
 - Age control mechanisms, safety measures, and compliance with the principle of minimizing data on popular applications
 - SREN Law (17 October 2023) on protection of minors online
- Right of access of data subjects



▶ Developments in Czech Data Protection Law

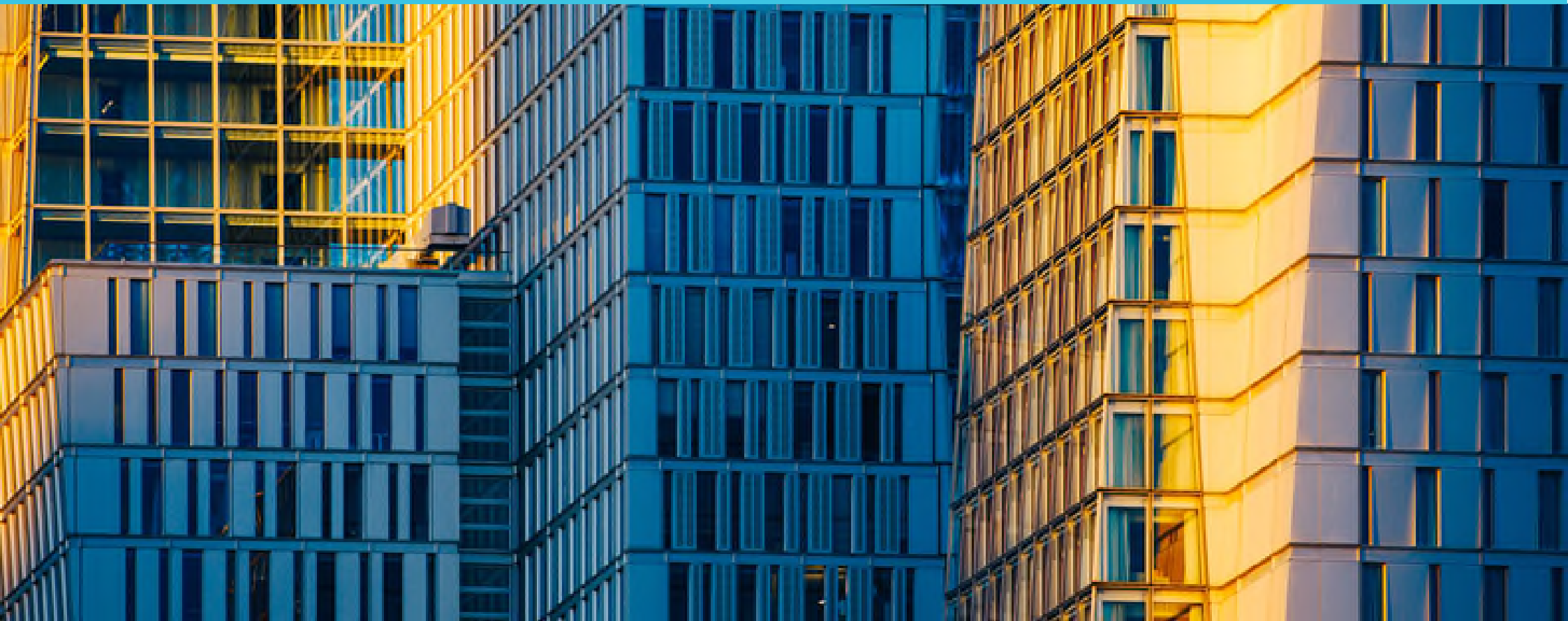


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- Powers of the Czech Data Protection Authority (CDPA)
- Observable trends as to the activities of CPDA
- Inspections and case law

▶ Powers of the Czech Data Protection Authority (CDPA)

- Independent administrative authority
- Applicable laws:
 - GDPR, Czech Data Protection Act, Act on Electronic Communications, Act on Inspections, Code of Administrative Procedure, and Act on Administrative Offenses
- 3 types of procedures:
 - consultations, inspections and administrative proceedings

Inspections

- CDPA is authorized to conduct inspections under the Act on Inspections
 - Inspected entities have an obligation to cooperate and provide information
 - CDPA issues protocols containing findings from inspections
 - A procedure on an administrative offense may follow after the inspection, but is usually preceded by a remedial notice (a form of consultation activity of the CDPA)

