

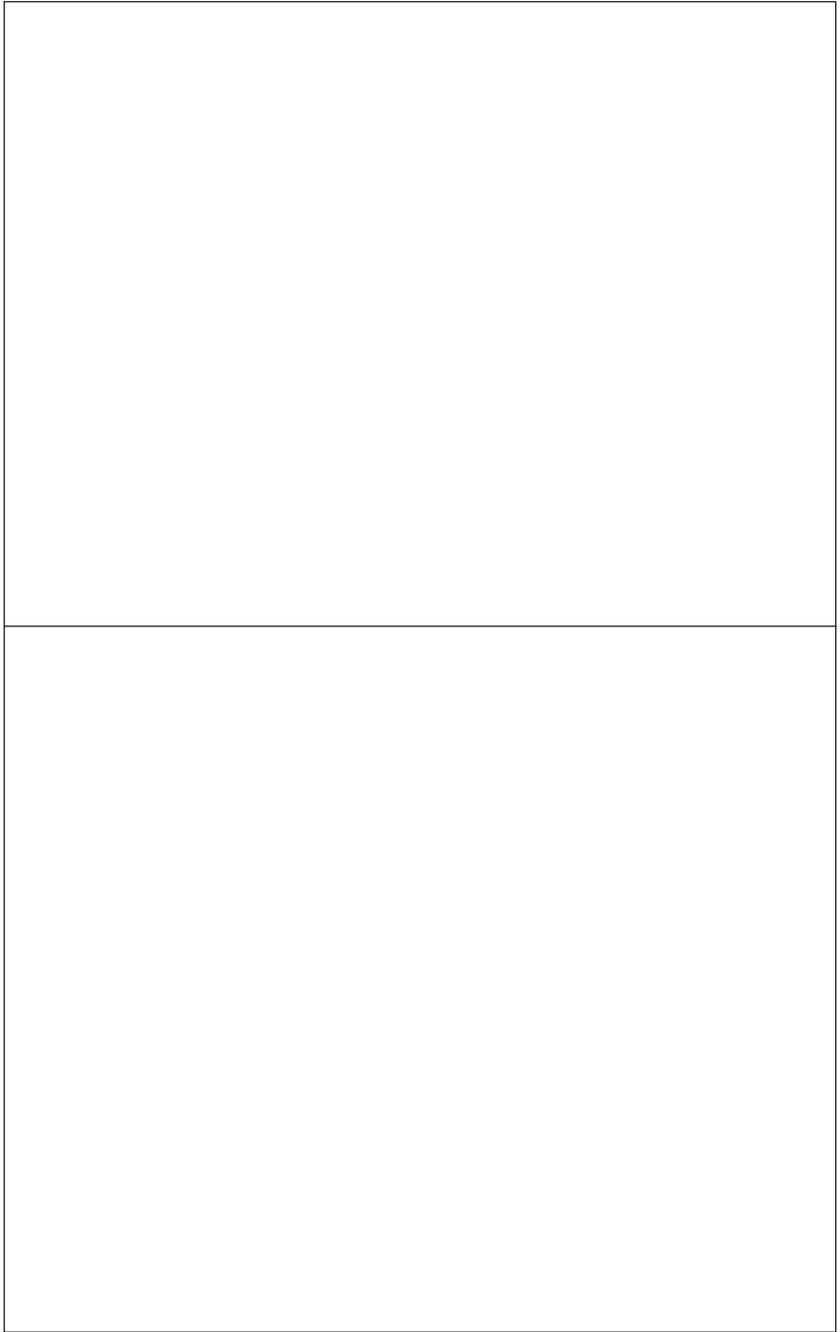
Lea Katharina Kumkar | Wiebke Voß (Hrsg.)

Confidentiality in a Digital World

A Contradiction in Terms?



Nomos



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Preface

The present volume is the result of a conference held in May 2023 in cooperation between the *Institute for Digital Law Trier / Trier University* and the *University of Würzburg*, pursuing a common interest in a prominent yet elusive legal concept: confidentiality. The idea for the conference arose from the fact that recent European legislation in different areas of private law tends to emphasise transparency, seemingly to the detriment of its counterpart confidentiality. With this dichotomy enticing discussions in almost every sub-discipline of private law already, it seemed time to provide an overarching, intra-disciplinary forum to identify recurring themes, common lines of argument and general challenges in preserving confidentiality in the digital age.

In line with the main areas of discussion, we have divided this volume into three parts. The first part examines the theoretical and constitutional foundations of confidentiality as a legal concept. In the second part, the specific challenges to confidentiality in data and AI law come to the core. Finally, the contributions in the third part focus on the role of confidentiality in core areas of private and procedural law and its shift in the context of technological developments.

