



## **Final report**

**dated April 11,**

**2024 of the**

**Federal Data Protection and Information Commissioner (FDPIC)**

**concerning the processing of personal data of**

**Ricardo users**

**by Ricardo AG and TX Group AG (formerly: Tamedia AG)**

**according to**

**Article 29 of the Federal Act of June 19, 1992 on**

**Data Protection (FADP; SR 235.1)**

**based on the facts of February 28, 2020**

**with amendments and corrections dated May 12 and September 26, 2023**



## Table of contents

|         |  |    |
|---------|--|----|
| 1.      | Introduction .....   | 4  |
| 1.1     | Initial situation .....  | 4  |
| 1.2     | Developments in the facts of the case since the opening of the fact-finding procedure..... | 4  |
| 1.3     | Chronology .....   | 6  |
| 1.4     | Legal basis .....  | 7  |
| 1.5     | Scope of the clarification of the facts .....  | 8  |
| 2.      | Findings .....   | 9  |
| 2.1     | Ricardo platforms and conditions for their use.....  | 9  |
| 2.2     | Changes to Ricardo's privacy policy .....  | 9  |
| 2.3     | Scope and purpose of the processing of personal data.....                                  | 10 |
| 2.3.1   | Data collected when visiting the portals .....   | 10 |
| 2.3.2   | Data collected during the registration of a user account .....                             | 11 |
| 2.3.3   | Data collected during use as a registered user .....                                       | 11 |
| 2.3.4   | Information on purchases and contracts .....   | 12 |
| 2.3.5   | Data from participation in competitions and contests.....                                  | 12 |
| 2.3.6   | User surveys and market research .....   | 13 |
| 2.3.7   | Location information .....   | 13 |
| 2.4     | Data processing .....  | 14 |
| 2.4.1   | Notification of the "data transfer" and its purposes .....                                 | 14 |
| 2.4.2   | Data processing in accordance with the Privacy Policy dated July 9, 2015.....              | 14 |
| 2.4.3   | Data processing in accordance with the privacy policy dated February 11, 2020 .....        | 15 |
| 2.4.4   | Current use and disclosure as stated by Ricardo .....                                      | 17 |
| 2.4.4.1 | .....  | 17 |
| 2.4.4.2 | .....  | 17 |
| 2.4.4.3 | .....  | 17 |
| 2.4.4.4 | .....  | 18 |
| 2.4.5   | Anonymization/pseudonymization .....   | 20 |
| 2.5     | Information and options for objection .....  | 20 |
| 2.5.1   | Information and procedure for a new application/registration with Ricardo .....            | 20 |
| 2.5.2   | Information to Ricardo members about the change to the privacy policy .....                | 20 |
| 2.5.2.1 | <i>Privacy policy from July 27, 2017.....</i>  | 20 |
| 2.5.2.2 | <i>Privacy Policy dated May 25, 2018 and subsequent versions.....</i>                      | 21 |
| 2.5.3   | Concrete objection options and implementation .....  | 23 |
| 2.6     | Relevant changes to the facts after the formation of SMG AG .....                          | 23 |
| 2.6.1   | New privacy policy .....   | 24 |
| 2.6.2   | CMP .....  | 27 |
| 3.      | Data protection assessment.....  | 28 |
| 3.1.    | Processing of personal data and applicability of the FADP .....                            | 28 |
| 3.1.1.  | Data processing at Ricardo and further use of data by TX Group .....                       | 28 |
| 3.1.2.  | Term personal data .....   | 28 |
| 3.1.3.  | Existence of a clear personal reference .....  | 29 |
| 3.2.    | Editing personality profiles .....   | 30 |
| 3.2.1.  | Term personality profile .....   | 31 |
| 3.2.2.  | Processing of personality profiles of Ricardo users .....                                  | 31 |
| 3.3.    | Ricardo and TX Group as data controllers .....   | 32 |
| 3.4.    | Existence of an infringement of personality rights .....                                   | 33 |



|        |  |    |
|--------|--|----|
| 3.4.1. | Compliance with the processing principles (Art. 12 para. 2 lit. a FADP).....           | 33 |
| 3.4.2. | Processing of a person's data against their express will (Art. 12 para. 2 lit. b FADP) | 42 |
| 3.4.3. | Violation of privacy due to data processing that significantly impairs privacy.....    | 43 |
| 3.4.4. | Conclusion on the localized personality violations .....                               | 43 |
| 3.5.   | Grounds for justification .....  | 44 |
| 3.6.   | Recommendations .....  | 50 |
| 4.     | Procedure .....  | 51 |
| 4.1.   | Legal hearing and further proceedings .....  | 51 |
| 4.2.   | Statements by Ricardo AG and TX Group AG.....  | 51 |
| 4.3.   | Publication of the final report with recommendations.....                              | 52 |



## 1. Introduction

### 1.1 Initial situation

1. Since February 2016, the Tamedia Group - TX Group since 20 December 2019 - has gradually introduced a new, uniform data protection policy for its companies. This was intended to facilitate the internal exchange of data within the Group in order to improve the online experience and security. The auction platform Ricardo - operated by the TX Group company Ricardo <sup>AG</sup><sup>1</sup> (hereinafter referred to as Ricardo) - introduced this privacy policy in July 2017.
2. Existing customers were informed of the change to the data protection provisions by email on July 12, 2017. The FDPIC has received reports and complaints from data subjects stating that Ricardo's approach is not transparent. The persons concerned are being coerced into giving their consent, in particular to the transfer of data for marketing purposes, and any objection would result in the termination of their membership.
3. In a letter dated July 19, 2017, the FDPIC asked Ricardo to explain how it ensures the voluntary nature of the consent with the chosen procedure and what justification Ricardo has to justify the data processing that goes beyond the original purpose.
4. On July 27, 2017, the Data Protection Officer (DPO) of Ricardo replied to the FDPIC's letter, whereby he performs this function at Ricardo as well as at Tamedia AG (new: TX Group AG) and the entire Tamedia Group (new: TX Group).
5. Following Ricardo's statement, the FDPIC felt compelled to investigate the matter in more detail. In a letter dated September 4, 2017, he opened formal proceedings to clarify the facts.

### 1.2 Developments in the facts of the case since the opening of the fact-finding procedure

6. In March 2018, the FDPIC established the facts of the case in an initial version. The subject matter was the new privacy policy introduced in July 2017, the related communication to Ricardo members (i.e. users who have an account) and the results of various clarifications with Ricardo. The clarifications related to the data processing described by Ricardo, in particular the aforementioned data exchange within the Tamedia Group for marketing and security purposes.
7. Ricardo commented on this first version on March 29, 2018 and <sup>announced</sup> a new privacy policy with various changes to adapt to the <sup>GDPR</sup><sup>2</sup>. Ricardo introduced the amended privacy policy on May 25, 2018. In particular, it should be possible to object to the exchange of data within the Tamedia Group from this date.
8. The FDPIC subsequently analyzed the revised data protection provisions and clarified the facts anew in order to take the updated situation into account. The processing of Ricardo data at Tamedia AG (in particular [REDACTED] - i.e. the data preparation and the "aggregation and anonymization processes" as well as the data linking and segmentation - were clarified in more detail.
9. In March 2019, Ricardo's privacy policy and the standardized privacy policy of Tamedia AG were updated <sup>again</sup><sup>4</sup>. In addition, as part of a reorganization

---

<sup>1</sup> Ricardo.ch AG until November 25, 2019.

<sup>2</sup> General Data Protection Regulation of the European Union (EU).

<sup>3</sup> [REDACTED]

<sup>4</sup> Privacy policy Ricardo/Tamedia AG from March 30, 2019.



the business unit [REDACTED] was transferred to the independent subsidiary as of March [REDACTED] outsourced.

10. The results of the investigation and the developments and findings described above made it necessary to extend the proceedings to Tamedia AG. Tamedia AG was informed by [REDACTED]. The company was renamed TX Group AG (hereinafter: TX Group) on December 20, 2019, and Ricardo also underwent a name change.<sup>5</sup> Therefore, the privacy policy of February 11, 2020 was also adapted to this new name.
11. On November 26, 2021, the DPO of Ricardo and TX Group informed the FDPIC about the establishment of the joint venture SMG Swiss Marketplace Group AG (hereinafter: SMG) as of November 11, 2021: a company jointly held by TX Group AG, Ringier AG, Mobilier AG and General Atlantic. The FDPIC asked Ricardo and TX Group to provide him with all relevant information for the present clarification of the facts and to disclose which innovations or changes with regard to data processing or data flows or data responsibilities the restructuring would entail.<sup>6</sup>
12. In a letter dated February 10, 2022, TX Group commented on this and stated that the actors involved in the data processing in question would remain unchanged from the perspective of the users concerned. In addition, no data of users of the former TX Markets products would be shared with the products of Scout24 or with other SMG shareholders "until further notice". The business areas of the former TX Markets products and those of Scout24 are to be separated according to separate business areas, between which no data would be exchanged. [REDACTED]
13. In view of the statements made by Ricardo/TX Group that the data processing, data flows and data responsibilities remain unchanged after the restructuring, it was consequently determined that the clarification of the facts did not need to be adjusted or extended from a procedural point of view.
14. Nonetheless, in this context, there were new developments of relevance to the present clarification of the facts, which made it necessary to supplement the findings of the facts, namely the activation of SMG's new privacy policy and the use of a consent management platform on the Group's websites. These changes are described in more detail in section 2.6.
15. In its statement of June 29, 2023 regarding the statement of facts with additions of May 12, 2023, Ricardo and SMG stated that data was now being exchanged between Ricardo and the other SMG companies. The FDPIC also noted that sections 3.9. and 5.1 of SMG's privacy policy had since been supplemented by one paragraph on May 15, 2023. The FDPIC therefore amended the facts again to state that the statements in para. 12 f. no longer correspond to the current situation.
16. On July 18, 2023 and again on August 31, 2023, the FDPIC asked Ricardo/SMG and the TX Group to comment on the amended facts. They clarified that the platforms that changed from TX Group AG to Swiss Marketplace Group AG (SMG) with the restructuring in November 2021 (e.g. Ricardo, tutti, Carforyou, Homegate) are also connected to the data processing of "TX Group data offers".<sup>7</sup> TX Group

<sup>5</sup> Since November 25, 2019 new Ricardo AG; see Ricardo/TX Group statement of January 16, 2020 and Ricardo/TX Group data protection statement of February 11, 2020.

<sup>6</sup> Letter FDPIC 22.12.2021 / 21.01.2022.

<sup>7</sup> See TX Group letter dated September 14, 2023.



stated the following in this regard: "Apart from the restructuring under company law, however, the data processing and data flows within the scope of the 'TX Group data offerings' have not changed.<sup>8</sup>". With regard to the "data exchange within SMG", which is provided for in sections 3.9. and 5.1 of SMG's privacy policy, SMG has clarified that this has nothing to do with the data processing that is carried out as part of the "TX Group data offerings". Even if both data processing operations have, among other things, the purpose of profiling for the control of targeted advertising, these are "two technically and organizationally separate data processing and forwarding operations"<sup>9</sup>.

17. The FDPIC therefore established that further data processing was taking place that had not previously been investigated as part of the present investigation. In view of the advanced stage of the present proceedings, the FDPIC has decided, for reasons of procedural economy, not to further clarify the facts with regard to the "data exchange within SMG" and to formally extend the proceedings to Swiss Marketplace Group AG (SMG) or its companies. Should this prove necessary, there is still the possibility of initiating a new investigation on the basis of the now revised law and reviewing this data exchange for its data protection compliance.

### 1.3 Chronology

|            |   |
|------------|---|
| 12.07.2017 | Notification of changes to the privacy policy to Ricardo members  |
| 19.07.2017 | Letter from the FDPIC to Ricardo (preliminary clarification)  |
| 27.07.2017 | First statement Ricardo   |
| 04.09.2017 | Opening of fact-finding by the FDPIC and delivery of a questionnaire catalog to Ricardo   |
| 27.09.2017 | Request for extension of deadline Ricardo   |
| 06.11.2017 | Ricardo answers the questionnaire   |
| 06.12.2017 | Meeting with representatives of Ricardo and the FDPIC   |
| 09.03.2018 | Dispatch of facts to Ricardo  |
| 29.03.2018 | Ricardo's statement of facts  |
| 09.05.2018 | Notification of new privacy policy as of May 25, 2018 by Ricardo  |
| 25.05.2018 | New privacy policy (adaptation to GDPR)   |
| 08.10.2018 | Supplementary questions regarding the new privacy policy from 2018  |
| 08.11.2018 | Request for extension of deadline Ricardo   |
| 08.01.2019 | Ricardo's answer to the supplementary questions   |
| 18.02.2019 | Letter from the FDPIC (clarification questions)   |
| 20.03.2019 | Answer Ricardo  |
| 30.03.2019 | New privacy policy  |
| 08.11.2019 | Dispatch of the updated statement of facts to Ricardo/Tamedia AG and Formal opening of the fact-finding procedure at Tamedia AG |
| 16.12.2019 | Deadline for comments Ricardo/Tamedia AG - extension of deadline granted  |
| 20.12.2019 | Change of name of Tamedia AG to TX Group AG (hereinafter: TX Group)   |
| 16.01.2020 | Statement Ricardo/ TX Group   |
| 11.02.2020 | New privacy policy  |
| 28.02.2020 | Dispatch of the statement of facts to Ricardo/TX Group  |
| 25.03.2020 | Renewed statement by Ricardo/TX Group on the facts of 28. February 2020 (This was subsequently adjusted accordingly)            |
| 28.05.2021 | Letter to DPO Ricardo/TX Group (with result of our legal evaluation) and invitation to the Skype meeting                        |

<sup>8</sup> Ibidem. See also letter dated February 10, 2022 and July 25, 2023.

<sup>9</sup> See TX Group letter dated September 14, 2023; see also Ricardo AG/SMG letter dated September 14, 2023



- 29.06. 2021 Sending of the legal evaluation (summary) and comments on our legal considerations and the need for improvement identified
- 15.07.2021 Skype meeting : Exchange regarding the legal evaluation of the FDPIC and presentation of innovations on the part of Ricardo/TX Group (in particular Consent Management Platform, CMP)
- 03.08. 2021 Letter from Ricardo/TX Group regarding the application and discontinuation of CMP
- 18.08.2021 Delivery of TX Group's "Legitimate interest assessment" and deletion concept
- 31.08.2021 Delivery of TX Group's internal guideline on the configuration of a CMP
- 11.11.2021 Foundation of the joint venture Swiss Marketplace Group AG (SMG)
- 26.11.2021 DPO of the TX Group informs the FDPIC about the establishment of SMG
- 22.12. 2021/Letter from the FDPIC: Request for relevant information regarding the restructuring
- 21.01.2022 and its impact on the clarification of the facts
- 10.02.2022 Letter from TX Group: Explanations regarding the new organizational structure of SMG, no changes to data processing & data flows, presentation of data protection measures introduced (SMG privacy policy, data protection information for TX data offerings, introduction of CMP)
- 23.03. 2022 Skype meeting regarding the effects of the restructuring on the ongoing clarification of the facts
- 12.05. 2023 Delivery of amended statement of facts to Ricardo/TX Group
- 07.06. 2023 The deadline extension requested by TX Group is granted until 30.06.2023
- 29.06.2023 Statement by Ricardo /SMG and TX Group on the amended statement of facts dated May 12, 2023
- 18.07. 2023 Dispatch of the amended statement of facts to Ricardo /TX Group with corrections and additions following the comments of June 29, 2023
- 25.07. 2023 Statements by Ricardo /SMG and TX Group on the newly supplemented statement of facts
- 27.07.2023 Telephone conversation with [REDACTED] Ricardo/SMG
- 31.08. 2023 Letter from the FDPIC: Request for comments on apparent contradictions between the provisions of the privacy policy and statements by Ricardo and TX Group
- 14.09. 2023 Reply Ricardo/SMG and TX Group
- 26.09. 2023 Adjustment and notification of the statement of facts based on the comments of July 25 and September 14, 2023
- 11.04. 2024 Dispatch of the final report to Ricardo and TX Group

#### 1.4 Legal basis

18. The new Federal Act of September 25, 2020 on Data Protection (hereinafter "nDSG", SR 235.1) has been in force since September 1, 2023. According to Art. 70 nDSG, the new law does not apply to investigations by the FDPIC that are pending at the time of entry into force. These cases are subject to the previous law, which is why the FDPIC based his legal assessment on the Federal Act of June 19, 1992 on Data Protection. However, with regard to the continuation of data processing, which is the subject of this clarification of the facts, there are selective references in individual chapters to the extent to which the provisions of the new DPA provide for changes compared to the old law.
19. Art. 1 to 15 of the Federal Act of June 19, 1992 on Data Protection (FADP, SR 235.1) and Art. 1 to 12 of the Ordinance of June 14, 1993 on the Federal Act on Data Protection (OFADP, SR 235.11) are applicable to the processing of personal data by private persons. Pursuant to Art. 29 para. 1 lit. a FADP, the FDPIC may, on his own initiative or in response to a report from a third party, investigate a matter further if processing methods are likely to violate the privacy of a large number of persons (so-called system errors). In accordance with Art. 29 para. 2 FADP



he can request files, obtain information and have data processing demonstrated to him. On the basis of its investigations, it may recommend that the processing be changed or discontinued (Art. 29 para. 3 FADP). If such a recommendation is not followed or is rejected, it may submit the matter to the Federal Administrative Court (FAC) for a decision by way of an appeal (Art. 29 para. 4 FADP in conjunction with Art. 35 lit. b of the Administrative Court Act of June 17, 2005 [ACA, SR 173.32]).

