

NEWSLETTER

TECH / DATA



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LATEST NEWS - TECHNOLOGIES

Adoption of the AI Act

In our [June-August 2023 issue](#), we reported on the adoption of the first version of the AI Act by the European Parliament. After three days of marathon negotiations, the parliamentary negotiators and the Council Presidency reached a final proposal on December 8, 2023.

The dialogues made it possible to define a common position on the future provisions of the regulation concerning respect for fundamental rights. In particular, the text provides for a ban on AI that could pose a threat to citizens' rights and democracy. This covers systems using sensitive data, abusing facial and emotional recognition or used for intrusive and discriminatory purposes. There are also enhanced obligations for AI classified as high-risk, presenting significant harm to health, safety or the environment. Content-generating foundation models should be subject to a general obligation of transparency and comply with copyright legislation.

Citizens will have rights of information and will be able to lodge complaints. Penalties ranging from 7.5 million euros or 1.5% of worldwide turnover to 35 million euros or 7% of worldwide turnover are also envisaged.

The text should come into effect in 2026, with a few exceptions for specific provision.



G7 Adoption of a conduct code to provide a better framework for AI

At the G7 meeting on October 28 and 29, 2023, member countries adopted a code of conduct on artificial intelligence aimed at "promoting safe, secure and trustworthy AI worldwide". The code will provide voluntary guidance for the actions of organizations developing advanced AI systems, including basic models and generative AI systems to fight against the risks associated with cyberattacks and fake news. In particular, companies are urged to publish reports on the capabilities and limitations of their AI systems, and to invest in robust security controls. This code, although non-binding, will provide guidance for AI developers, users and regulators, and will be used as a basis for subsequent measures taken by member states.

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INTERNATIONAL FOCUS

USA : Signature of Presidential Executive Order to regulate AI

Executive Order « Safe, Secure, and Trustworthy Artificial Intelligence », October 30, 2023

On October 30, 2023, Joe Biden signed the "Safe, Secure, and Trustworthy Artificial Intelligence" executive order to ensure new standards for the safety and security of AI systems. Aware of the algorithmic biases of AI systems, the US government wishes to guarantee their fairness and limit the risks of discrimination surrounding generative AI systems in the recruitment sector and in the prison system. Among other things, the decree will require developers to notify the government of the results of their security tests, set up a cybersecurity program using AI, and award additional grants to encourage research into the development of trusted AI.

China : AI generated images protected by copyright law

Beijing Internet Court, n°(2023)-0491-11279 (decision in Chinese)

In a ruling dated November 27, 2023, Chinese judges recognized for the first time copyright protection for AI generated images. In this case, someone having generated images using the AI tool Stable Diffusion had sue for infringement a person who had used such images to illustrate a poem published on the content creation platform Baijiahao.

The court stated that the plaintiff having used AI tool had played a predominantly active role and made sufficient intellectual investment to establish his copyright on the images. He had defined the layout and composition of the images using parameters that reflected his choices. Thus, the litigious images were not mere "mechanical intellectual creations". In that sense, AI was regarded as a technical tool used by a creator, just like a camera can be used by a photographer.



LATEST NEWS - TECHNOLOGIES



INTERNATIONAL FOCUS

Google abuses its monopoly on the online application market

U.S. judges have stated in favor of the video game company Epic Games in its lawsuit against Google: the search engine is considered as having abused its monopoly on the Android mobile application distribution market. The company had turned its Play App Store and Play Billing services into an illegal monopoly by charging unduly high fees, up to 30%, to app developers, forcing them to use both services for their apps to be included in the store. Remedies are expected to be announced in January 2024. Google is encouraged to create more app stores on Android-powered devices.

**Open AI and Microsoft sued by the New York Times for copyright violation**

The New York Times announced on December 27, 2023 that it had filed a lawsuit against OpenAI and Microsoft for copyright violation. The daily newspaper claims that the companies' AI models use, without authorization, more than 66 million documents of the Time. It is seeking damages, the withdrawal of all language models including their content, and the destruction of data already collected. This complaint is part of a series of lawsuits against major companies developing AI systems. OpenAI had already been the subject of a class action filed by the American Authors Guild for infringement of copyright protecting literary works. For more information, we invite you to read our article on this subject in the [September-October 2023 TECH/DATAS Newsletter](#).

LATEST NEWS - TECHNOLOGIES

Censorship by the Constitutional Council of the remote activation of electronic devices to capture sounds and images

Constitutional Council, Ruling No. 2023-855 DC , November 16, 2023

The Constitutional Council has ruled on the Justice Act's provision for remote activation of connected devices to listen and film their owners, without their knowledge, and has stated that this provision is likely to cause a particularly serious breach of privacy. This measure allows the recording in any place, including private homes, of words and images relating to both the persons under investigation and third parties, and cannot be considered proportionate to the aim pursued, and therefore contrary to the Constitution. However, the Council greenlighted other contested measures, such as the remote activation of telephones and electronic devices for geolocation purposes, recognizing that they did not infringe the right to privacy.



Tiktok contest its gatekeeper designation

In our [September-October 2023 issue](#), we reported on the designation of six gatekeepers concerned by the DMA. On November 16, 2023, Tiktok announced its intention to contest its gatekeeper designation, as it believes it does not occupy a solid position in Europe and has only been established in the territory for five years. The platform considers itself a "challenger" rather than a historic operator and maintains that the revenues it generates do not reach the threshold set by the text, i.e. 7.5 billion euros per year. The social media also points out that its parent company ByteDance, and not Tiktok, appears on the list of access controllers published last September. Pending a ruling on the merits of the case, Tiktok is requesting a temporary suspension of the designation.