Administrative Offenses

- CDPA may impose fines for violations of GDPR in administrative proceedings
- Decisions are subject to appeal to the Chairman of the CDPA
- The final CDPA decision is subject to judicial review before the administrative courts

Observable trends in the activities of CDPA

- Covid-19
- Cyber attacks
- Cookies

Covid-19

- 664 public-interest submissions to the CDPA in 2021
- Review of pandemic control applications
- Review of using tracking links within text messages
- Inspection of an online vaccination booking system
- Review at a college that had ordered students to upload vaccination certificates to its information system

Cyber attacks

- Russian aggression against Ukraine
 - Disinformation and cyber attacks with the main motive of undermining credibility of the state
 - Coupled with unprecedented efforts to abuse personal data
 - 313 data breaches reported in 2022 (cyber attack as the most common cause)
- CDPA's cooperation with the National Office for Cyber and Information Security
 - 2022 - inspection of the processing of personal of data in the use of cloud services within the Public Administration Portal

▶ Cookies (1 of 2)

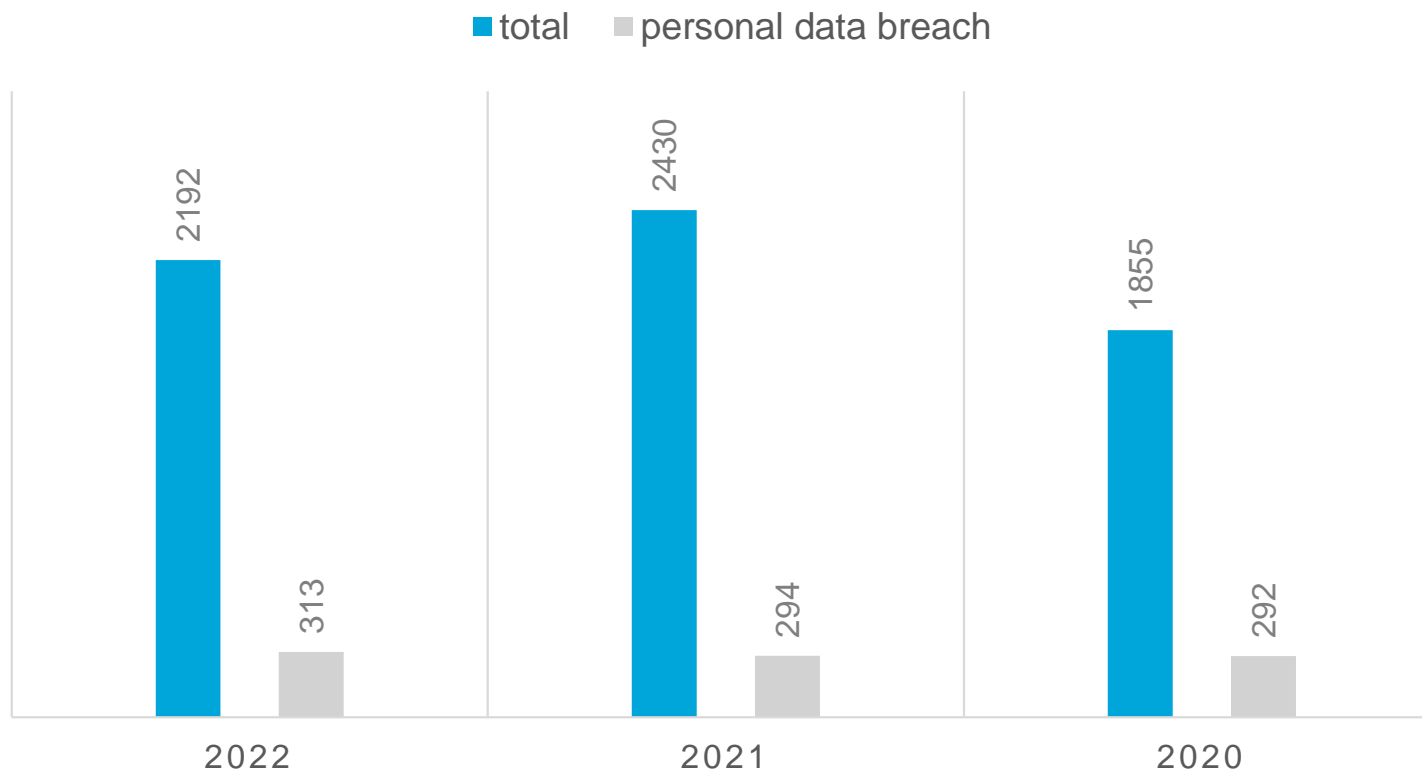
- Amendment to the Act on Electronic Communications
 - Effective 1 January 2022, the so-called opt-in principle (active consent) is implemented in the Czech Republic
- New Cookies Methodology of CDPA
 - No cookie bar required for essential cookies
 - No dark patterns, one (non-)consent layer, easy revocability
 - Consent granted for a maximum of 12 months, repeated requests limited