## **1.5 Scope of the clarification of the facts**

20. The present proceedings focus in particular on the forwarding of Ricardo users' data to TX Group (formerly Tamedia) and its use or linking with data from other sources for the purpose of targeted advertising, as well as on the existing options for objection. In particular, the information provided to Ricardo members and users in the privacy policy and in the various communications from Ricardo was examined more closely. As already explained in sections 11 ff., the changed situation made it necessary to extend the formal clarification of the facts, which was originally only carried out at Ricardo, to Tamedia AG (now: TX Group AG). For reasons of procedural economy, the FDPIC has decided not to further clarify the facts with regard to the "data exchange within SMG" or to formally extend the procedure to Swiss Marketplace Group AG (SMG) or its companies.
21. In his findings of 28 February 2020 (see below, points 2.1 to 2.5), the FDPIC took into account changes to the privacy policy and the factual situation up to 28 February 2020. In doing so, he relied on the data protection declarations of Ricardo (in particular the version of February 11, 2020), the statements of Ricardo and TX Group (formerly: Tamedia) and the documents submitted to the FDPIC, as well as the findings from the joint meeting of December 6, 2017.<sup>10</sup>
22. Further documents that were submitted to the FDPIC after February 28, 2020 (in particular the Legitimate Interest Assessment) as well as "data protection measures" introduced by TX Group in the meantime (activation of a privacy policy, use of a consent management platform on Ricardo's website) and findings from the meetings of July 15, 2021 and March 23, 2022 were also taken into account (see section 2.6). Further developments were no longer taken into account from the delivery of the statement of facts with additions on May 12, 2023, apart from the corrections and additions made on the basis of the statements of Ricardo AG and T X Group AG dated June 29, 2023, August 31, 2023 and September 14, 2023 were made.



## 2. Findings

23. The findings below relate to the facts of February 28, 2020 and the privacy policy of February 11, 2020 (sections 2.1.-2.5) and take into account the changes that have occurred in the meantime with the launch of a new privacy policy and the introduction of a consent management platform<sup>11</sup> (see section 2.6).

### 2.1 Ricardo platforms and conditions for their use

24. Ricardo operates platforms for trading in products of all kinds under the domain names ricardo.ch and autoricardo.ch<sup>12</sup>. Members can buy or sell products via these platforms and choose from three different types of offer: Auctions, offers at fixed prices and auctions with a buy-it-now price.
25. Anyone wishing to offer or purchase products on Ricardo's platforms must register<sup>13</sup>. Registration is free of charge. Selling on ricardo.ch is subject to a fee<sup>14</sup>. The following fees are incurred when selling on ricardo.ch: listing fees: free of charge; optional promotional fees: voluntary fees to increase the visibility of the offers; closing fees: Closing commission (success commission) after a successful sale<sup>15</sup>.

### 2.2 Changes to Ricardo's privacy policy

26. On July 27, 2017, Ricardo's previous privacy policy was replaced by a new one<sup>16</sup>. This was intended to facilitate the exchange of data between the Tamedia companies. The new privacy policy should serve as a common basis for companies in the Tamedia Group. Since then, the privacy policy has been updated several times (see recitals 29-30).
27. Ricardo's new privacy policy applies both to data processing by Ricardo and to data processing by the companies of the TX Group (formerly: Ta- media Group) and affiliated companies. It is standard for all TX Group companies that exchange data with each other. This allows relevant offers and services and advertising tailored to the respective needs to be displayed. The exchange of data is also intended to improve security for members, for example to better prevent online fraud<sup>17</sup>.



<sup>11</sup> See margin nos. 14 and 22.

<sup>12</sup> Since mid-December 2019, it has no longer been possible to enter new advertisements on autoricardo.ch. Instead, users are referred to the services of the partner platforms tutti.ch, carforyou.ch and ricardo.ch. There are also plans to take the autoricardo.ch platform offline in the first quarter of 2020 (see Ricardo/TX Group statement 16.01.2020).

<sup>13</sup> One exception: at autoricardo.ch, the buyer can purchase a vehicle advertised in a classified ad without being registered.

<sup>14</sup> See <https://help.ricardo.ch/hc/de/articles/115002854885-Gebühren-für-das-Verkaufen> and fee regulations dated 13.09.2018 (new fee model, see [https://www.ricardo.ch/de/login?return\\_url=%2Fde%2Fpricing](https://www.ricardo.ch/de/login?return_url=%2Fde%2Fpricing)).

<sup>15</sup> If the sale is successful, 9% of the sales price (max. CHF 190) is paid (success commission). See fee regulations dated 13.09.2018.

<sup>16</sup> See Privacy Policy dated July 12, 2017 (valid as of July 27, 2017), on the Ricardo website, under the heading "GTC & Regulations".

<sup>17</sup> See also section 2.5.



[REDACTED] To do so, it is dependent on the Group-wide use of data".<sup>18</sup>

28. The following is stated in the introduction to Ricardo's privacy policy:

This data protection declaration of ricardo.ch, an offer of ricardo.ch AG, informs you about how we and the companies of the TX Group as well as affiliated companies ([here](#) you will find a complete list of all companies concerned; hereinafter also referred to collectively as "we") handle data that is processed about you, whether when using our websites and mobile applications (hereinafter also referred to as "digital offers" or "portals"; [here](#) you will find a complete list) or in any other way.<sup>19</sup>

29. The purpose of the new privacy policy dated May 25, 2018 was to adapt it to the GDPR. In particular, the aim was to create options for objecting to the exchange or transfer of data within the Tamedia Group.
30. With the update on March 30, 2019, a new section (section 12) was introduced regarding location information. The privacy policy was updated again on February 11, 2020. The update was necessary due to the name changes of Ricardo and the Tamedia Group (now: TX Group). However, no changes were made to the content of this latest version. The present findings (sections 2.1.-2.5) refer in principle piell to this version dated February 11, 2020.

### 2.3 Scope and purpose of the processing of personal data<sup>20</sup>

31. The following describes which data can be processed in accordance with Ricardo's privacy policy and the standardized privacy policy of the TX Group<sup>21</sup> as well as the statement of Ricardo/TX Group (formerly: Tamedia), and for what purposes this can be done.

#### 2.3.1 Data collected when visiting the portals

32. When visiting the portals (for Ricardo: "ricardo.ch" or "autoricardo.ch"), *log data/traffic data* is collected by the system: IP address, browser type, internet service provider, digital offers accessed, reference/exit pages, time and duration of the visit.
33. The privacy policy of Ricardo/TX Group states the following:

If you use our digital offers without providing any further information, the web server technology we use automatically logs general technical visit information in so-called log files. This includes the IP address of the device used, from which the visit is made, information on the browser type, the Internet service provider and the operating system used, which of our digital offers were accessed, reference/exit pages, the time and duration of the visit.

This information is collected and processed for the purpose of enabling the use of the websites (establishing a connection), ensuring and increasing the security and stability of our systems and offers, analyzing the use of our offers and services, collecting general geographical information and enabling the optimization of our Internet offer (marketing measures, target group-specific advertising, etc.), as well as for internal statistical purposes.

<sup>18</sup> Cf. statement Ricardo/TX-Group of 16.01.2020.

<sup>19</sup> Privacy policy of Ricardo/TX Group from February 11, 2020.

<sup>20</sup> See section 1 of the Ricardo/TX Group privacy policy ("Scope and purpose of the processing of personal data").

<sup>21</sup> Privacy policy from February 11, 2020.



The user is not identified in the process. Similarly, no connection is made between this automatically collected information and personal data stored by us. However, there may be an exception to this basic rule if you already have a registered user account with one of our portals.<sup>22</sup>

34. In addition, *cookies as well as tracking and analysis tools* are used when visiting the portals:

In addition, we use cookies and analysis tools (e.g. Google Analytics tics) when you visit our portals.<sup>23</sup>

### 2.3.2 Data collected during the registration of a user account

35. When registering a user account, it is necessary to enter certain personal data. Ricardo collects the following data: Gender, title, first and last name, address (full postal address, zip code, city), email address, date of birth, telephone number, information on subscribed newsletters or other advertising, language, user name (defined voluntarily by the member).<sup>24</sup> Since September 2019, only the email address and password have been collected when registering for a private account. Before a user can buy or sell on Ricardo, he or she must then enter the following personal data: First and last name, date of birth, address (street, zip code, city), telephone number, identity document (optional), language, user name (generated automatically). In the user account, users can also optionally enter a salutation, customize the automatically generated user name or manage their notification preferences (incl. newsletter).<sup>25</sup>

36. With regard to the purpose of collecting this data, the standardized data protection declaration of Ricardo/TX Group states the following:

We use the data to process and administer our digital offers, to check the plausibility of the data entered, i.e. to establish, structure the content of, process and amend the contractual relationships concluded with you via your user account and, in the case of chargeable services, for proper invoicing.<sup>26</sup>

### 2.3.3 Data collected during use as a registered user

37. The standardized privacy policy of Ricardo/TX Group states the following:

During the use of the portal by registered users, we collect data for statistical reasons in order to enable the smooth functioning of the portal and to analyse, optimize and personalize the use of our offers and services. For example, we collect data on whether and how you use our digital offers, in particular which functions and which advertising you perceive and how.<sup>27</sup>

38. Ricardo collects the following data when registered (*and logged in*) users use the portal: Instant purchases (BINs), bids in auctions (bids), orders, products offered on ricardo.ch (listings), contacts for classified products (contact forms), questions and answers for offers (questions & answers) ("Customer activity around articles")<sup>28</sup>.

39. As Ricardo/TX Group stated in its statement of January 16, 2020, the above-mentioned data would be used by Ricardo itself for its own marketing and advertising purposes.

---

<sup>22</sup> Section 1 letter a of the data protection declaration of February 11, 2020 ("When visiting our portals").

<sup>23</sup> Section 1 letter a of the data protection declaration of February 11, 2020.

<sup>24</sup> Cf. letter from Ricardo dated November 6, 2017.

<sup>25</sup> Cf. statement Ricardo/TX-Group of 16.01.2020.

<sup>26</sup> Section 1 letter b of the privacy policy of February 11, 2020.

<sup>27</sup> Section 1 letter c of the privacy policy of February 11, 2020.

<sup>28</sup> Letter from Ricardo dated November 6, 2017.



However, this has nothing to do with the collection of usage data and its exchange within the group.<sup>29</sup>

40. If a registered visitor has logged in via their user account, the user data is merged with the account data.

#### 2.3.4 Information on purchases and contracts

41. The standardized privacy policy of Ricardo/TX Group states the following:

If you purchase a product or a fee-based service on our website, you must provide data such as your first and last name, address (full postal address, zip code, city) and any other data, as we need this to process the contract with you. If you choose an online payment option such as credit card or PayPal to purchase a product or a chargeable service, payment is made via the online payment system of the respective provider. In this case, personal and payment data is processed directly by the provider of the respective payment system. We do not know or store your payment data. The data protection provisions of the respective provider of the online payment system also apply.

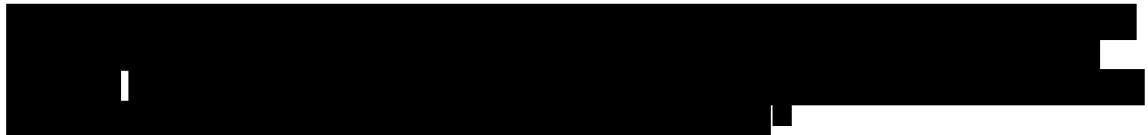
If you are registered and have a user account, we can save your data in the user account for the next purchase / contract conclusion.

In any case, we store all information about your current and previous purchases and contracts, i.e. the products, the services, the number of products and services per purchase, the payment amount. We are entitled to use this information for marketing and analysis purposes.

Further information on marketing and analysis purposes can be found below in section 4.<sup>30</sup>

42. As Ricardo/TX Group stated in its statement of January 16, 2020, this data (i.e. information on purchases and contract conclusions, i.e. the products, the services, the number of products and services per purchase, the payment amount) would be used by *Ricardo itself* for its own marketing and advertising purposes. However, the corresponding data processing would have nothing to do with the group-wide data exchange<sup>31</sup>.

43.



#### 2.3.5 Data from participation in competitions and contests

44. The privacy policy<sup>34</sup> mentions that personal data may also be processed when participating in competitions and contests and may be used and passed on for direct marketing and market research:

<sup>29</sup> Cf. statement Ricardo/TX-Group of 16.01.2020.

<sup>30</sup> Section 1 letter d of the data protection declaration of February 11, 2020.

<sup>31</sup> Cf. statement Ricardo/TX-Group of 16.01.2020.

<sup>32</sup> Section 1 letter d of the data protection declaration of July 12/27, 2017.

<sup>33</sup> Cf. letter from Ricardo dated March 29, 2018; see also letter from Ricardo/Tamedia dated November 6, 2017



<sup>34</sup> Privacy policy from February 11, 2020.



We use the data you provide to organize and run the events and to notify and/or publish the winners on our portals, by means of direct notification or on social networks. If you have enabled us to do so, we may use your data in accordance with sections 2 and 4 and also pass it on in accordance with section 3.<sup>35</sup>

### 2.3.6 User surveys and market research

45. Results from user surveys (consisting of "aggregated and anonymous data") can be used "to improve the user experience" according to the privacy <sup>policy</sup><sup>36</sup>:

We use the data you provide exclusively to improve the user experience and to further develop our products. The results consist exclusively of aggregated and anonymous data. If you have given your consent, you may also be contacted by other companies in the TX Group and affiliated companies (here you will find a complete list of all the companies concerned), for example to take part in other user surveys.<sup>37</sup>

### 2.3.7 Location information

46. According to the privacy policy of Ricardo/TX <sup>Group</sup><sup>38</sup>, location data is used via certain mobile applications (a current list can be found on the website [www.tamedia.ch](http://www.tamedia.ch)).

If you use our mobile applications with a mobile device (a list of all relevant mobile applications can be found here), we can collect information about the location of your mobile device (longitude and latitude, information on horizontal accuracy) using GPS signal data.

We use the location data to enhance your user experience by displaying location-based online advertising and other location-based digital content (location-based weather information & news; display of approximate user locations) on your mobile device via the mobile application(s) (a list of all relevant mobile applications can be found here). If required by law, we will ask for your consent before collecting your location data for the aforementioned applications.