As organisers of the conference and editors of this volume, we are indebted to many people. First and foremost, we would like to express our sincere gratitude to the contributors for their enthusiasm about the general topic, for vivid and stimulating discussions at the conference, and for their sustained dedication throughout the publication process. To *Nomos Publishing* we owe thanks for the swift and professional publication of the book as well as for sponsoring the conference. We would also like to thank the *Verein zur Förderung des Deutschen, Europäischen und Vergleichenden Wirtschaftsrechts e.V.* and the *Trier University* for their generous financial support. Finally, our special thanks go to the team of both our junior professorships: to Niklas Köny and Johanna Singer for their invaluable support in staging the conference; and to Mona Al Rowas, Tristan Meier and Silvia Giegbefumwen for their assistance in finalising the manuscript.

Trier/Würzburg, February 2024

*Lea Katharina Kumkar and
Wiebke Voß*

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Abbreviations

AEPD	Agencia Española de Protección de Datos
AfP	Archiv für Presserecht
AG	Advocate General
AGCM	Autorità Garante della Concorrenza e del Mercato
AI	artificial intelligence
ALR	Australian Law Reports
App no	Application number
Appl Sci	Applied Sciences
ArbRB	Arbeitsrechtberater
art/s	article/s
BAG	Bundesarbeitsgericht
BB	Betriebs-Berater
BC	before Christ
BeckOK	Beck'scher Online-Kommentar
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
BRAO	Bundesrechtsanwaltsordnung
BT-Drs	Bundestagsdrucksache
BTLJ	Berkeley Technology Law Journal
Bull Civ	Bulletin des Arrêts de la Chambre Civile de la Cour de Cassation
Bull WHO	Bulletin of the World Health Organization
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
BVerwG	Bundesverwaltungsgericht
Cal L Rev	California Law Review
CCO	Chief Compliance Officer
CERRE	Centre on Regulation in Europe

Abbreviations

cf	confer
CFR	Charter of Fundamental Rights of the European Union
ch/s	chapter/s
CJEU	Court of Justice of the European Union
comp/s	compiler/s
CPI	Competition Policy International
CR	Computer und Recht
CRIDS	Centre de Recherche Information, Droit et Société
CSD	Collecting Society Directive
CUP	Cambridge University Press
DA	Data Act
DB	Der Betrieb
DCI	Dynamic Competition Initiative
DGA	Data Governance Act
DIS	Deutsche Institution für Schiedsgerichtsbarkeit
DMA	Digital Markets Act
DÖV	Die Öffentliche Verwaltung
DPO	Data Protection Officer
DSA	Digital Service Act
EC	European Commission
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
ed/s	editor/s
edn	edition
EFTA	The European Free Trade Association
eg	for example
EHPL	European Health & Pharmaceutical Law Review
EHRL Rev	European Human Rights Law Review
ELJ	European Law Journal
ELTE LJ	ELTE Law Journal
EP	European Parliament

esp	especially
etc	et cetera
EU	European Union
Eur Data Protect L Rev	European Data Protection Law Review
EWCA Civ	England and Wales Court of Appeal (Civil Division)
EWHC	England and Wales High Court
fn/fns	footnote/s (external to the chapter)
FRAND	Fair, Reasonable and Non-Discriminatory
F.R.D.	Federal Rules Decisions
FRG	Federal Republic of Germany
Front Artif Intell	Frontiers in Artificial Intelligence
GC	General Court
GDPR	General Data Protection Regulation
Geo LJ	Georgetown Law Journal
GeschGehG	Gesetz zum Schutz von Geschäftsgeheimnissen
GG	Grundgesetz
GovLab	The Governance Lab
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR-Prax	Gewerblicher Rechtsschutz und Urheberrecht in der Praxis
GRUR-RR	Gewerblicher Rechtsschutz und Urheberrecht, Rechtspre- chungs- Report
GRUR-RS	Gewerblicher Rechtsschutz und Urheberrecht Rechtspre- chungssammlung
GTC	General Terms and Conditions
GVG	Gerichtsverfassungsgesetz
GWB	Gesetz gegen Wettbewerbsbeschränkungen
Harv UP	Harvard University Press
Harvard LR	Harvard Law Review
HCCH	Hague Conference on Private International Law
HGB	Handelsgesetzbuch
HLEG	High-Level Expert Group
IBA	International Bar Association
ibid	ibidem

