

NEWSLETTER

TECH / DATA



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Published on December 27, 2022, this new text replaces the Directive NIS 1 No. 2016/1148, which became insufficient to guarantee a high and uniform level of security of networks and information systems in the EU.



LATEST NEWS - TECHNOLOGIES

Entry into force of the Directive NIS 2

Directive No. 2022/2555, Dec. 14, 2022, NIS 2

Published on December 27, 2022, this new text replaces the NIS 1 Directive No. 2016/1148, which has become insufficient to ensure a high and uniform level of security of networks and information systems throughout the EU.

The NIS 2 Directive aims to remove significant disparities between Member States, in particular by defining minimum transposition rules. Thus, Article 5 provides for a minimum level of harmonization allowing Member States to only introduce a higher level of cybersecurity than the one imposed by the text.

The text also establishes effective cooperation mechanisms between the competent authorities of each Member State. Article 14 creates a group for cooperation and exchange of information between Member States. Article 15 creates a network bringing together national CSIRTs (Computer Security Incident Response Teams) to enable rapid and effective operational cooperation. Finally, Article 16 establishes "EU-CyCLONe", the European network for liaison and coordinated management of major cyber security incidents and crises.

The directive also updates the list of sectors and activities subject to cybersecurity obligations. Indeed, Article 3 defines the essential entities subject to the obligations of the directive, including for example: providers of public electronic communication networks, domain name registries, DNS service providers, etc. Article 21 enforces entities to take appropriate and proportionate technical, operational and organizational measures to manage the risks related to the security of networks and information systems.

It also provides for remedies and effective enforcement of these obligations. Article 32 provides that national competent authorities may subject critical entities to inspections, audits, security scans, requests for information, requests for access to data and requests for evidence. In particular, these authorities have the power to issue warnings, order entities to comply or to put an end to illegal behavior.

Member States have until October 17, 2024 to incorporate these provisions into their national law.

Blocking of pornographic sites: Pornhub's claim for unconstitutionality to the Court of cassation rejected

French Court of cassation 1st, Jan. 5, 2023, No. 22-40.017

The Court of cassation refused to submit to the Constitutional Council the request of unconstitutionality presented by Pornhub for lack of seriousness. Pornhub had indeed submitted this claim, considering that the offence it was accused of, provided for in Article 227-24 of the Penal Code, was not defined "in sufficiently clear and precise terms". This issue follows the referral of the case to the Court by ARCOM in order to block Pornhub website, because it failed to comply with the injunction under Article 227-24 of the Penal Code by putting in place the necessary means to prevent access to its pornographic content by minors, the simple request for confirmation of majority at the entrance of a pornographic site is, according to ARCOM, insufficient.

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Warranty against eviction: necessary limitation in time and respect of the trade freedom

Paris Court of appeal, Section 5, Ch. 9, Nov. 24, 2022, No. 22/02374

In a dispute between former partners of tech companies, the Court of appeal recalls the legal requirement of non-competition, born of the warranty against eviction. Articles 1626 to 1640 of the Civil Code provide that in the event of a sale of shares, the seller must refrain from carrying out acts that could prevent the continuation of the company's economic activity as well as the realization of the company's mission.

Former partners of a company specializing in open source solutions had sold their shares to create or join a concurrent company, Blue Mind, several years later. Linagora accused the former partners of not having refrained from any act likely to constitute a takeover or an attempt to take over the property sold or to undermine Linagora's activities.

The Court of Appeal concluded, however, that they had not violated this legal obligation since it must not disproportionately infringe the freedom of trade and industry, and thus the freedom of entrepreneurship which has constitutional value. Therefore, it is required that this prohibition of competition be delimited as to the prohibited activity and as to the spatial and temporal framework, which must be assessed *in concreto*.

In the present case, the prohibition to re-establish oneself was no longer justified at the time of the alleged facts due to the necessary temporal delimitation.