In this context, we may use the services of other companies within and outside the TX Group ("data processors"). We may share your location data with these companies to the extent necessary to provide the relevant services. A list of the companies concerned can be found here. We ensure that the protection of your data is guaranteed throughout the entire processing by selecting the contract data processors and through suitable contractual agreements.

Even after you have given your consent, you can deactivate the collection, processing and disclosure of your location data at any time. If you do not wish to receive location-based online advertising and content, you can either refuse access to your location or deactivate the location services in the settings of your mobile device at any time. To deactivate location services, please follow the instructions provided by the device manufacturer:

- for Apple devices: <https://support.apple.com/de-ch/HT202074>
- for Android devices: <https://support.google.com/ads/answer/2662922?hl=de><sup>39</sup>

No location data is currently collected via the Ricardo mobile application.<sup>40</sup>

---

<sup>35</sup> Section 1 letter e of the privacy policy of February 11, 2020.

<sup>36</sup> Privacy policy from February 11, 2020.

<sup>37</sup> Section 1 letter f of the data protection declaration of February 11, 2020.

<sup>38</sup> Privacy policy from February 11, 2020.

<sup>39</sup> Section 12 of the Privacy Policy dated February 11, 2020.

<sup>40</sup> See Ricardo/TX-Group statement dated 16.01.2020.



## 2.4 Data processing

47. The following describes which data processing relating to Ricardo data should take place in accordance with the privacy policy or actually takes place in accordance with the description of Ricardo - and for what purposes.

### 2.4.1 Notification of the "data transfer" and its purposes

48. By exchanging data within the Tamedia Group (new: TX Group), the data of Ricardo and Tamedia users will be processed for marketing and security purposes. See section 2.2, para. 26ff. Ricardo members were informed by e-mail and on the ricardo.ch website as follows:

"With the new privacy policy, we can show you offers and services that are relevant to you and improve your online experience as well as the security of our offers. This increases protection against online fraud and abuse."<sup>41</sup>

"Why does Tamedia share data internally at all? One important reason for sharing is to improve security for members, for example to better prevent online fraud. This is made possible by exchanging information between Tamedia's online platforms in the event of suspicious cases. We would also like to display more relevant advertising tailored to your needs in the future."<sup>42</sup>

49. The exchange of data within the Group or disclosure for security purposes (e.g. combating misuse) was not explicitly provided for in the privacy policy.

[REDACTED]

[REDACTED].<sup>43</sup> However, did not explain how the corresponding workflows and processes differ from the data processing and data preparation workflows for marketing purposes [REDACTED].<sup>44</sup> Ricardo/TX Group comments on this as follows:

[REDACTED]

### 2.4.2 Data processing in accordance with the privacy policy dated July 9, 2015

50. According to an older version of the privacy policy (valid from July 9, 2015<sup>45</sup>), Ricardo was able to *process and use* members' personal data "*for marketing measures such as sending e-mails with general information or of an advertising nature (newsletters, e-mails for information purposes)*".
51. To this end, Ricardo was also allowed to *pass on* the data "*to auxiliary persons in Germany and abroad as well as affiliated companies and group companies that advertise for [Ricardo<sup>46</sup>]*" - i.e. to third parties,

<sup>41</sup> Communication to all Ricardo members by e-mail dated July 12, 2017.

<sup>42</sup> FAQ "Summary of the privacy policy as of May 25, 2018", published on ricardo.ch in May 2018.

<sup>43</sup> Cf. letter from Ricardo/Tamedia dated March 20, 2019 and Ricardo/TX-Group statement dated January 16, 2020.

<sup>44</sup> See question 4 of the FDPIC dated February 18, 2019 and the corresponding answer from Ricardo/Tamedia dated March 20, 2019.

<sup>45</sup> Privacy Policy dated July 9, 2015, published on the Ricardo website ("Terms & Conditions" section).

<sup>46</sup> In the text: " for ourselves ".



who process personal data for Ricardo's own advertising purposes. They contractually undertake not to disclose the personal data.

52. The privacy policy also contained an explicit reference to the opt-out option ("*At your request, we will not use your data for advertising purposes*") with the corresponding contact details<sup>47</sup>.
53. In addition, reference was also made to the collection of surfing data when visiting the website as well as the use of cookies and web analysis using Google Analytics, among other things, with instructions on how to deactivate these functions<sup>48</sup>.

#### **2.4.3 Data processing in accordance with the privacy policy dated February 11, 2020**

54. The privacy policy dated February 11, 2020 states that the data listed therein may be used for marketing purposes and may be passed on to TX Group companies or affiliated <sup>companies</sup><sup>49</sup>:
55. Direct marketing and online advertising

When you register or order as a guest on one of our portals (you can find a complete list here), we may also use your personal data for personalized advertising measures. This concerns both the personalization of advertising by e-mail, such as e-mails with general information or advertising character (newsletter), by telephone, post, fax, text messages, picture messages and on instant messaging services as well as the delivery of personalized content and advertising on our portals. For this purpose, we may automatically evaluate information known to us about your usage behavior on our portals so that we can prevent you from receiving inappropriate advertising. These processing operations can be found in section 4. (...) We are entitled to commission third parties with the technical processing of advertising measures and advertising for us and are entitled to pass on your data for this purpose (see section 3 below).<sup>50</sup>

56. Disclosure of data to third parties

We work together with other companies or persons or commission other companies or persons with the processing and storage of data. They may have access to your personal data or usage data, but only to the extent necessary to perform their tasks.

We may use and pass on information collected from you and data about your person or your user account collected as part of our usage measurements in accordance with section 1 above either to companies of the TX Group or companies affiliated with the TX Group (a current list of all companies concerned can be found [here](#)) for the evaluation, improvement and needs-based design of our services or the services of the affiliated companies, for customer care, personalization and marketing purposes.

Data processing by other companies of the TX Group or companies affiliated with the TX Group is described in section 4 below.<sup>51</sup>

---

<sup>47</sup> Section 14 of the Privacy Policy dated July 9, 2015 ("Use for advertising purposes").

<sup>48</sup> Sections 5 to 7 of the Privacy Policy dated July 9, 2015.

<sup>49</sup> Privacy Policy dated February 11, 2020, Section 2 "Direct marketing and online advertising" and Section 3 "Disclosure of data to third parties".

<sup>50</sup> Section 2 of the Privacy Policy dated February 11, 2020.

<sup>51</sup> Section 3 of the Privacy Policy dated February 11, 2020.



57. The TX Group companies and affiliated companies that exchange data with each other in accordance with the data protection declaration are as follows <sup>52</sup>:
- Tamedia Basler Zeitung AG ([www.baslerzeitung.ch](http://www.baslerzeitung.ch))
  - Berner Oberland Medien AG BOM ([www.berneroberlaender.ch](http://www.berneroberlaender.ch), [www.thunertagblatt.ch](http://www.thunertagblatt.ch))
  - Tamedia Espace AG ([www.bernerzeitung.ch](http://www.bernerzeitung.ch), [www.langenthalertagblatt.ch](http://www.langenthalertagblatt.ch), [www.derbund.ch](http://www.derbund.ch))
  - Tamedia Verlag Finanz und Wirtschaft AG ([www.fuw.ch](http://www.fuw.ch))
  - TX Group AG ([www.20min.ch](http://www.20min.ch), [www.friday-magazine.ch](http://www.friday-magazine.ch))
  - Tamedia Publications romandes SA ([www.24heures.ch](http://www.24heures.ch), [www.bilan.ch](http://www.bilan.ch), [www.lematin.ch](http://www.lematin.ch), [www.lematindimanche.ch](http://www.lematindimanche.ch), [www.femina.ch](http://www.femina.ch), [www.tdg.ch](http://www.tdg.ch), [www.lematindusoir.ch](http://www.lematindusoir.ch))
  - Tamedia Publikationen Deutschschweiz AG ([www.schweizerfamilie.ch](http://www.schweizerfamilie.ch), [www.sonntagszeitung.ch](http://www.sonntagszeitung.ch), [www.tages-anzeiger.ch](http://www.tages-anzeiger.ch), [www.zueritipp.ch](http://www.zueritipp.ch))
  - Tamedia ZRZ AG ([www.landbote.ch](http://www.landbote.ch), [www.zuonline.ch](http://www.zuonline.ch), [www.zsz.ch](http://www.zsz.ch))
  - Digital Ad Services AG ([www.goldbach.com](http://www.goldbach.com))
  - Homegate AG ([www.homegate.ch](http://www.homegate.ch), [www.home.ch](http://www.home.ch), [www.tutti.ch](http://www.tutti.ch))
  - ImmoStreet.ch AG ([www.immostreet.ch](http://www.immostreet.ch))
  - OLMERO AG ([www.renovero.ch](http://www.renovero.ch))
  - Ricardo AG ([www.ricardo.ch](http://www.ricardo.ch))
  - Starticket AG ([www.starticket.ch](http://www.starticket.ch))

58. This transfer "always takes place with pseudonymized or anonymized data". The technical and organizational measures implemented are intended to ensure that personal identification is no longer possible:

Any disclosure to companies of the TX Group or companies affiliated with the TX Group ([here](#) you will find a complete list of all companies concerned) in accordance with this section 3 is always carried out with pseudonymized or anonymized data. This means that the data can no longer be assigned to you without additional information. Within the companies of the TX Group or companies affiliated with the TX Group ([here](#) you will find a complete list of all companies concerned), we ensure by contract and by means of technical and organizational measures that personal identification is no longer possible.<sup>53</sup>

59. Data processing by other TX Group companies or companies affiliated with the TX Group for marketing and analysis purposes is described in section 4 of the Data Privacy Statement:

The companies of the TX Group or companies affiliated with the TX Group ([here](#) you will find a complete list of all companies concerned) aim to continuously improve the digital services offered to you and to make them more needs-oriented and secure.

For this purpose, user-specific historical and future data available to us can be linked on an ongoing basis using various analysis tools and user behaviour can be analyzed, aggregated, pseudonymized and anonymized across all offers. We may use publicly available data or data from third-party providers to improve our database. The findings from your use of our offer can be used and exploited as part of the analysis of user behavior at other participating companies. Such data processing takes place primarily with pseudonymized or anonymized data. The processing is carried out in particular for the purpose of sending you personalized advertising in accordance with section 2 or displaying it on one of our portals and improving the security of our portals.<sup>54</sup>

---

<sup>52</sup> This list of "TX Group companies that exchange data with each other" is continuously updated on the TX Group website (corresponding reference in Ricardo's privacy policy): [https://www.tamedia.ch/tl\\_files/content/Group/Datschutzerklaerung/Tamedia\\_Unternehmen\\_EN.pdf](https://www.tamedia.ch/tl_files/content/Group/Datschutzerklaerung/Tamedia_Unternehmen_EN.pdf) (version dated 01.10.2019), [https://tx.group/tl\\_files/content/Group/Datschutzerklaerung/Tamedia\\_Unternehmen\\_EN.pdf](https://tx.group/tl_files/content/Group/Datschutzerklaerung/Tamedia_Unternehmen_EN.pdf) (version dated 15.01.2021).

<sup>53</sup> Section 3 of the Privacy Policy dated February 11, 2020.

<sup>54</sup> Section 4 of the privacy policy dated February 11, 2020 ("Processing of your personal data for marketing and analysis purposes").



60. Using various analysis tools, "user-specific historical and future data available to TX companies can be linked with each other on an ongoing basis and user behaviour can be analysed, aggregated, pseudonymized and anonymized across all offerings." In addition, publicly available data or data from third-party providers can be used to improve the TX Group's database<sup>55</sup>.

#### 2.4.4 Current use and disclosure according to information from Ricardo

61. Since the introduction of the new privacy policy in July 2017 and our initial clarifications<sup>56</sup>, the situation regarding data sharing and data exchange has evolved, as shown below. In particular,<sup>57</sup> data segments from various sources are now being linked or enriched - which was not previously the case<sup>58</sup>.

62. The current data processing can be described as follows on the basis of the newly available information and the clarifications<sup>59</sup> carried out:

[REDACTED]

63. [REDACTED]

64. [REDACTED]

#### 2.4.4.2 [REDACTED]

65. [REDACTED]. This allows Ricardo's data segments to be enriched with additional data from the other Group companies. The data [REDACTED] prepared by and from [REDACTED]

<sup>55</sup> According to Ricardo/Tamedia (new: TX Group), no such enrichment has taken place to date (Ricardo letter dated January 2019).

<sup>56</sup> See statement of facts from March 2018.

<sup>57</sup> See Ricardo letter dated March 2019.

<sup>58</sup> "Data processing, in particular the linking or refinement of profile data with other data, does not currently take place. However, this could certainly become an option in the future" (see letter dated November 6, 2017). "Neither the user data from Ricardo nor the segments resulting from the aggregation are passed on to third parties, whether inside or outside the Tamedia Group. They are also not merged with other data or segments from other sources. This strict separation also applies to the cookies used" (see statement of facts of March 2018).

<sup>59</sup> See letter from Ricardo dated January and March 2019. See also IT services contract dated December 19, 2018.



[REDACTED]

The demand-oriented design and delivery of digital advertising is intended to offer the users concerned added value and increase the attractiveness of the portals for existing and potential advertising customers.

66. The detailed procedures and processes are described below.

**2.4.4.3** [REDACTED]

67. [REDACTED]

68. [REDACTED]

69. [REDACTED]

70. [REDACTED] <sup>63</sup>

71. [REDACTED]

<sup>60</sup> As part of a reorganization, the [REDACTED] business unit was outsourced to the independent subsidiary as of 1 March 2019 [REDACTED] (see Ricardo letter, 20 March 2019).

<sup>61</sup> See Ricardo letter dated March 20, 2019.

<sup>62</sup> [REDACTED]

<sup>63</sup> [REDACTED]



- [REDACTED]

72. The privacy policy states that all information on current purchases and contract conclusions (products, services, payment amount) may be stored and used for marketing and analysis purposes (see section 2.3.4 above) - with reference to section 4 of the privacy policy. According to Ricardo/TX Group, however, this data is used by Ricardo itself for *its own* marketing and advertising purposes. The corresponding data processing would have nothing to do with the group-wide data exchange.<sup>64</sup>

73. [REDACTED]

74. [REDACTED]

75. [REDACTED] applies a "k-50 anonymization filter" before transmission to [REDACTED], which ensures that the number of persons per segment does not fall below the threshold value of 50.

76. [REDACTED]

77. [REDACTED]

<sup>64</sup> Cf. statement Ricardo/TX-Group 16.01.2020.

[REDACTED]

<sup>66</sup> See Ricardo/Tamedia letter dated March 2019.



#### 2.4.5 Anonymization/pseudonymization

78. Ricardo/Tamedia (TX Group) points out that the transfer within the Tamedia (TX) Group is carried out on behalf of the Tamedia (TX) Group and that the aggregated data would no longer allow Tamedia (TX Group) to draw any conclusions about a specific or identifiable person. For Tamedia (TX Group), this data therefore no longer constitutes personal data and its processing is not subject to the FADP. Ricardo describes the "output data" and the "usage data" as well as the (uniform) segments created from them as "anonymous" and assumes that these are not personal data within the meaning of the FADP [REDACTED]
79. In other words: Due to the described anonymization and aggregation process and the technical and organizational measures, Ricardo assumes that a re-identification of Ricardo customers or users is not possible at any time. When delivering digital advertising content or target group-specific advertising, no identification of the person concerned takes place and therefore no personal data is used.<sup>67</sup>

80. [REDACTED]

.68

## 2.5 Information and objection options

### 2.5.1 Information and procedure for a new application/registration with Ricardo

81. In order to register as a new member, the user must fully accept the GTC and the privacy policy when registering for the first time on ricardo.ch or autoricardo.ch<sup>69</sup>. On the registration form, a text under the registration button indicates that both are accepted upon registration. Both documents are linked.