Abbreviations

ICC	International Chamber of Commerce
IDPL	International Data Privacy Law
ie	that is
IIC	International Review of Intellectual Property and Competition Law
ILA	International Law Association
INL	Legislative initiative procedure
IoT	Internet of Things
IP	Intellectual Property
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
IT	information technology
ITRB	IT-Rechtsberater
J Info Tech	Journal of Information Technology
J Manag	Journal of Management
J Polit Econ	Journal of Political Economy
JLawEcon	Journal of Law & Economics
JuS	Juristische Schulung
JZ	JuristenZeitung
KAS	Konrad-Adenauer-Stiftung
LCIA	The London Court of International Arbitration
LJ	Lord Justice
Lloyd's Rep	Lloyd's Law Reports
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LWDA	Lernen. Wissen. Daten. Analysen.
MdLRev	Maryland Law Review
MDR	Monatsschrift für Deutsches Recht
MMR	Multimedia und Recht
mn	margin number
MPILux	Max Planck Institute Luxembourg
n/nn	footnote/s (internal to the chapter)
Nat Commun	Nature Communications
NEJM	The New England Journal of Medicine
NIS	Network and Information Security

NJOZ	Neue Juristische Online Zeitschrift
NJW	Neue Juristische Wochenschrift
no	number
NVwZ	Neue Zeitschrift für Verwaltungsrecht
NVwZ-RR	Neue Zeitschrift für Verwaltungsrecht Rechtsprechungs-Report
NZA	Neue Zeitschrift für Arbeitsrecht
NZG	Neue Zeitschrift für Gesellschaftsrecht
NZKart	Neue Zeitschrift für Kartellrecht
öAT	Zeitschrift für das öffentliche Arbeits- und Tarifrecht
ODI	Open Data Institute
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Communities
OJ L	Official Journal of the European Union: Legislation
OLG	Oberlandesgericht
ORDO	Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft
OUP	Oxford University Press
P2B	Platform-to-Business
para/s	paragraph/s
PIMS	Personal Information Management Systems
pt/pts	part/s
Pub L	Public Law
QB Com Ct	High Court, Queen's Bench Division, Commercial Court
r/rr	rule/s
RD <i>i</i>	Recht Digital
Rev Arb	Revue de l'arbitrage
s/ss	section/s
S <i>Cal</i> L Rev	Southern California Law Review
Sch	Schedule
seq	sequitur
seqq	sequent
SME	Small and medium-sized enterprises
SRA	Solicitors Regulation Authority

Abbreviations

Stat	United States Statute
StGB	Strafgesetzbuch
SÜG	Sicherheitsüberprüfungsgesetz
SWD	Staff working document
TechReg	Technology and Regulation
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCITRAL	The United Nations Commission on International Trade Law
UPaLRev	University of Pennsylvania Law Review
US	United States of America
USCA	United States Code Annotated
UWG	Gesetz gegen den unlauteren Wettbewerb
v	versus
VGG	Verwertungsgesellschaftengesetz
vol	Volume
WIPO	World Intellectual Property Organization
WLR	Weekly Law Reports
WP	Working Party
WRP	Wettbewerb in Recht und Praxis
Yale LJ	Yale Law Journal
Yale UP	Yale University Press
ZD	Zeitschrift für Datenschutz
ZEuP	Zeitschrift für Europäisches Privatrecht
ZfDR	Zeitschrift für Digitalisierung und Recht
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht
ZHR	Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht
ZIS	Zeitschrift für Internationale Strafrechtsdogmatik
ZPO	Zivilprozessordnung
ZRP	Zeitschrift für Rechtspolitik
ZUM	Zeitschrift für Urheber- und Medienrecht

ZVglRWiss

Zeitschrift für Vergleichende Rechtswissenschaft

ZZP Int

Zeitschrift für Zivilprozess International

Index of Directives, Regulations and Conventions

2010 SPEECH Act: Securing the Protection of our Enduring and Established Constitutional Heritage Act by United States Congress

2019 Judgments Convention: Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters of 2 July 2019

Brussels I-bis Regulation: Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] OJ L 351/1

Collecting Societies Directive: EU Directive 2014/26 of the European Parliament and of the Council of February 2014 on collective management copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, [2014] OJ L 84/72.

Data Act: Proposal for a regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data, COM/2022/68 final, 23 February 2023.

Data Governance Act: Regulation (EU) 868/2022 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724, [2022] OJ L152/1.

Data Protection Directive: Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] OJ L281/31

Digital Markets Act: Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265, 12 October 2022.

Digital Service Act: Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), [2022] OJ L277/1.

EC Proposal for the AI Act: European Commission (2021). Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts (COM (2021) 206 final), April 21, 2021.

General Data Protection Regulation: Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L 119.

Lisbon Guidelines on Privacy: ILA Guidelines on the Protection of Privacy in Private International and Procedural Law

Market Abuse Regulation: Regulation (EU) No 596/2014 of the European Parliament and of the Council on market abuse, [2014] OJ L173/1

NIS 2 Directive: Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive), [2022] OJ L333/80

P2B Regulation: Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation service, [2019] OJ L186/57

Rome II Regulation: Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L 199/40

Trade Secrets Directive: Directive (EU) No 943/2016 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, [2016] OJ L157/1

Whistleblower Directive: Directive (EU) No 1937/2019 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, [2019] OJ L305/17