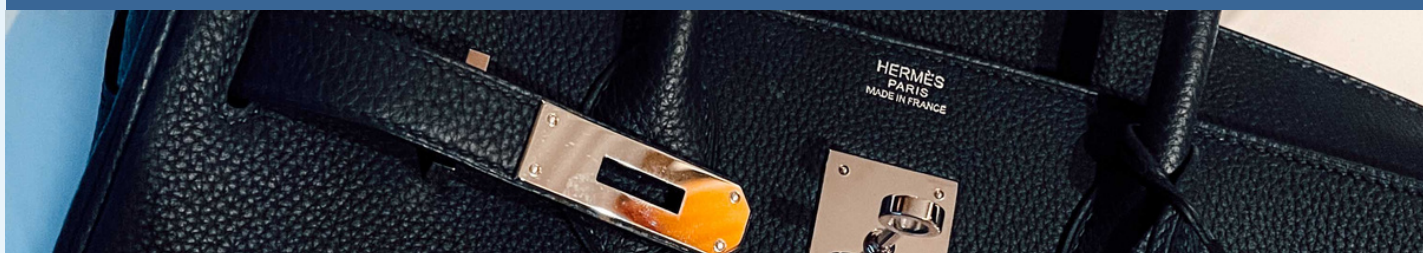


INTERNATIONAL NEWS

On January 14, 2022, Hermès filed an action against Mason Rothschild for infringement of its bag design and its trademark "BIRKIN", as well as an action for brand damage. Indeed, the American artist sells NFTs representing bags in fake fur, freely inspired by the Hermès design.

In response, Mason Rothschild filed a motion to dismiss, invoking his artistic freedom. However, this motion was denied by the Southern District Court of New York, which found that Hermes' claim made sufficient factual allegations. This finally allowed the trial to begin on January 30, 2023.

To be continued...



LATEST NEWS - TECHNOLOGIES

ECJ - Administrative and civil actions under the GDPR can be exercised simultaneously and independently

ECJ, Jan. 12, 2023, No. C-132/21

The ECJ recalls that the GDPR allows persons invoking its violation to opt for different remedies "without prejudice" to the others, as the GDPR does not provide for priority or exclusive jurisdiction, nor any rule of primacy in the assessment of the existence of a violation of the rights concerned.

It is therefore up to the Member States to adopt procedural rules to ensure that the parallel exercise of these remedies does not prejudice the consistent and homogeneous application of the GDPR.

In France, it will certainly be necessary to comply with this decision. Indeed, Article 37 paragraph 2 of the French Data Protection law provides, for example, the only alternative choice between a civil or administrative action.

ECJ - Clarification on the dereferencing of allegedly inaccurate content from search engines

ECJ, Dec. 8, 2022, No. C-460/20

The applicants had referred a question to the ECJ for a preliminary ruling following Google's refusal to dereference results leading to articles which, in their view, contained inaccurate allegations and defamatory opinions, in that they suggested that they lead a luxurious life and criticized the investment model of several of the companies in which they are directors.

According to the ECJ, where some of the information is not minor in relation to the content referenced appears to be manifestly inaccurate in light of the evidence provided by the applicants, the search engine operator is required to grant the request for de-listing.

CNIL highlights the limits of the applicability of the GDPR

CNIL, Dec. 20, 2022, decision No. SAN-2022-024

Lusha is a web browser extension that reveals to its users the professional contact information of people with LinkedIn or Salesforce accounts. Although the CNIL considered that it did not provide sufficient information on how the data was obtained and processed, it nevertheless dismissed the case against the Israeli-American company Lusha, considering that the GDPR was not applicable to it. Indeed, the company has no establishment in the European Union. Moreover, the extension is not linked to an offer of goods or services to the persons concerned, and it has not been established that these persons are subject to monitoring of their behavior by the company.

However, if the GDPR is not enforceable against Lusha, user customers who use the contact information collected through this extension without having first obtained the consent of the individuals concerned can potentially be sanctioned.