### 2.5.2 Information about the change to the privacy policy for Ricardo members

82. Ricardo members were informed by email about the new privacy policy in its 2017 and 2018 versions<sup>70</sup>. Additional information was posted on the ricardo.ch website with the new data protection declaration.

#### 2.5.2.1 Privacy policy from July 27, 2017

83. Ricardo informed its existing members by email on July 12, 2017 about the changes to its privacy policy. The notification stated, among other things, that the new privacy policy will enable relevant offers and services to be displayed for users, thereby improving the online experience and security.
84. It was also stated that existing users have automatically accepted the new privacy policy by continuing to use their account from the same day.
85. The information was as follows:

<sup>67</sup> See Ricardo/Tamedia letter dated January 2019.

<sup>68</sup> Cf. [REDACTED]

<sup>69</sup> In the meantime (as of March 2020), the privacy policy no longer needs to be accepted, but must be acknowledged.

<sup>70</sup> The amendment to the privacy policy in the version dated March 30, 2019 was not communicated separately (by e-mail) to Ricardo customers, as the latter were not aware of the newly introduced data processing (section 12: "Location information"). are not affected in terms of content. No location data is collected via the Ricardo mobile application. (See Ricardo/TX Group statement from 16.01.2020).



We are pleased to inform you about the new privacy policy of ricardo.ch, which will come into force on July 12, 2017.

TO THE PRIVACY POLICY

*Why has the privacy policy been changed?*

The privacy policy has been harmonized within the Tamedia media group in order to facilitate the internal exchange of data.

*What exactly is changing?*

With the new privacy policy, we can show you offers and services that are relevant to you and improve your online experience and the security of our offers. This increases protection against online fraud and abuse.

By using the services of [ricardo.ch](https://www.ricardo.ch) or [autoricardo.ch](https://www.autoricardo.ch) on or after July 12, 2017, you automatically accept the new privacy policy. If you do not agree to this, you can object within 14 days by e-mail to [datenschutz@ricardo.ch](mailto:datenschutz@ricardo.ch) or in writing by post. The objection will result in the termination of your membership.

Thank you for your loyalty! Your  
ricardo.ch team<sup>71</sup>

The new privacy policy could be accessed by clicking on a link.

86. The privacy policy in force since July 27, 2017 (and thus also the transfer of data within the Tamedia Group) was deemed to have been automatically accepted if the member continued to use the services of ricardo.ch or autoricardo.ch from July 12, 2017 or did not object to the privacy policy within 14 days (by July 27, 2017). The objection resulted in the termination of the membership.
87. Ricardo informed those who objected to the new privacy policy even with regard to processing for personal analysis and marketing purposes that their user account had been closed. According to Ricardo, however, this exclusion was not <sup>intentional</sup><sup>72</sup>.
88. However, deactivation of usage data tracking (at Tamedia) was/is possible at this time by means of an opt-out cookie. (see specific implementation below under section 2.5.3). However, it was not possible to object to data exchange within Tamedia.
89. After the FDPIC expressed criticism in a letter dated July 19, 2017 regarding the fact that the amendment to the privacy policy was to enter into force on the date of the notification, Ricardo informed the FDPIC that July 12, 2017 had been erroneously stated as the introduction date. For the sake of clarification, the document "Summary of the Privacy Policy ricardo.ch AG" was published on July 21, 2017 on the Ricardo website (under the heading "GTC & Regulations"). Those members who have contacted ricardo.ch customer service in the meantime have been informed of the correct insertion date.

#### **2.5.2.2 Privacy Policy dated May 25, 2018 and subsequent versions**

90. On May 9, 2018, Ricardo members were notified by email of the new privacy policy that will apply from May 25, 2018.

---

<sup>71</sup> Email Ricardo from July 12, 2017.

<sup>72</sup> Ricardo letter dated March 2018: "If members were excluded solely on the basis of an objection to this under the new data protection declaration of July 12/27, 2017, this was not intended".



We are updating ricardo.ch's privacy policy as of May 25, 2018 to keep pace with the new, stricter EU regulation on the protection of personal data (GDPR). This gives you more control over your data. The most important change to the privacy policy is that you now have the option to object to certain data processing. (...) <sup>73</sup>

91. The privacy policy dated May 25, 2018 and subsequent versions now state the following:

**You can object to the processing of your data for marketing and advertising purposes and the forwarding of your data within the TX Group in accordance with 2 and 4 at any time by e-mail.**

Such an objection does not completely rule out the collection of personal data. Under the following [link](#)<sup>74</sup> you can prevent us from collecting your usage data. The objection only excludes the possibility that collected personal data will not be processed anonymously for marketing purposes and may also be forwarded to and analyzed by other companies for this purpose. In order to completely exclude or at least reduce the collection of personal data, the steps mentioned in section 10 regarding the deactivation of cookies must be followed. This may mean that you can no longer obtain or use the services you have purchased. <sup>75</sup>

92. The document "Summary of the privacy policy as of May 25, 2018"<sup>76</sup> served to present the frequently asked questions about the corresponding change. After general questions and answers about the GDPR, the "most important changes to the privacy policy" were listed. In particular, reference was made to a new opt-out option: "*You now have the option to object to the transfer of your data for marketing and advertising purposes.*". The reason for the data exchange within Tamedia was explained as follows:

Why is there an internal transfer at Tamedia at all?

An important reason for the transfer is to improve security for members, for example to better prevent online fraud. This is made possible by exchanging information between Tamedia's online platforms in cases of suspicion. In addition, we would like to display advertising that is more relevant to you and tailored to your needs in future. However, if you do not want this, you can let us know [here](#).<sup>77</sup>

93. Accordingly, from May 25, 2018, it should now be possible to object to the exchange of data within the Tamedia Group. By clicking on the link above, the logged-in user could opt out in a section of the help.ricardo.ch website by clicking on the option "Unsubscribe from Tamedia data exchange" and entering their email address. Regarding this opt-out option, which is no longer offered in the meantime, the data protection officer of Ricardo/TX Group explained the following in his statement of March 25, 2020:

[REDACTED]

94. In his statement of January 16, 2020 on the facts of the case, Ricardo/TX Group stated that the option to object by e-mail<sup>78</sup> mentioned in the privacy policy relates to the use of data for marketing measures by Ricardo or the group companies concerned

<sup>73</sup> Cf. email from Ricardo dated May 9, 2018.

<sup>74</sup> Reference to <https://www.tamedia.ch/de/datenschutzerklaerung/nutzungsdaten>.

<sup>75</sup> See section 6 of the privacy policy dated February 11, 2020 ("Right of access, rectification, erasure and complaint").

<sup>76</sup> Visited on 25.09.2018; the document in question is no longer on the ricardo.ch website.

<sup>77</sup> Document "Summary of the privacy policy as of May 25, 2018".

<sup>78</sup> "*You can object to the processing of your data for marketing and advertising purposes and the forwarding of your data within the TX Group in accordance with 2 and 4 at any time by e-mail*". Privacy policy, section 6.



itself. This involves data processing that has nothing to do with Group-wide data use.<sup>79</sup>

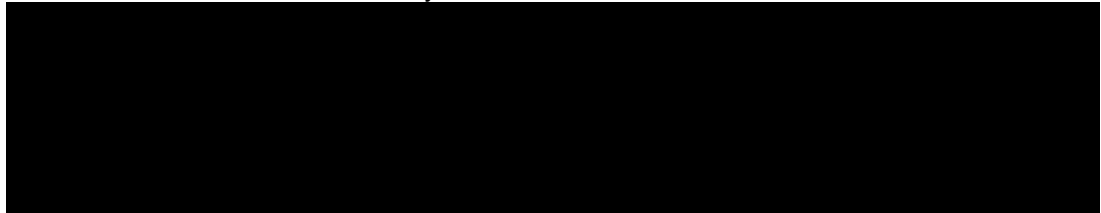
### 2.5.3 Concrete objection options and implementation

95. According to Ricardo and TX Group, users therefore have the following options to object<sup>80</sup>:

- Objection to Ricardo's marketing measures by e-mail: The possibility to object by e-mail<sup>81</sup> mentioned in the data protection declaration only concerns the use of data for marketing measures by Ricardo or the relevant group companies themselves. An objection to the exchange of data within the group by e-mail, on the other hand, is *not* possible. Ricardo/TX Group stated that this would not be enforceable because TX Group (TDA) did not know the e-mail addresses of the users concerned.<sup>82</sup>
- Objection to usage data tracking through the use of an opt-out cookie: Users of the platforms of the Tamedia/TX Group are offered the opportunity to object to usage data tracking within the Group via a link provided in the privacy policy (this link/URL of the Tamedia/TX Group is provided in the privacy policy under Section 6 "Right to information, correction, deletion and complaint" and under Section 10 "Tracking and analysis tools").

96. Specifically, the objection options described above are currently implemented as follows:

- An objection by e-mail will result in the user concerned being blocked from marketing measures by Ricardo (e.g. newsletters) or the data concerning him/her will no longer be used for this purpose. The user will no longer receive advertising messages. The settings regarding the newsletter can also be changed in the user account (subscription/unsubscription). Further marketing measures by Ricardo and what effect a possible objection request would have on them are not known.
- The opt-out cookie can be installed on the user's end device via the TX Group link provided. In this way, the collection of usage data by tracking cookies can be prevented: The opt-out cookie used will be deleted on every future visit to the website.



to make advertising based on usage data tracking impossible.

## 2.6 Relevant changes to the facts after the formation of SMG AG

97. As part of the restructuring, the privacy policy applicable to Ricardo users was revised. With the introduction of Consent Management Platforms (CMP), Ricardo users will be able to manage their cookie settings.

<sup>79</sup> Cf. statement Ricardo/TX-Group 16.01.2020.

<sup>80</sup> Cf. statement Ricardo/TX-Group 16.01.2020.

<sup>81</sup> "You can object to the processing of your data for marketing and advertising purposes and the forwarding of your data within the TX Group in accordance with 2 and 4 at any time by e-mail". Privacy policy, section 6.

<sup>82</sup> Cf. statement Ricardo/TX-Group 16.01.2020.

<sup>83</sup> If a different browser or device is used or the cookies are deleted, the deactivation process must be carried out again to prevent usage data tracking.

<sup>84</sup> See Ricardo/Tamedia AG letter dated January and March 2019.



### 2.6.1 New privacy policy

98. The FDPIC found that the privacy policy was revised in the course of the restructuring and that a new privacy policy applies to Ricardo's platforms (as well as all SMG portals) and has been published on Ricardo's website. Ricardo users were informed by means of an information banner on the landing pages that the privacy policy had changed.<sup>85</sup> For the so-called "TX data offerings" (TX Group portals such as ricardo.ch, carforyou.ch, tutti.ch, home-gate.ch, 20minuten.ch, immostreet.ch, etc.), separate data protection notices were also drawn up to inform the users concerned about which data is processed and for what purposes within the scope of the TX data offerings (including Ricardo's offerings).<sup>86</sup>

99. If Ricardo users click on the current data protection declaration on the website (under the heading *Data protection or GTC*), they will be shown the standardized *data protection declaration of SMG Swiss Marketplace Group* <sup>AG87</sup>:

This Privacy Policy informs you about how SMG Swiss Marketplace Group AG and the companies of the SMG Swiss Marketplace Group (SMG Swiss Marketplace Group AG, Casasoftware AG, Anibis Vertrieb GmbH, CAR FOR YOU AG, Immostreet.ch SA, Ricardo AG, Acheter-Louer.ch & Publimmo Sàrl, Nhat Viet Group Co. Ltd, IAZI, Informations- und Ausbildungszentrum für Immobilien AG; hereinafter jointly referred to as "**we**", "**us**", "**our**", "**SMG and SMG Group**"), when using our websites, platforms, portals or mobile applications (hereinafter jointly referred to as "**Offer**") as well as in the context of a cooperation with your personal data, to whom we may pass on your data and what rights you have vis-à-vis us with regard to the use of your data.

The SMG Group is jointly held by Schweizerische Mobiliar Versicherungsgesellschaft, Bundesgasse 35, 3001 Bern ("**Mobiliar**"), TX Group AG, Werdstrasse 21, 8004 Zurich ("**TX Group**"), Ringier AG, Brühlstrasse 5, 4800 Zofingen ("**Ringier**") and General Atlantic SC B.V., Raamplein 1, 1016XK Amsterdam, Netherlands ("**General Atlantic**") (hereinafter jointly referred to as the "**Shareholders**").

100. SMG and the SMG Group are named as data controllers in the privacy policy (Chapter 1: *Who is responsible for processing your data?*):

SMG and the SMG Group are responsible for the processing of your data collected or received in the context of our offers or cooperation with you or processed for other purposes as defined in this Privacy Policy.

101. A further section (3. Scope, purpose and legal basis of the processing of your data) describes the purposes for which the data is "generally" processed when using the SMG Group's services.

102. The following ten sub-chapters of the privacy policy explain the data processing and the "legal basis" depending on the purpose. With regard to the legal basis, reference is made to the GDPR. The following section is particularly relevant for the collection, use and linking of data for the evaluation of user behavior and for personalized advertising purposes (personalized marketing measures) and the matter at hand:

#### 3.9 Marketing and analysis purposes

When you register or order as a guest via one of our offers, we may also use your data for personalized advertising measures from us and from companies affiliated with us, from third parties and from our shareholders. Personalized advertising measures include in particular the personalization of advertising by means of digital advertisements on our websites and mobile applications, by e-mail, such as e-mails with general information or advertising character (newsletter), by

---

<sup>85</sup> See TX Group letter dated February 10, 2022.

<sup>86</sup> See TX Group letter dated February 10, 2022.

<sup>87</sup> The privacy policy of SMG Swiss Marketplace Group AG dated November 11, 2021 is an integral part of the present matter.



Telephone, post, fax, text messages, picture messages and instant messaging services. You will find a link at the end of every email sent by us that you can use to unsubscribe from the newsletter at any time. You can also [unsubscribe](#) from the newsletter at any time by sending an email to [kundendienst@ricardo.ch](mailto:kundendienst@ricardo.ch).

We will only send you newsletters if they relate to similar offers or if you have expressly consented to this. Otherwise, the delivery of personalized content and advertising, e.g. on our portals or portals of companies affiliated with us, is in our legitimate interest in accordance with applicable data protection law to offer you our products or services that may be of interest to you and to market our offers optimally. If prior consent is required, in particular for the processing of your data by companies affiliated with us or by our shareholders, we will obtain this in advance.

For this purpose, user-specific historical and future data available to us can be linked on an ongoing basis using various analysis tools and user behaviour can be analyzed, aggregated, pseudonymized and anonymized across all offers. We may use publicly available data or data from third-party providers to improve our database. The findings from your use of our offer can be used and exploited as part of the analysis of user behavior at other participating companies. Such data processing is always carried out with pseudonymized or anonymized data. You can object to this processing of your data at any time by [sending](#) an e-mail to [kundendienst@ricardo.ch](mailto:kundendienst@ricardo.ch).

103. The last paragraph corresponds to the wording of the previous privacy policy (see para. 56). It also explicitly mentions the possibility of objecting by e-mail to Ricardo's customer service. Based on TX Group's statements that data processing has not changed in principle after February 28, 2020, it is assumed that the possibility to object by e-mail mentioned in the Privacy Policy <sup>still</sup><sup>88</sup> concerns the use of data for marketing measures by Ricardo or the relevant group companies themselves. This concerns "data processing that has nothing to do with group-wide data use." <sup>89</sup> It is still not possible to object by e-mail to data exchange within the group.
104. Chapter 5 deals with disclosure to third parties.

#### **Disclosure of your data to third parties**

We work together with other companies or persons or commission other companies or persons to process and store data in accordance with this privacy policy. [...]

#### **I Disclosure to companies of the SMG Group**

If compatible with the purposes described above in section 3 or legally permissible, your data and usage data relating to your person or your user account may be used and passed on to companies of the SMG Group for the evaluation, improvement and needs-based design of our offers, for customer care, for personalization and for marketing purposes.