▶ Cookies (2 of 2)

- 35 in-depth analyses of websites were carried out in 2022
 - Most common violations:
 - Invalid consent (65.58% of inspected cases), undisclosed behavior of cookies (56.52%), late data retention (52.17%), information obligation breach (34.78%), wrong classification of cookies (8.7%)
- From January to August 2023, CDPA imposed fines in the total amount of CZK 4,443,000

Statistics

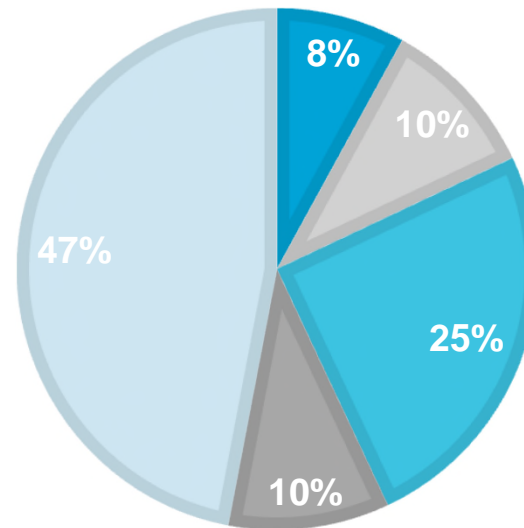
SUBMISSIONS AND COMPLAINTS 2022



Statistics

COMPLAINTS 2022

- exercise of the rights of data subjects under Articles 15 to 21 GDPR
- disclosure/access to personal data
- business communication and telemarketing
- CCTV monitoring
- others



Inspection activities of the Czech Data Protection Authority (CDPA) (1 of 3)

- Inspection of loyalty programmes of retail chains
 - Overlong / unjustified retention of personal data
 - Retention of personal data on the purchase of food products and drugstore goods for 3 years was found unreasonable.
 - CDPA recommended shortening the retention to match the warranty period.

Inspection activities of the Czech Data Protection Authority (CDPA) (2 of 3)

○ Telemarketing

- 1/4 of the complaints received by the CDPA in 2021 and 2022 were complaints about the processing of personal data for marketing purposes.
 - Affected persons experience marketing calls as a much greater invasion of privacy than commercial communication sent electronically (email, SMS).
 - The "opt-in" principle implemented by the Amendment to Act No. 127/2005 Coll., on Electronic Communications effective from 1 January 2022 also applies to randomly generated phone numbers.

Inspection activities of the Czech Data Protection Authority (CDPA) (3 of 3)

- Deputies' personal data on social media
 - Publishing the address of someone's residence constitutes personal data processing even when it is not clearly linked to a name.
 - Violation of Articles 6(1) and 14 of the GDPR.
 - The first step in any personal data processing is determining its (legitimate) purpose.

Recent judicial review of CDPA decisions

- Judgment of the Supreme Administrative Court (SAC) of 25 February 2022, Case No. 10 As 190/2020-39
- Judgment of the SAC of 18 May 2022, Case No. 5 As 128/2021-38
- Judgment of the SAC of 11 November 2021, Case No. 1 As 238/2021 - 33

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