As of November 27, 2022, when transferring data outside the European Union, data exporters and importers must use the new standard contractual clauses (SCCs) updated in 2021 by the European Commission, or use another transfer tool. It is no longer possible to rely on the old SCCs.

PENALTIES FOR DATA PROTECTION BREACHES

USA - Epic Games fined 520 million euros by the US Federal Trade Commission (FTC)

The FTC criticized Epic Games, the publisher of the video game Fortnite, for not having sufficiently protected players under the age of 13 by collecting their private data without notifying their parents. In addition, text or voice message exchange features were enabled by default, allowing any user to contact minors, making harassment and sending threats possible.

In a second action, the FTC argued that the game's purchase of virtual items was overly simplified, misleading minors who made purchases without realizing it.



IRELAND - EDPD adopts three binding decisions on Facebook, Instagram and WhatsApp

EDPD, Dec. 5, 2022, No. 3/2022

EDPD, Dec. 5, 2022, No. 4/2022

EDPD, Dec. 5, 2022, No. 5/2022

The Irish Data Protection Commission (DPC) has fined Meta three times for a total of €395.5 million, accusing it of violating its transparency obligations on its Instagram, Facebook and WhatsApp platforms. Meta was accused of not clearly indicating to its users what processing was carried out with their private data and for what purpose when they accepted the general terms of use.

In his decisions, the EDPD considers that it is not allowed to invoke the legal basis of "contract" as a ground for processing private data for behavioral advertising purposes.

PENALTIES RULED BY THE CNIL

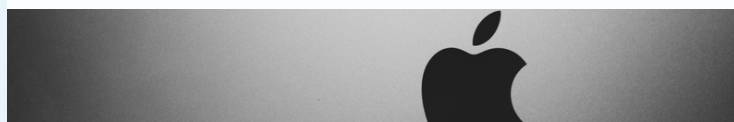
60 million euros fine against Microsoft Ireland

CNIL, Dec. 19, 2022, decision No. SAN-2022-023

On December 19, 2022, the CNIL imposed a fine of 60 million euros on the company MICROSOFT IRELAND OPERATIONS LIMITED, for breaches of Article 82 of the Data Protection Act of 1978. Indeed, cookies were deposited, in particular for advertising purposes, without prior consent of the users of the search engine "Bing".

While a button allowed the user to accept cookies, there was no equivalent solution to refuse them as easily, as two clicks were required to refuse them.

Microsoft has communicated that it has introduced key changes in its cookie practices but expressed concerns about the CNIL's position on the risk of advertising fraud detrimental to the general public and French businesses.



8 million euros fine against Apple

CNIL, Dec. 29, 2022, decision No. SAN-2022-025

The CNIL criticized Apple for the automatic use under the 14.6 old version of the iPhone's operating system, of users' identifiers from the App Store, in particular for the purpose of personalizing advertisements. In fact, these identifiers must not be read and/or stored without the user's prior consent, which was not the case since the ad targeting settings were pre-checked by default.

Apple said it was disappointed with this decision because of its efforts to prioritize user privacy and confirmed its willingness to appeal.

3 million euros fine against VOODOO

CNIL, Dec. 29, 2022, decision No. SAN-2022-026

On December 29, 2022, the French Data Protection Authority (CNIL) fined VOODOO, a smartphone game publisher, 3 million euros after noting that even when players refused to be tracked for advertising purposes, the technical identifier associated with the user was still read without their consent and used for advertising purposes.

5 million euros fine against TIKTOK

CNIL, Dec. 29, 2022, decision No. SAN-2022-027

The CNIL criticized the companies TIKTOK UNITED KINGDOM and TIKTOK IRELAND for not allowing users of the social network to refuse cookies as easily as to accept them. Moreover, it noted that users were not informed in a sufficiently precise manner of the purposes of the cookies present on the platform. The CNIL therefore concluded that there was a breach of Article 82 of the 1978 Data Protection Act.