If your consent is required for this, we will obtain it from you in advance. Such consent can be revoked at any time. If no consent is required, the transfer of your data is based on our legitimate interest or the legitimate interest of a company of the SMG Group or companies affiliated with the SMG Group and joint ventures of the SMG Group to enable the use of our websites (connection establishment) in accordance with applicable data protection law, to ensure and increase the security and stability of our systems and offers, to analyze, statistically evaluate, adapt and improve the use of our offers, to display or send you advertising and to enable the optimization of our Internet offer.

**[New section since May 15, 2023:]**

[In addition, we operate an automated evaluation of user behavior on various platforms in order to create a profile of the respective user (section 3.9). We will share this with you if you have given your consent.

---

<sup>88</sup> See margin no. 94/95.

<sup>89</sup> Cf. statement Ricardo/TX-Group 16.01.2020.



The platforms belonging to the SMG Group are used to create an overarching profile that the various platforms can use to manage advertising, marketing and analyses. These are the following platforms: ImmoScout24, Homegate, Immostreet.ch, home.ch, Publimmo, Acheter-Louer.ch, CASA-SOFT, IAZI, AutoScout24, MotoScout24, CAR FOR YOU, anibis.ch, tutti.ch, Ricardo, FinanceScout24].

## II Disclosure to shareholders of the SMG Group

We may disclose your data to the shareholders of SMG Group [...]. The shareholders may in turn pass on the data to their subsidiaries, provided that they only process your data for the same purposes (described below) as the shareholders themselves are permitted to do.

Data is passed on for evaluation, improvement and needs-based design of our shareholders' products and services, for personalization, for marketing purposes and to combat fraud and abuse. Data will only be passed on as described herein if this is legally permissible or if we have obtained your consent in advance. Such consent can be revoked at any time.

TX Group AG maintains a range of data services for the benefit of other companies (affiliated companies). The SMG Group also procures such services from TX Group AG. These data offerings can personalize the user experience on platforms of affiliated companies (e.g. by recommending content), better detect fraud activities on platforms, display target group-specific advertising on their own platforms ("ad targeting") or display personalized advertising on the platforms of other affiliated companies ("ad retargeting"). Further information about the processing of your data by the TX Group data offerings can be found here.

### 105. Clicking on "here" takes you to the TX Group website "Data protection information on TX data offerings"<sup>90</sup> :

TX Group AG maintains a range of data offerings for the benefit of companies (hereinafter referred to as "affiliated companies" and "TX data offerings"). TX Group AG may make aggregated, non-personal data available to the Affiliated Companies in this context (hereinafter referred to as "Data"), i.e. certain statements about larger user groups. By using such data, these companies can personalize the user experience on their platforms (e.g. by recommending content), better detect fraudulent activities on platforms, display target group-specific advertising on their own platforms ("ad targeting") or display personalized advertising on the platforms of other affiliated companies ("ad retargeting"). This personalization of the user experience by the affiliated companies is generally carried out on a non-personal basis, i.e. without assigning the information received from TX Group AG to individually known users. If, on the other hand, an affiliated company assigns data received from TX Group AG to you personally (e.g. if you have identified yourself by registering), the corresponding data processing is subject to separate data protection declarations of the company concerned (section 3).

In this data protection notice, we inform you about the handling of such data in the context of the TX Data offerings for reasons of transparency. They apply to all users of the platforms of the affiliated companies.

### 106. This data protection information is intended to provide information on the handling of data processed within the scope of the TX Data offerings. This additional privacy policy is intended to apply to all users of the platforms of the affiliated <sup>companies</sup><sup>91</sup>, including Ricardo users.

### 107. The introduction to SMG's privacy policy states: "We may provide you with additional privacy policies if we deem this appropriate. Such additional data privacy statements supplement this data privacy statement and must be read together with it".

<sup>90</sup> Cf. URL <https://tx.group/de/datenschutzerklaerung/datenschutzhinweise-zu-den-tx-daten-angeboten>. This page (visited on 11.04.2023) is also part of the present facts.

<sup>91</sup> List of affiliated companies TX Data Services (09.11.2021): Tamedia Publikationen Deutschschweiz AG, Tamedia Finanz und Wirtschaft AG, Tamedia Publications romandes SA, Tamedia Basler Zeitung AG, Tamedia ZRZ AG, Tamedia Espace AG, Tamedia Abo Services AG, SMG Swiss Marketplace Group AG, CAR FOR YOU AG, ImmoStreet.ch S.A., Ricardo AG, Goldbach NeXT AG, Goldbach Publishing AG, Jaduda GmbH, Neo Advertising SA, Swiss Radioworld AG.



108. Section 10 "What rights do you have in relation to your data?" explains the "right to object" as follows:

**Right of objection**

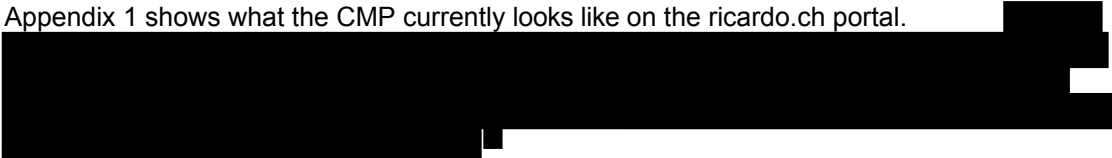
**You can object to the processing of your data for marketing and analysis purposes and the transfer of your data within the SMG Group in accordance with section 3.9 at any time by sending an email to [kundendienst@ricardo.ch](mailto:kundendienst@ricardo.ch).**

Such an objection does not completely exclude the collection of personal data, but only for marketing and analysis purposes and for the transfer of your data within the SMG Group in accordance with section 3.9.


**In addition, you can object to any data processing based on a legitimate interest of ours by sending an e-mail to [kundendienst@ricardo.ch](mailto:kundendienst@ricardo.ch) if you can provide reasons arising from your particular situation.**

For TX Group data offers: You can access the Cookie Preference Center via the "Manage preferences" link in the footer of the main page of this website or in the settings of the mobile app. To deactivate the processing of your data by the TX Group data offers (see section 5.3 [sic]<sup>92</sup> and other technologies, you can deactivate all processing purposes listed in the Cookie Preference Center for which data processing by the TX Group data offers is to be prevented. You also have the option of deactivating TX Group AG in the list of suppliers in the Cookie Preference Center. Detailed information on the processing purposes can be found in the Cookie Preference Center. After you have made your cookie settings, a cookie is stored in your browser or on your end device. If you change browsers, use a different device or delete your cookies, you will have to carry out the deactivation process again.

## 2.6.2 CMP

109. In summer 2021, the DPO of TX Group informed the FDPIC about the gradual introduction of consent management platforms on the portals of TX Group (e.g. Ricardo, Carforyou, Tutti, 20 Minuten, Homegate). This should enable users to manage "their privacy settings" and "in particular also prevent data processing in connection with TX data offerings".<sup>93</sup>
110. Appendix 1 shows what the CMP currently looks like on the ricardo.ch portal. 

<sup>92</sup> Wrong reference, correct would be 5.2.

<sup>93</sup> Letter from TX Group dated February 10, 2022. 

<sup>95</sup> Ricardo/TX Group letter dated August 3, 2021.



### 3. Data protection assessment

#### 3.1. Processing of personal data and applicability of the FADP

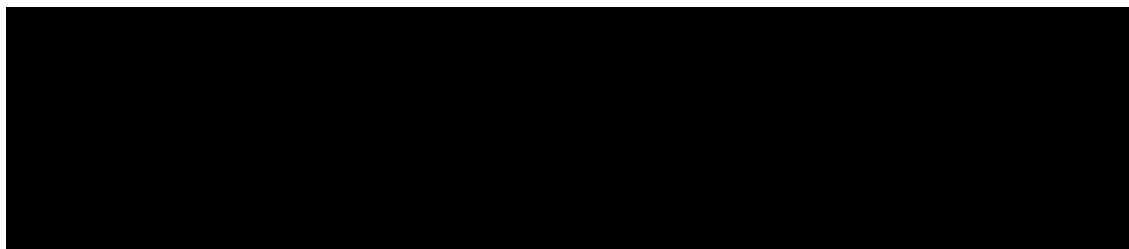
111. The Federal Act of June 19, 1992 on Data Protection applies to the processing of personal data by private persons (Art. 2 para. 1 lit. a FADP). Processing" is understood to mean any handling of personal data, regardless of the means and procedures used, in particular the procurement, storage, use, modification, disclosure, archiving or destruction of data (Art. 3 lit. e FADP). Personal data" within the meaning of Art. 3 lit. a FADP refers to all information relating to an identified or identifiable person. If there is no personal data, the FADP does not apply. The new FADP does not provide for any changes in this regard, apart from the fact that persons are now only understood to be natural persons.

##### 3.1.1. Data processing at Ricardo and further use of data by TX Group

112. When using the auction platforms of Ricardo.ch, various data are collected, forwarded, processed and analyzed for various purposes (see sections 2.3 and 2.4 of the statement of facts<sup>96</sup>).

113. The collection of data during registration and further processing of data of Ricardo customers by Ricardo undoubtedly constitute processing of personal data within the meaning of Art. 2 FADP in conjunction with Art. 3 let. a and e FADP. Art. 3 let. a and e DSG.

114.



115. Ricardo/TX Group disputes the qualification of the master customer data converted into output data, the usage data and the uniform segments created from this data as personal data. They take the view that this data would no longer be considered personal data, as the technical and organizational measures applied (in particular the aggregation and anonymization/pseudonymization of the data) would no longer allow any conclusions to be drawn about a specific or identifiable person and it would be impossible to re-identify Ricardo customers or users at a later date. This data is therefore anonymized data ( so that their processing by Tamedia (TX Gr [redacted] targeted [redacted] all within the scope of the FADP. The delivery of digital advertising content or target group-specific advertising to the users represented by the "anonymous" identifier [redacted] also does not constitute the processing of personal data within the meaning of the FADP.

##### 3.1.2. Term personal data

---

<sup>96</sup> The detailed procedures and processes from the collection to the display of personalized advertising are described in particular in section 2.4.4.3 of the facts.

<sup>97</sup> Cf. facts, margin no. 71

<sup>98</sup> Cf. facts, margin no. 69

<sup>99</sup> Cf. facts, margin no. 73



116. Personal data (or "data" within the meaning of the Data Protection Act) is all information that relates to an identified or identifiable person (Art. 3 lit. a FADP). The legal definition of the term "personal data" therefore covers all information that can be associated with a natural or legal person. The wording of Art. 3 let. a FADP must therefore be interpreted extensively (BLECHTA, in: Basler Kommentar, Datenschutzgesetz/Öffentlichkeitsgesetz, 3rd ed. 2014, N. 7 to Art. 3 FADP).
117. A person is identifiable if he or she cannot be clearly identified by the data alone, but can be inferred from the circumstances, i.e. the context of the information (Message FADP, BBI 1988 II 413, p. 444). The way in which the reference to the person concerned, i.e. the identification, is established, such as by means of a key, an AHV number, a file number or even a customer number, is generally irrelevant (BLECHTA, loc. cit., N. 10 on Art. 3 FADP).
118. However, not every theoretical possibility of identifying the person is sufficient to assume that the person is identifiable. If the effort involved is so great that, according to general experience, it cannot be expected that an interested party will take it upon themselves, there is no identifiability (BBI 1988 II 444 f.; e.g. the complicated analysis of a statistic with the help of which information could be assigned to a specific person). This must be examined in the specific case, taking into account in particular the possibilities of technology (BELSER, in: Basler Kommentar, Datenschutzgesetz, 2nd ed. 2006, N. 6 on Art. 3 FADP; ROSENTHAL, Handkommentar DSG, N. 24 f. on Art. 3 FADP).
119. The effort required for identification depends largely on the interest and resources of the interested party. This includes the means that are generally accessible to everyone, as well as those additional means that the data processor has at his disposal, whether due to his special knowledge, due to the sources of information available to him (e.g. an internal database) or due to other circumstances. The data processor's interest in identification must also be examined in order to determine whether, based on general experience, it can be expected that the data processor would go to the effort required for identification. This interest may change over time, as may the means available to the data processor for identification (ROSENTHAL, Handkommentar DSG, N. 26 on Art. 3 FADP).
120. Anonymization and pseudonymization of personal data are processing methods that aim to conceal the identity of the data subject. Data can be assumed to be anonymized if no party is able to extract a person from a dataset, establish a link between two datasets of a dataset (or between two independent datasets) or derive information from such a dataset by inference.<sup>100</sup> If, on the other hand, it is still possible to re-identify the data by extraction, linking and inference, the data is said to be pseudonymized.<sup>101</sup>
121. Pseudonymized data constitutes personal data pursuant to Art. 3 let. a FADP insofar as it can be re-identified without unreasonable effort (see BLECHTA, loc. cit., n. 11 - 12 on Art. 3 FADP).

### **3.1.3. Existence of a clear personal reference**

#### *3.1.3.1. Creation of a pseudonymized identifier for the purpose of personalization*

122. So-called identifiers are used to link the output and usage data of Ricardo users with data from other sources. In this way, data collected from Ricardo users can be linked with data from other companies (TX data offerings) that also relate to these users.

---

<sup>100</sup> See *Opinion 5/2014 of the Article 29 Working Party on anonymization techniques*.

<sup>101</sup> *Ibidem*.



123. [REDACTED]

124. The use of these unique identifiers enables TX Group or the advertising marketing company to display personalized advertising to a user based on the aggregated information processed. The link between the aggregated data and the individual user remains despite the pseudonymization, as otherwise the objective - the personalization of the displayed advertising based on the tracked usage behaviour - could not be achieved.

3.1.3.2. *Interest in and technical possibility of assigning pseudonymized data to a person*

125. TX Group does not need to obtain the "civil identity" of the user for data linking and advertising delivery: a pseudonym is sufficient. . Therefore, it cannot be assumed that TX Group has an interest in re-identifying the persons behind the identifier ( [REDACTED] during data processing in connection with a [REDACTED] "civil identity" in connection with the fulfillment of this purpose. TX Group would have an interest in this re-identification in order to fulfill another purpose, specifically to detect misuse. [REDACTED]

[REDACTED] the fact that no corresponding processes are currently taking place does not play a role in determining the specificity of the users and therefore the qualification of the data as personal data.

126. Moreover, the interest in re-identification is not the only criterion for assuming a personal reference (see para. 117 et seq.). Personal data may already exist if TX Group has the means to assign this data to a person without unreasonable effort. This is the case here (see paras. 123-124).

3.1.3.3. *Conclusion*

127. In summary, it can be stated that there is a clear personal reference in the present case and that the identity of the data subject can be determined by Ricardo and TX Group without disproportionate effort. The data processed by TX Group is therefore personal data within the meaning of the FADP: Ricardo passes on personal data to TX Group and this must also be regarded as personal data for TX Group after the technical measures or the aggregation and pseudonymization process. The provisions of the FADP therefore apply to their processing.

**3.2. Editing personality profiles**

128. The FADP attaches special legal consequences to the processing of personality profiles: If consent is required for the processing of personal data, this must be expressly given when personality profiles are processed (Art. 4 para. 5 FADP). There is also an obligation to provide information when obtaining personality profiles (Art. 14 FADP).

129. The reason for this increased protection under the law is that the processing or creation of personality profiles has a particularly strong impact on the personality of the persons concerned. The creation of personality profiles is particularly affected by the evaluation of personal data.

---

[REDACTED]



<sup>103</sup> Cf. facts, para. 49.



The possibilities of automatic data processing and the linking of automated data sets have become increasingly easy and frequent. The persons concerned are often unaware of the existence of a profile and are therefore unable to check its accuracy or use and are thus deprived of the freedom to present themselves as they wish (BBI 1988 II 447).