To be continued...

LATEST NEWS - TECHNOLOGIES

Lauching of the Registration Data Request Service to obtain contact information of disputed domain name registrant without initiating legal proceedings

Communiqué de presse de l'ICANN, 28 novembre 2023, « L'ICANN lance un service global pour simplifier les demandes d'accès à des données d'enregistrement de noms de domaine non publiques »

US Internet regulator ICANN (Internet Corporation for Assigned Names and Numbers) has introduced the Registration Data Request Service (RDRS), a new Whois data access facility enabling the request to obtain normally private generic top-level domain (gTLD) registration information, such as the name and contact details of its registrant, without having to initiate a procedure. The service will streamline and standardize the process of receiving requests via a single platform. This new system represents an important resource for ICANN-accredited registrars and for all those with a legitimate interest in accessing non-public data, such as law enforcement, consumer advocates and government officials.



Apple forced to suspend sales of Apple Watch in the United States for patent infringement

The U.S. International Trade Commission (ITC) found that the marketing of two Apple Watch models infringed patents held by Masimo Corporation and Cercacor Laboratories by copying patented technologies for detecting oxygen levels in the blood. The ITC recommended a ban on the sale of these connected watches, and President Joe Biden's administration had until December 25, 2023 to veto it, which it ultimately failed to do. From now on, Apple is no longer entitled to sell the disputed products, either online or in physical stores.

LATEST NEWS - DATA PROTECTION

EDPS Guidelines aimed at clarifying the notion of tracking in the ePrivacy Directive

EDPS Guideline No. 2/2023 on Technical Scope of Art. 5(3) of ePrivacy Directive

On November 15, 2023, the EDPS (European Data Protection Committee) adopted a set of guidelines on the technical scope of the "tracking" provisions of the ePrivacy Directive, which guarantees users and subscribers protection of their terminals against unwanted access or storage of information. In particular, these guidelines clarify certain key notions of the Directive, and point out that the notion of "access" is independent of the notion of "storage of information", as these two operations are not necessarily carried out cumulatively or by the same entity. The text also presents a series of use cases representative of practices in the advertising ecosystem, representing alternative methods to third-party cookies (pixel tracking, unique identifiers, local data processing, etc.).

CNIL's Recommendations on sharing of personal data via API

CNIL technical recommendation on the use of APIs for the secure sharing of personal data, November 24, 2023

Application Programming Interfaces (APIs) are now regularly used to share data between administrations, private organizations or individuals. On November 24, 2023, the CNIL issued a series of recommendations on the subject, with a view to clarifying the implementation of these interfaces. A detailed methodology coupled with concrete examples is thus made available to all players in the sharing chain to ensure that data exchanges via APIs comply with the laws in force, taking into consideration various factors such as the type of data access and the security of authentication techniques.



Conditions of access by a patient to his medical file with regard to the GDPR

ECJ, C-307/22, October 26, 2023

In this case, a German patient wanted to have access to his medical file in the context of a dispute with his dentist, who ordered him to pay a fee for providing a copy of the file in accordance with German law. The ECJ, asked about the compatibility of German law with the GDPR, recalled that as a matter of principle, Article 12 of the GDPR grants every person the right to obtain a faithful and intelligible reproduction of their personal data, which must be communicated free of charge. While reasonable charges may be requested in exceptional cases where requests are excessive or unfounded, it is however impossible for member states to adopt legislation which, to protect the economic interests of a data controller, authorizes charging for access to personal data.

The healthcare professional is therefore obliged to provide a copy of the patient's personal data free of charge, without the patient having to justify his request.

LATEST NEWS - DATA PROTECTION

ECJ rulings on the interpretation of the RGD regarding sanctions for data controllers

ECJ, Case C-683/21 and case C-807/21, December 5, 2023

ECJ has ruled on the status of data controllers and the sanctions they are submitted to in the event of a GDPR violation in two major interpretative rulings dated December 5, 2023. It points out that a data controller can only be sentenced if it is established that it has committed, deliberately or through negligence, a GDPR violation. An actual fault on the part of the data controller, and not the mere finding of a breach, must therefore be demonstrated.

In addition, the Court clarifies that an entity that has commissioned a company to develop a mobile IT application may be qualified as a data controller, even if this entity has not itself performed any data processing operations via this application. Processing operations performed on behalf of an entity that influences the purposes and means of said processing operations for its own purposes are therefore also regarded as processing operations. Entities cannot therefore escape their responsibility under the GDPR by delegating processing operations to third parties.



Fear of potential misuse of personal data constitutes moral damage

ECJ, C-340/21, December 14, 2023

In 2019, the Bulgarian National Public Revenue Agency was the victim of a cyberattack affecting more than six million citizens, a few hundred of whom claimed moral damages resulting from the misuse of their personal data. The ECJ ruled on the conditions for compensation for moral damage, stating that in the event of unauthorized disclosure of personal data or unauthorized access to such data, judges cannot deduce from this fact alone that the protection measures implemented by the data controller were not appropriate.

It is up to the judges to appreciate the legitimacy of these measures in a concrete manner, the proof of which must be provided by the data controller himself. In the event of cyber-attacks, the data controller may still be required to compensate individuals who have suffered damage, unless he can prove that the damage is not attributable to him. In this sense, the mere fear of potential misuse of one's data by third parties that a person experiences as a result of a GDPR violation is likely, on its own, to constitute moral damage.



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