### 3.2.1. Term personality profile

130. According to Art. 3 lit. d FADP, a *personality profile* is "a compilation of data that allows an assessment of essential aspects of the personality of a natural person". According to the dispatch on the FADP, a personality profile is a compilation of a large amount of data on the personality structure, professional skills and activities or even non-professional relationships and activities, which provides an overall picture or a significant partial picture of the person concerned. The decisive factor is that the systematic compilation of data that is not in itself particularly worthy of protection (e.g. on reading habits, travel and leisure activities) allows an assessment of essential aspects of the personality (BBI II 1988 447).
131. According to the case law of the Federal Supreme Court, personality profiles are processed if a large amount of data that is not in itself particularly worthy of protection is compiled in such a way that an assessment of key aspects of the personality is possible. Data collections on consumer behavior are also suitable for providing at least a partial picture of the person concerned. The amount and content of the personal information plays a role here, as does the time dimension of the information. Personal data that is collected over a longer period of time and thus provides a biographical picture, as it were, is more likely to qualify as a personality profile than data that is merely a snapshot (BVerG A-4232/2015 judgment of 18 April 2017, E. 5.2.1).

### 3.2.2. Processing of personality profiles of Ricardo users

132. The data processing carried out by TX Group aims to use algorithms to establish correlations between the data collected from users in order to analyze and predict a person's behavior and preferences. Accordingly, the question arises as to whether the compilation of this data makes it possible to assess key aspects of the personality of Ricardo users or is suitable for providing at least a partial picture of them.
133. In the present case, customer and usage data of Ricardo users are systematically linked with data from other companies of the TX Group or affiliated companies using analysis tools, with the purpose of analyzing user behavior across all offers (see para. 59 et seq. and 102). This personal data is collected over a longer period of time.<sup>104</sup> Publicly available data or data from third-party providers can also be used to improve the database. By linking data sets from different sources, the interlinked personal data achieves a density of information that allows behavioral patterns to be identified.
134. The findings from the analysis of the linked data on consumer behavior enable TX Group to create at least a partial picture of the people who use the TX Group platforms. This link therefore allows an "assessment of key aspects of a natural person's personality."<sup>105</sup> Consequently, TX Group processes personality profiles.
135. In the nDPA, the term "personality profile" has been replaced by the term "profiling". According to Art. 5 lit. f, the processing form of profiling includes "any type of

---

<sup>104</sup> The data protection declarations that currently apply to Ricardo users contain the following information on data retention: "When analyzing your data, we store your data until the analysis is completed or you have objected to further processing" (SMG privacy policy) and "We process data for as long as our processing purposes [...] require it" (privacy policy for TX data offers).

<sup>105</sup> See Moneyhouse case law.



automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyze or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behavior, location or movements".

136. As part of the parliamentary work, the 2020 legislator has included "profiling" in lit. g. of Art. 5 nDSG is supplemented by the qualified processing form of "high-risk profiling", which was not yet provided for in the Federal Council's proposal. This is a "profiling that entails a high risk to the personality or fundamental rights of the person concerned by leading to a combination of data that allows an assessment of essential aspects of the personality of a natural person." It is evident that the 2020 legislator has based this wording on the definition of the old-law "personality profile" and has largely adopted it (according to RUDIN, in: Baeriswyl/Pärlü/Blonski (ed.), Stämpflis Handkommentar um DSG, 2nd ed. Art. 5 N 52).
137. Although both terms presuppose an automated form of processing, their meaning is not congruent. While the personality profile under the old law is the result of data processing, "profiling" refers to a special form of processing. From the logical connection between the result and the form of processing, in turn, it can be deduced, based on the relevant doctrine, that automated processing that results in a "personality profile" under traditional law, which allows an assessment of essential aspects of a person's personality, generally also fulfils the qualification characteristics of "high-risk profiling" (in this sense STENGEL/LODERER, citing Daniel Rosenthal et al, in: Bieri/Powell (eds.), Kommentar DSG, edition 2023 Art. 5 N 16 f.).
138. As explained above, the personality profiles processed by TX Group AG permit an assessment of key personality aspects, as is also characteristic of "high-risk profiling" under the new law. The FDPIC can, however, leave open whether such "high-risk profiling" is to be assumed in the specific case, as the present clarification of the facts is assessed under the old law.

### 3.3. Ricardo and TX Group as data controllers

139. According to Art. 3 lit. i FADP, data controllers or owners of a data collection are private persons or federal bodies who decide on the purpose and content of the data collection.
140. Data processing carried out by the competence center of TX Group Ltd for the fulfilment of processing purposes determined by Ricardo is to be regarded as commissioned data processing within the meaning of Art. 10a FADP. However, the data collection and further processing examined here, which TX Group Ltd carries out for the fulfilment of the purposes of TX Group and its affiliated companies, constitutes data processing for which TX Group is responsible or jointly responsible under data protection law.
141. In the data protection declarations currently applicable to Ricardo <sup>users<sup>106</sup></sup>, the data responsibilities are defined as follows:

*SMG's standardized privacy policy: "SMG or the SMG Group is responsible for the processing of your data that is collected or received in the context of our offers or cooperation with you or processed for other purposes as defined in this privacy policy."*

*TX Group privacy policy: "TX Group AG and the affiliated companies are jointly responsible for the collection of data within the scope of the TX data offerings."*

---

<sup>106</sup> Cf. facts, para. 98ff.



*TX Group AG is responsible for the aggregation of the user data collected via the TX Data Offers and the design of the TX Data Offers. The affiliated company is independently responsible for processing the data received through the TX Data Offers".*

142. Although this is not clear from the privacy policy<sup>107</sup>, both Ricardo (as an affiliated company) and TX Group are responsible for compliance with the FADP for the data processing under review<sup>108</sup>. Ricardo and TX Group also confirmed this several times during the investigations<sup>109</sup>.

### **3.4. Existence of an infringement of personality rights**

143. According to Art. 12 FADP, a controller who processes personal data may not unlawfully violate the privacy of the data subjects. In particular, they may not process personal data contrary to the principles of Articles 4, 5 paragraph 1 and 7 paragraph 1 or process a person's data against their express will without justification.

#### **3.4.1. Compliance with the processing principles (Art. 12 para. 2 lit. a FADP)**

144. Personal data must be processed in accordance with the processing principles set out in Art. 4, 5 para. 1 and 7 para. 1 FADP. A violation of these processing principles constitutes a violation of personality rights pursuant to Art. 12 para. 2 lit. a FADP.

##### **3.4.1.1. Recognizability of data processing for marketing purposes (principle of transparency, good faith)**

###### **3.4.1.1.1. Transparency requirements in accordance with the DSGVO**

145. The processing of personal data must be carried out in good faith in accordance with Art. 4 para. 2 FADP. According to Art. 4 para. 4 FADP, the collection of personal data and, in particular, the purpose of its processing must be recognizable to the data subject.
146. The principle of transparency serves to enable data subjects to make informed decisions about their right to informational self-determination. If the purposes of processing are not defined precisely enough or are not described in a clear and unambiguous form, a data subject can neither control the data processing carried out nor exercise their data protection rights in a reasonable manner. According to the dispatch: "The transparency required in Article 4 paragraph 4 (...) also adds a new dimension to the right to object to processing (Art. 12 para. 2 lit. b FADP). The right to object to processing must remain merely theoretical for as long as the data subjects are unaware of the data collection and its essential framework conditions. The transparency of the procurement and the information of the person concerned thus form the actual cornerstone of the entire data protection system." (BBI 2003 2101, p. 2126)
147. Against this background, the information that the controller of the data collection must provide to the data subject in a specific situation in order to ensure that the data collection is carried out in such a way that the data subject is informed.

---

<sup>107</sup> On the recognizability of data controllers, see 3.4.1.2, para. 171 and para. 180.

<sup>108</sup>

<sup>109</sup> See para. 12f and para. 16.



The data processing must be assessed according to the circumstances and the principles of proportionality and good faith (Art. 4 para. 2 FADP).

148. If the data collection and its purpose are clearly recognizable from the circumstances, no special information needs to be provided. If, on the other hand, the circumstances make the collection of data less obvious, the data subject must be made aware of the collection and its essential framework conditions in an appropriate manner. If information is required, the principles of proportionality and good faith presuppose that, from the perspective of an average, reasonable person belonging to the target audience of the platform, this is sufficient in good faith to give them a reasonable opportunity to take note of it.
149. It must be checked in each case whether the information is sufficiently clear and specific for an average, reasonable person to form an impression of it and to make a decision on the declaration of consent or an objection based on it (see FADP 2017, p. 7050). In addition to the explicitly stated purpose, the identity of the controller or, if data is to be disclosed, the category of possible data recipients must be disclosed (Dispatch FADP 2003, p. 2125).
150. According to the dispatch, however, it is possible that further information may have to be provided under certain circumstances: "If the principle of good faith so requires, the controller of the data collection must provide further information, for example on whether answers to the questions asked are voluntary or mandatory and on the consequences of refusing to provide the requested information" (BBI 2003 2131). In order to fulfill its duty to provide information, the controller must do everything that can reasonably be required of it under the circumstances (BBI 2003 2101, p. 2132).
151. In addition to the transparency requirement of Art. 4 para. 4 FADP, the FADP also stipulates a duty of information on the part of the controller when obtaining particularly sensitive personal data and personality profiles: The controller of the data collection is obliged to inform the data subject about the acquisition of particularly sensitive personal data or personality profiles (see Art. 14 para. 1 FADP).
152. The more drastic the data processing is with regard to personal rights, the higher the requirements for transparency. The duty to inform under Art. 14 FADP requires that the information is expressly provided and that the controller of the data collection provides the data subject with all information necessary for processing in accordance with the principles of good faith and proportionality, in particular the identity of the controller of the data collection, the purpose of the processing and the categories of any data recipients.
153. In the event of particularly drastic or unexpected processing, the person concerned is "separately".<sup>110</sup>
154. However, the nDPA goes further by obliging data controllers to inform data subjects appropriately about the collection of personal data, even if the data is not collected from the data subject (cf. Art. 19 nDPA). When procuring data, data controllers must provide the data subjects with the information required to enable them to assert their rights under the nDPA and to ensure transparent data processing (cf. Art. 19 para. 2 nDPA).

#### **3.4.1.1.2. Compliance with transparency and information obligations in the present case**

---

<sup>110</sup> The requirement of a separate notice or the unusualness rule is derived from the principle of trust and the principle of proportionality. The requirement of a separate notice means that the data subject must be made "separately aware" in the sense of the case law on unusualness (see Lukas Bühlmann/Michael Schüepp, Information, consent and other focal points in (new) Swiss data protection law, in: Jusletter March 15, 2021, p. 22).



155. In the present case, it is to be examined whether the data processing and the transfer of Ricardo user data to the TX Group as well as the subsequent cross-platform data linking for the purpose of personalized advertising by the TX Group or the affiliated companies are recognizable from the perspective of the Ricardo member or an average Ricardo user.
156. Ricardo AG, TX Group AG and all companies of the Tamedia/TX Group or affiliated companies are to be qualified as "third parties" for each other. The relationship between the Ricardo platform and Tamedia or the TX Group is not known per se to most Ricardo users. In principle, a Ricardo member cannot expect that the data from his use of the Ricardo auction platform will be linked with data from his use of other platforms such as homegate.ch, anibis.ch or 20 Minuten or a Tamedia newspaper. Nor can he expect, without adequate information, that the data he provided when registering with Ricardo can be compared and linked with the data from his other TX accounts.
157. TX Group processes personality profiles in connection with tracking for marketing and security purposes (see section 3.2.2) and is therefore subject to the duty to provide information pursuant to Art. 14 FADP, which supplements the principle of transparency and requires explicit information from the controller about the procurement of the data, the purpose of its processing, the identity of the controller of the data collection and the categories of any data recipients.
158. In this case, it must be checked whether the information provided is clear and appropriate to ensure that the data processing is recognizable.
159. The recognizability of the data processing operations introduced in July 2017, their purposes (as well as any options to object), the identity of the controller and any data recipients are examined below from the various perspectives of the data subjects (be it an existing member of Ricardo or a potential new customer).

**a) Notice dated July 12, 2017 and Privacy Policy dated July 12/26, 2017**

160. The then existing Ricardo members were informed by e-mail on July 12, 2017 about the forthcoming change to the privacy policy and the transfer of data within the Tamedia Group. Ricardo members were informed that the new privacy policy would be automatically accepted if a member used the services of ricardo.ch. Any objection would result in the termination of membership. For those members who objected to the processing for personal analysis and marketing purposes, the user account was actually deactivated.<sup>111</sup>
161. In the notification, the security purposes of the data exchange within the Tamedia Group were emphasized<sup>112</sup> (see Statement of Facts, 2.5.2.1). On the other hand, there was no clear indication of data transfer or data exchange for marketing purposes or personalized advertising. Nor was any reference made to the processing of personal profiles, although this was explicitly provided for in the revised privacy policy<sup>113</sup>. The exchange of data within the group for security purposes, in particular the aforementioned combating of misuse, which was mentioned prominently in the communication, was not provided for in the privacy policy.

---

<sup>111</sup> Facts, margin no. 85-87

<sup>112</sup> "With the new privacy policy, we can show you offers and services that are relevant to you and improve your online experience and the security of our offers. This increases protection against online fraud and abuse."; "...Objection will result in termination of membership".

<sup>113</sup> However, the corresponding reference was subsequently deleted in the privacy policy revised in May 2018 (see facts, para. 43).



162. However, it became clear during the clarification of the facts that the newly introduced data processing, in particular the linking of data from different sources, is primarily intended to serve marketing or personalized advertising purposes. This approach violates the principle of good faith.
163. The emphasis on the security purposes, which only played a marginal role compared to the marketing and advertising purposes<sup>114</sup>, and the lack of information regarding the marketing purposes of the data processing meant that the members concerned were not adequately informed about the newly introduced data processing and were therefore only partially able to make a decision about their right to informational self-determination based on this notification and the privacy policy.
164. The framework conditions for data processing for marketing purposes (including the options to object) were also not sufficiently clear. For those members who objected to the processing for personal analysis and marketing purposes, the user account was deactivated.<sup>115</sup> However, the possibility of deactivating online tracking by Tamedia was mentioned in this first version of the data protection declaration (the corresponding URL was not linked, however). This gave the impression that an objection was possible. Moreover, this option to object was limited to *future* usage data (use of an opt-out cookie). In fact, there was no possibility to object to the data exchange or data linking within Tamedia for marketing purposes as a whole.<sup>116</sup> This approach also violates the principle of good faith.

**b) Notice dated May 9, 2018 regarding the privacy policy dated May 25, 2018**

165. On May 9, 2018, Ricardo.ch announced to registered customers an updated privacy policy adapted to the EU GDPR, which should apply from May 25, 2018. In the corresponding communication, the security purposes were again emphasized<sup>117</sup>. As far as the framework conditions for data processing are concerned, this time explicit reference was made to a "new" option to object to the exchange of data within Tamedia. In particular, members should be provided with "a simple option to prevent the transfer of data within the Tamedia Group" (Tamedia data exchange opt-out).<sup>118</sup>
166. According to the privacy policy revised in May 2018, it was possible to object to the analysis of user behavior or the cross-offer data linkage by e-mail to Ricardo: "You can object to the processing of your data for marketing and advertising purposes as well as the transfer of your data within the TX Group [...] at any time by e-mail".<sup>119</sup> According to the findings of this clarification of the facts, however, an objection request submitted by e-mail has no such effect.<sup>120</sup>
167. The fact that Ricardo users were informed about the possibility of objecting to the forwarding or linking of data within the TX Group for advertising purposes and that this was not implemented contrary to expectations constitutes a breach of the principle of good faith. Against this background, it can be stated that the framework conditions

---

<sup>114</sup> In any case, no corresponding lawsuits were filed, see facts para. 49.

<sup>115</sup> Cf. facts, para. 87.

<sup>116</sup> Cf. privacy policy of July 27, 2017 and facts, para. 94-96.

<sup>117</sup> "Why does Tamedia share data internally at all? One important reason for sharing is to improve security for members, for example to better prevent online fraud. This is possible because information can be exchanged between Tamedia's online platforms in the event of suspicious cases. In addition, we would like to display advertising that is more relevant to you and tailored to your needs in the future..." (see facts, para. 92).

<sup>118</sup> Cf. facts, para. 91ff., in particular para. 92-93.

<sup>119</sup> Cf. facts, para. 91.

<sup>120</sup> Cf. facts, para. 93.



of data processing for marketing purposes were not sufficiently recognizable and thus the principle of transparency was violated.

**c) Information for a new application**

168. During the initial clarifications, a new registration was made by accepting Ricardo's terms and conditions and privacy policy. There was no specific or explicit reference to the transfer of data to the TX Group or to cross-platform tracking by the TX Group for advertising purposes. Currently, when creating a Ricardo account, new members must accept the terms and conditions by ticking the box and only take note of Ricardo's privacy policy. When registering, there is still no special or explicit reference to the transfer of data to the TX Group or to cross-platform tracking by the TX Group for advertising purposes.<sup>121</sup>
169. Thus, new members are generally informed by the privacy policy (or the data protection declarations) that a transfer to TX Group and a data linkage or cross-platform tracking based on data from all other affiliated TX companies (so-called TX offers) will take place. The appropriateness of this information is examined below (letters d and e). Since the introduction of the CMP, users have also been informed about the processing of their data by means of banners (see letter f).

**d) Standardized data protection declaration of the TX Group using the example of the data protection declaration of 11 February 2020**

170. As described in the facts of the case, the Tamedia Group and, since the end of 2019, the TX Group have introduced a standardized privacy policy for associated companies<sup>122</sup>. The standardized privacy policy should apply to all companies in the group that exchange data with each other - including Ricardo in particular. The privacy policy was updated several times, but - apart from the possible objection to the group-internal exchange of data - without any significant changes to its content. The privacy policy dated February 11, 2020 is used for the present clarification.
171. The (standardized) privacy policy refers both to data processing by Ricardo and to data processing by companies of the TX Group (formerly: Tamedia) and affiliated companies.<sup>123</sup> Although Ricardo AG and TX Group AG or companies of the Tamedia/TX Group or "affiliated companies" are not jointly responsible for the data processing, they are referred to as "we" in the privacy policy<sup>124</sup>. It is therefore not clear which data processing can be carried out by which companies or who is responsible for the data processing in each case.
172. Section 3 of the Privacy Policy explains the disclosure to third parties. According to its wording, "the information collected from you and your personal data collected as part of our usage measurements in accordance with section 1 above" may be used and passed on to TX Group companies or affiliated companies "for the evaluation, improvement and needs-based design of our services, or the services of affiliated companies, for customer care, personalization and marketing purposes".<sup>125</sup> A

---

<sup>121</sup> Cf. facts para. 81.

<sup>122</sup> Cf. statement of facts, para. 1. At the snapshot of the statement of facts of February 28, 2020 and until the restructuring in November 2021, Ricardo AG was part of the TX Group.

<sup>123</sup> Cf. facts, para. 27.

<sup>124</sup> "This privacy policy of ricardo.ch, an offer of ricardo.ch AG, informs you about how we and the companies of the TX Group as well as affiliated companies (...); hereinafter also referred to collectively as "We") handle data that is processed about you (...)", Facts, para. 28.

<sup>125</sup> See section 1 of the privacy policy and section 3 of the privacy policy



Such disclosure is to take place "in principle with pseudonymized or anonymized data"; in addition, "technical and organizational measures" will be taken to ensure this, "that personal identification is no longer possible". For data processing by other companies of the TX Group or companies affiliated with the TX Group, reference is made to section 4 ("Processing of your personal data for marketing and analysis purposes"). For marketing and analysis purposes of the companies of the TX Group or companies affiliated with the TX Group, "user-specific historical and future data that we have may be linked with each other on an ongoing basis using various analysis tools and user behaviour may be analysed, aggregated, pseudonymized and anonymized across all offers. To improve our database, we may use publicly available data or data from third-party providers". The findings from the analysis should be used and exploited by the participating companies, whereby such data processing is carried out "primarily with pseudonymized or anonymized data".<sup>126</sup>

173. According to the findings of the present clarification of the facts, it is clear that this refers to the data processing pursuant to para. 63 et seq. However, average Ricardo users cannot reasonably be expected to infer from this information that their master data is linked to data collected through their use of the Ricardo platform and other platforms and data from other sources and processed in such a personalized manner that TX Group allows conclusions to be drawn about significant aspects of their personality. The duty to inform under Art. 14 FADP requires that explicit information be provided that personality profiles are being created. This obligation is not fulfilled with this information.
174. In addition, according to the privacy policy, all data that Ricardo collects may be passed on to TX Group companies or affiliated companies for various purposes. Accordingly, the behavioral analysis by TX Group could potentially collect all user and customer data of Ricardo or personal data of Ricardo customers and users. However, according to Ricardo and TX Group, not all data is in fact used for analysis and marketing purposes. TX Group determines which data is to be used or aggregated for analysis and segmentation. For example, information on purchases and contract conclusions would not be used for TX Group's marketing and analysis purposes, although this possibility is listed in the privacy policy<sup>127</sup>. The privacy policy therefore does not reflect the data processing that can be carried out according to the information provided by Ricardo and TX Group and the information in the privacy policy does not allow a Ricardo user to recognize the possible data processing by Ricardo and TX Group.
175. In the present case, the processing in question can be classified as particularly intrusive (see para. 3.2.2) and unexpected (para. 156), which is why the data subjects must be made "separately aware" of this particularly intrusive and unexpected data processing. The information provided in the privacy policy about the transfer of data to the TX Group and the cross-platform tracking does not allow them to exercise their rights as data subjects because the framework conditions for this data processing are not transparent and recognizable. This procedure does not meet the requirements for transparency.
176. For the reasons mentioned above, the privacy policy does not allow users to obtain an overview of the data processing actually carried out. Therefore, the information in the privacy policy of February 11, 2020 does not meet the transparency requirements of Art. 4 para. 4 FADP in conjunction with Art. 14 FADP. Art. 14 FADP not. If Ricardo users

---

<sup>126</sup> See section 4 of the privacy policy.

<sup>127</sup> See facts, para. 41-42.



If you have to assume that all possible data processing can be carried out for all possible purposes, then the principle of good faith is also violated.

177. With regard to the recognizability of the objection options, this data protection declaration has the same shortcomings that we already mentioned in recital 166 et seq. of the data protection declaration of May 25, 2018 have determined.
178. The wording "You can object to the processing of your data for marketing and advertising purposes and the disclosure of your data within the TX Group [...] at any time by e-mail" has been retained, although an objection request submitted by e-mail has no such effect. This violates the principle of good faith. Furthermore, it is not clear that the existing option to object (use of an opt-out cookie) is limited to future usage data.

**e) Introduction of the standardized data protection declarations of SMG and the TX Group per November 11, 2021**

179. Since 11 November 2021, a standardized data protection declaration of SMG Swiss Marketplace Group AG has applied to Ricardo users. In addition, the TX Group's data protection notices are to apply to TX offers (including ricardo.ch). SMG's standardized privacy policy with reference to that of the TX Group replaces Ricardo's privacy policy dated 11 February 2020.
180. With regard to the identifiability of the controllers and recipients, this data protection declaration has the same deficiencies that were already identified in the TX Group's standardized data protection declaration in sections 170 et seq: SMG Group's (standardized) privacy policy informs "how SMG Swiss Marketplace Group AG and the companies of SMG Swiss Marketplace Group [...] hereinafter jointly referred to as "we, "us", "our", "SMG and SMG Group", handle your personal data when using SMG offerings and in the context of a collaboration". In addition, the new data protection declaration of Ricardo (SMG) provides for the transfer of data to the companies of SMG<sup>128</sup> and a transfer to the shareholders of SMG (including its subsidiaries)<sup>129</sup>, including the TX Group, for personalization and marketing purposes.<sup>130</sup>
181. The clarity of the TX platforms or "TX data offers", i.e. the platforms involved in the data exchange, is also to be criticized. The "list of affiliated companies" can only be found after careful and time-consuming reading of the data protection provisions<sup>131</sup>. In addition, the list no longer mentions the participating platforms or TX data offerings (e.g. tutti.ch, homegate.ch, 20min.ch, etc.)<sup>132</sup>, but the companies of the data controllers that can exchange data with each other, which makes it difficult for the average data subject to identify them<sup>133</sup>. In addition, with SMG's standardized privacy policy and the "data protection information"

---

<sup>128</sup> I.e. SMG Swiss Marketplace Group AG, Casasoft AG, Anibis Vertrieb GmbH, CAR FOR YOU AG, Immostreet.ch SA, Ricardo AG, Acheter-Louer.ch & Publimmo Sàrl, Nhat Viet Group Co. Ltd, IAZI, Informations- und Ausbildungszentrum für Immobilien AG.

<sup>129</sup> I.e. Schweizerische Mobiliar Versicherungsgesellschaft, TX Group AG, Ringier AG, General Atlantic.

<sup>130</sup> see Privacy Policy of Swiss Marketplace Group AG (SMG), 3.9 Marketing and analysis purposes and 5.1 and 5.2 Disclosure of your data to third parties.

<sup>131</sup> Privacy Policy SMG, 5.2 "Further information about the processing of your data by the TX Group data offerings can be found here", linked to a URL that leads to the TX Group website ("Data protection information on the TX data offerings" - tx.group).

<sup>132</sup> In an earlier version of TX Group's privacy policy, all platforms were listed, see Facts, para. 57.

<sup>133</sup> As at 09.11.2021: Tamedia Publikationen Deutschschweiz AG, Tamedia Finanz und Wirtschaft AG, Tamedia Publications romandes SA, Tamedia Basler Zeitung AG, Tamedia ZRZ AG, Tamedia Espace AG, Tamedia Abo Services AG, SMG Swiss Marketplace Group AG, CAR FOR YOU AG, ImmoStreet.ch S.A., Ricardo AG, Goldbach NeXT AG, Goldbach Publishing AG, Jaduda GmbH, Neo Advertising SA, Swiss Radioworld AG.



of the TX Group, which should apply complementarily to all Ricardo users, the data processing carried out has become even more confusing. With the numerous references (in one section of a sub-chapter reference is made to a supplementary data protection declaration of the TX Group and vice versa), it is not comprehensible for the Ricardo user how the data protection declarations are to be classified or which data protection provisions apply in each case. As a result, the data subjects are not able to recognize what the framework conditions of the data processing carried out are.

182. Furthermore, the Ricardo user cannot be expected to study the entire data privacy statement in order to access the information on the TX data offers and the corresponding URL link; these should be in the foreground.
183. The standardized privacy policies of SMG and TX Group therefore do not remedy the transparency deficiencies identified in Ricardo's privacy policy of 11 February 2020<sup>134</sup>. They even exacerbate these deficiencies.
184. In addition, SMG's data protection provisions leave open the justification (or "legal basis") on which such disclosure to third parties for personalization and marketing purposes would be based.<sup>135</sup> This is a problem in that the data subjects cannot exercise their rights if they do not know the basis on which the controller is relying. As a result, data controllers do not fulfill their transparency and information obligations towards Ricardo users.
185. In addition, the fact that the data protection declarations only refer to the GDPR and not to the DPA, although the latter is primarily applicable in this case, also makes it more difficult to take note. Unambiguous information about the data protection legislation applicable to the controller is essential to enable users to know and enforce their legal claims.

**f) Use of a consent management platform on ricardo.ch**

186. In connection with the use of a consent management platform<sup>136</sup>, the question arises as to whether the transparency with regard to the data processing carried out for marketing purposes by Ricardo AG and TX Group AG has improved, so that there is no longer any personal data breach.<sup>137</sup>
187. The CMP, which is available on the ricardo.ch website, illustrates certain data collections and data disclosures to third parties<sup>138</sup>. If you click on the link "all suppliers", you will find a list of 961 data suppliers<sup>139</sup>. This should make it easier to recognize the collection of usage data for the specified purposes, although the recognizability must be put into perspective, as the TX Group is only one of the 961 specified data suppliers ("vendors"). In addition, it is not easy for the average Ricardo user to see what the difference is between "cookies for marketing purposes" and "personalized ads and content, ads and content measurement, insights about target groups and product development".

---

<sup>134</sup> See above under para. 171ff.

<sup>135</sup> Disclosure to SMG Group companies: "If [...] your consent is required, we will obtain this from you in advance. [...] If no consent is required, the disclosure of your data is based on our legitimate interest or the legitimate interest of a company of the SMG Group or companies affiliated with the SMG Group and joint ventures of the SMG Group [...] to display or send you advertising". Disclosure to shareholders of the SMG Group: "Data [...] will only be disclosed if this is legally permissible or if we have obtained your consent in advance."

<sup>136</sup> See para. 109f.

<sup>137</sup> Subsequently, it is also checked whether (valid) consent within the meaning of the FADP is obtained via CMP.

<sup>138</sup> Cf. use of CMP on ricardo.ch, see Appendix 1.

<sup>139</sup> See Appendix 1



188. When it comes to managing the default settings, the user gets the impression that they have a real choice for all cookies that are not marked as "absolutely necessary" (which remain "always active"). In addition to the option to allow all cookies ("allow all"), the current settings include the option to reject all cookies ("reject all"). There is also the option to make granular decisions ("confirm my selection"). The buttons are preset to "off" for all these cookies.
189. However, when clicking on the "Personalized ads and content, ads and content measurement, insights about target groups and product developments" button, it is noticeable that, although the selection of these cookies is deactivated ("off"), there is a button below the text with the text "Object to legitimate interests". If you click on it, the text "Objection accepted" appears. This setting is confusing, as it is not clear whether data processing will take place despite an inactive selection ("off") as long as you have not objected to the interests.
190. Consequently, although the CMP has somewhat improved transparency regarding the processing of usage data for the stated purposes by specifically informing visitors to the website of the data processing when they access the website, transparency with regard to the data processing carried out for marketing purposes by Ricardo AG and TX Group AG has not been sufficiently improved. There is still a violation of privacy with regard to the principle of recognizability and good faith.

#### **3.4.1.1.3. Processing for marketing purposes despite objection (principle of good faith)**

191. In this case, Ricardo users have the option of "deactivating" the TX Group's "usage data tracking". However, this only prevents the collection of new data. An analysis, data linking and segmentation based on all data that has already been collected (e.g. master data or output data, the usage data already collected) takes place despite the objection. The delivery of targeted advertising is based on all data that has already been collected - possibly also from sources other than Ricardo - and is still available. As it is not clear from the information provided to customers what effects a possible objection would have, a user who has made use of this option could expect in good faith that their data will no longer be processed. This constitutes a breach of the principle of good faith.
192. The privacy policy revised as of May 25, 2018 was also intended to offer Ricardo members an easy way to "prevent the transfer of data within the Tamedia Group". With the Tamedia data exchange opt-out, members were provided with "a simple option to prevent the transfer of data within the Tamedia Group". A corresponding adjustment was made to the privacy policy<sup>140</sup>. According to Ricardo, the option to object only concerns the use of data for Ricardo's marketing measures.<sup>141</sup> This circumstance is also contrary to good faith.

#### **3.4.1.2. Principle of proportionality**

193. According to Art. 4 para. 2 FADP, the processing of personal data must be proportionate (principle of proportionality). Data processing is proportionate if it is suitable, necessary and reasonable for the data subject to achieve the intended purpose (Maurer-Lambrou/Steiner, DSG 4 N9; Rosenthal, DSG 4, N 20f; see also BGE 134 I 140, E).

---

<sup>140</sup> "You can object to the processing of your data for marketing and advertising purposes and to the disclosure of your data within the Tamedia (TX) Group in accordance with sections 2 and 4 at any time by e-mail" Privacy Policy, section 6; see Facts, para. 91 et seq.

<sup>141</sup> See the statement of facts, see margin no. 94.



6.2.). What is required is a reasonable relationship between the purpose of the processing and the associated impairment of personality (Message DSG, BBl 1988 II p. 450).

194. The principle of proportionality is expressed in the requirement to minimize data, according to which only the data that is actually required for a specific purpose may be obtained and processed. This also applies in terms of time: data may only be stored for as long as is suitable and necessary to achieve the purpose (storage limitation). According to the case law of the Federal Supreme Court, a longer retention period is in itself a serious interference with the right to self-determination and increases the risk of misuse of the stored data (BGE 133 I 77 E. 5.3). For this reason, the storage period must also be limited on the basis of the principle of proportionality.
195. When assessing the reasonableness of data processing, it is essential to examine whether there is an appropriate relationship between the data processing and the associated intrusion into the privacy of Cardo customers/users (proportionality in the narrower sense; see BGE 138 II 346 E. 9.2 p. 362). As part of a balancing of interests, it must therefore be examined to what extent TX Group's interest in collecting and evaluating large amounts of data to create profiles for personalized advertising outweighs the interest of the data subjects in the least possible interference with their informational self-determination.
196. Whether a "reasonable" relationship exists is assessed in accordance with the general principles of data protection according to objective aspects (Rosenthal, Handkommentar, Art. 4 N 22; BGE 125 II 473 E. 4b p. 476). It must be taken into account that this is tracking that is not only aimed at the customers or users of the Ricardo platform and is fed by their data, but is carried out across all platforms, i.e. data from all platforms of the TX Group are linked together. When weighing up interests, it must also be taken into account that measures have been implemented to minimize the interference with personal privacy (e.g. the pseudonymization procedure).
197. As an examination of mutual interests from the point of view of proportionality in the narrower sense under Art. 4 para. 2 FADP in conjunction with Art. 12 para. 2 lit. a FADP. Art. 12 para. 2 lit. a FADP is very closely related to the examination of the justification of overriding interests under Art. 13 para. 2 FADP, however, it seems more appropriate to examine the relevant aspects in the context of the balancing of interests and the proportionality test at the level of the justification grounds as a whole and to refrain from splitting them up (BGE 138 II 346 E. 9.3 p. 362 f.; BGE 136 II 508 E. 5.2.5 p. 521). The balancing of interests is therefore carried out as part of the examination of the justification of overriding private interests (Art. 13 para. 1 FADP).

#### **3.4.2. Processing of a person's data against their express will (Art. 12 para. 2 lit. b FADP)**

198. According to Art. 12 para. 2 lit. b FADP, no personal data may be processed without justification if the data subject has expressly objected to the data processing. If processing is carried out against the express will of the data subject and without justification, the data processing is considered unlawful (see BVerG A-7040/2009, judgment of 30.03.2011, E. 8.2.).
199. If a user objects to the linking of data for advertising purposes and this objection is not taken into account, this constitutes a violation of privacy.
200. The new privacy policy in force as of May 25, 2018 was intended in particular to make it possible to object to the exchange or linking of data within the Tamedia Group. In particular, members were provided with "a simple option to prevent the transfer of data within the Tamedia Group". A corresponding



The privacy policy has been <sup>amended</sup><sup>142</sup>. However, this option to prevent the transfer or exchange of data within the Group as a whole has not been or is not being implemented.<sup>143</sup> Any objection to the data linking carried out at TX Group is or was therefore not taken into account; in these cases, the data is processed further contrary to the expressly expressed wishes of the data subject, so that there is a violation of personality rights within the meaning of Art. 12 para. 2 lit. b FADP.

### 3.4.3. Violation of privacy due to data processing that significantly impairs privacy

201. According to the case law of the Federal Supreme Court, a violation of personality rights may exist if the impairment of personality rights is of a *certain intensity*, namely if the data processing constitutes such an encroachment on the personality of the person concerned that the development of the personality may be impaired (see case law of the Federal Supreme Court in the case of Google Street View (BGE 138 II 346 E. 8.3 p. 360) and of the Federal Supreme Court in the case of video surveillance in a tenant's house (BGE 142 III 263 E. 2.2.2)).
202. By combining data, information from different sources can be brought together and new insights can be gained (data enrichment). In the case of tracing, AI technologies can be used to process and combine any data in any way and in any quantity, which, depending on the context and use, can affect or violate the privacy of a data subject. The Federal Supreme <sup>Court</sup><sup>144</sup> describes this intensity as follows: "Since personal information can be stored, linked and reproduced to any extent with the help of electronic data processing, even information that is harmless in itself, which could easily be attributed to the public sphere, can be condensed into personality profiles that are actually worthy of protection".
203. Personality profiles are therefore fundamentally capable of significantly impairing the definition of the personality of the persons concerned, which is why they may only be created and processed under certain conditions (see case law of the Federal Administrative Court in the Moneyhouse case, see BVerG A-4232/2015 of 18.04.2017 E. 5.2.1.).
204. When personality profiles are processed as part of the customer behavior analysis, as carried out by Ricardo or the TX Group (see our comments on this under 3.2.2), the intensity of the impairment of personality described in the case law is reached.
205. The processing of personality profiles in the context of customer behavior analysis leads to a violation of personality due to the intensity of the impairment of personality in the present case.

### 3.4.4. Conclusion on the localized personality violations

206. In summary, it can be stated that personality violations were identified in connection with the data processing under investigation:
207. On the one hand, violations of the processing principles (Art. 12 para. 2 lit. a FADP) were identified: cross-platform tracking or extensive data enrichment from various sources indicates a violation of proportionality; misleading communication about the purposes of the newly introduced data processing indicates a violation of the principle of good faith; non-transparent and incomprehensible data processing is a violation of the principle of fairness.

---

<sup>142</sup> "You can object to the processing of your data for marketing and advertising purposes and to the disclosure of your data within the Tamedia (TX) Group in accordance with sections 2 and 4 at any time by e-mail" Privacy Policy, section 6; see Facts, para. 82 et seq.

<sup>143</sup> The option to object now only applies to the use of data for marketing measures by Ricardo (see the statement of facts, see para. 86).

<sup>144</sup> BGE 138 II 346 E. 8.2 P. 359



Information about data processing and options to object to a breach of transparency.

208. The FDPIC also found that data processing may have taken place against the explicit will of the data subjects (Art. 12 para. 2 lit. b FADP).
209. In addition, the processing of personality profiles in the context of customer behavior analysis leads to a loss of personality due to the intensity of the impairment of personality.
210. For these reasons, the data processing in question by Ricardo/TX Group, i.e. the forwarding and cross-platform tracking by TX Group (including data linking with other data from various sources) for the purpose of targeted advertising, constitutes a violation of personality rights within the meaning of Art. 12 FADP.
211. The nDSG does not provide for any changes to the concept of infringement of personality rights.

### **3.5. Justification reasons**

212. Pursuant to Art. 13 para. 1 FADP, a violation of personality rights within the meaning of Art. 12 FADP can be justified by the consent of the data subject, by an overriding private or public interest or by law.
213. The nDSG does not provide for any changes to the legal grounds for justification.

#### **3.5.1. Justification of an infringement of personality rights due to a breach of the processing principles**

214. As explained above, violations of the principles of good faith and recognizability were found in this case. According to the Federal Supreme Court, justification of the processing of personal data contrary to the principles of Art. 4, Art. 5 para. 1 and Art. 7 para. 1 FADP is not generally excluded. However, grounds for justification can only be affirmed with great reluctance in such a case (BGE 136 II 508 E. 5.2.4 and 6.3.1; see also BGE 138 II 346). Overriding private or public interests can therefore not easily be assumed to justify a violation of personality rights due to a violation of the processing purposes, as this would undermine compliance with the processing principles.
215. In view of the fact that adequate information about the data processing carried out is a basic condition of the right to informational self-determination, the interest of Ricardo or TX Group in the tracking carried out cannot justify the violation of the principle of transparency and good faith in connection with the provision of adequate information about the data processing carried out by them. Valid consent is also excluded if the data subjects have not been adequately informed. This is all the more the case as personality profiles are processed (see Art. 14 FADP). The personal data breaches caused in this context must therefore be assessed as unlawful.
216. Violations of proportionality constitute violations of personality rights, which - albeit only to a very limited extent - can in principle be justified by a justification ground. These are examined in more detail below in the context of the justification grounds cited by Ricardo and TX Group.

#### **3.5.2. Justification by an overriding private interest**



217. As part of the clarification of the facts, Ricardo and TX Group informed the FDPIC that the data processing under investigation was based on a "legitimate interest" or on an overriding private interest of TX Group - and not on consent<sup>145</sup>. This position was confirmed in a meeting with the data protection officer of Ricardo/TX Group in summer 2021. The latter explained that the TX Group had carried out a balancing of interests and that this was documented in a so-called "Legitimate Interest Assessment" (LIA)<sup>147</sup>. The TX Group concluded that it or the companies involved had an overriding private interest (or a "legitimate interest") in the processing of behavioral data for the purpose of ad targeting.
218. Data processing that violates personal privacy can be justified by an overriding private interest in accordance with Art. 13 para. 1 FADP if the legitimate interests in the data processing outweigh this in the specific case. Whether an overriding private interest exists is determined on the basis of a balancing of interests *in the individual case* (Dispatch FADP 2017, p. 7073). The balancing of interests must be determined by taking into account all the circumstances of the specific case in order to weigh up the conflicting legitimate interests or the interests at stake (Rosenthal, Art. 13 para. 1, N12; BSK DSG- Rampini, Art. 13, N 24). To this end, the interests of the data subject and the legitimate private interests in the data processing must be determined and compared. On the one hand, there is the right of the data subject to be protected in their personality and to be able to dispose of their data independently. On the other hand, there is the interest (including that of the data controller) in data processing (Dispatch FADP 2017, p. 7073; Rampini, BSK FADP, Art. 13 N 20). In principle, all concrete interests worthy of protection can be considered when balancing interests (BGE 138 II 346 E. 10.3 p. 364 f.).
219. In the balancing of interests in the present case, the interests in the disclosure of the data and in the data linkage or data enrichment must therefore be weighed against the interests of the data subject. The extent to which an overriding private interest is able to justify the identified violations of personality rights is examined below.

#### **3.5.2.1. Comparison of existing interests**

220. On the one hand, TX Group and the other participating companies (including Ricardo) have an interest in knowing the preferences of their existing or potential customers in order to be able to advertise their products or services in a more targeted manner. These interests are mainly of an economic nature: the combination of data from different sources or the group-wide use of data means greater added value for the TX Group, as such personalized advertising generates more revenue than non-personalized advertising. Personalized or relevant advertising can also bring benefits for the users of the platforms.
221. On the other hand, this is countered by the right to informational self-determination of the persons concerned: the users of the Ricardo platform have an interest in protecting their privacy and personality and keeping their consumer behavior to themselves or having control over their data.

#### **3.5.2.2. Conclusions of the "Legitimate Interest Assessment"**

---

<sup>145</sup> During the preliminary clarification in July 2017, the position was taken that the newly introduced data processing was justified by the consent of Ricardo members (cf. Ricardo letter dated July 27, 2017).

<sup>146</sup> See letter dated June 21, 2019.

<sup>147</sup>





- 222. According to TX Group, the legitimate interest in the behavioral tracking of users on the platforms of TX Group and in the automated collection of usage data on its platforms lies in particular in financing the platforms as efficiently as possible. As many of the platforms are used entirely or partially free of charge, they are basically dependent on income from advertising.
- 223. According to the TX Group's assessment, the impact of the tracking carried out on the privacy of the data subjects is low. Although the data is collected automatically and on a large scale, it does not have any serious impact on the rights and freedoms of users. The associated risk to privacy would also be "counterbalanced" by various protective measures, including pseudonymization,  
[REDACTED]
- 224. With regard to the principle of proportionality, in particular necessity, the TX Group examined as part of the Legitimate Interest Assessment whether there were less intrusive or milder options that could achieve the purposes. The alternatives examined (contextual advertising, processing of data on a platform basis, data minimization) were <sup>rejected</sup><sup>148</sup>. According to the TX Group, the available alternatives were less efficient and competitive.
- 225. TX Group is also of the opinion that the data subjects can expect the tracking to be carried out, as they have a direct customer relationship with TX Group (first party tracking) and are informed transparently about the data processing by means of a privacy policy and cookie <sup>layer</sup><sup>149</sup>. As the platform is offered free of charge [REDACTED] the recommendation to the persons concerned implies per se that it is based on any processing of their behavioral data on the <sup>platform</sup><sup>150</sup>.
- 226. In addition, users would be able to exercise their rights as data subjects "directly" by objecting to data processing by email or via the opt-out link in the privacy policy.

**3.5.2.3. Evaluation of the "Legitimate Interest Assessment" by the FDPIC**

- 227. The FDPIC examined the TX Group's Legitimate Interest Assessment and evaluated the elements relevant to the balancing of interests in relation to the specific facts of the case.
- 228. With regard to *the type of data processed*, in this case socio-demographic data as well as usage data are processed, which allow extensive conclusions to be drawn about a person, including their preferences and interests. With regard to *the type and manner of processing*, large amounts of personal data are automatically collected and processed in this case. The Ricardo user profile can be largely enriched with data or segments from other TX Group platforms and companies that participate in its data pipeline. This cross-platform tracking and data processing

[REDACTED]

[REDACTED]

[REDACTED]



The combination of data from different sources can result in a personality profile, as explained under 3.2.2. The data is collected automatically and on a large scale, and the impact on the rights and freedoms of users is not insignificant, even in the commercial or advertising sector: "online behavioral advertising" poses a risk to the privacy and autonomy of consumers, as well as restricting their freedom of choice and exploiting psychological characteristics and vulnerabilities<sup>151</sup>. Products are also offered and purchased on Ricardo that at least partially allow conclusions to be drawn about particularly sensitive personal data, such as health. The longer and the more a person orders on Ricardo, the more meaningful their personality profile is through the customer account. According to the Federal Administrative Court, personality profiles are capable of significantly impairing the development of the personality (see BVerG A-4232/2015 of 18.04.2017, E. 5.2.1.).

229. With regard to the *reasonable expectations of the data subjects*, Ricardo members cannot expect that their behavior can also be tracked on other TX Group platforms (or on other websites). In this regard, transparency deficiencies have been identified (namely in the data protection declaration and in Ricardo's communication) and have already been addressed in this report (see section 3.4.1.1.2). Contrary to what TX Group claims, there is neither a "direct" nor a "clear" relationship between Ricardo customers and TX Group. The customer data of Ricardo members is collected by Ricardo through the registration process. Ricardo then passes this data on to TX Group and TX Group uses the data, which it has now pseudonymized and partly aggregated, to enrich TX Group's database for the purpose of personalized advertising.
230. TX Group's argument that the data subjects could reasonably expect their online behavior to be recorded via TX Group's platforms, as the platform is offered free of charge ( [REDACTED] does not apply either [REDACTED] through. Selling on ricardo.ch is subject to a fee (see para. 25 of the facts).
231. When weighing up interests, the *position of the controller* should also be taken into account. [REDACTED]

#### **3.5.2.4. Conclusion**

232. In the present case, although an economic interest in cross-platform tracking for the purpose of advertising targeting and retargeting is understandable and must be recognized as worthy of protection, Ricardo and TX Group were not able to prove an overriding private interest in this context. The interests of the users or the persons concerned in the control of their data or in their right to informational self-determination outweigh the economic interests of TX Group and the other companies in the present case.

---

<sup>151</sup> See, among others, Michèle Burnier / Nando Lappert / Simon Winkler, Consumer manipulation through online behavioral advertising, in: Jusletter 2 August 2021, including the numerous references; see also "Briefing Regulating targeted and behavioural advertising in digital services (europa.eu)", at [https://www.europarl.europa.eu/Reg-Data/etudes/BRIE/2021/696967/IPOL\\_BRI\(2021\)696967\\_EN.pdf](https://www.europarl.europa.eu/Reg-Data/etudes/BRIE/2021/696967/IPOL_BRI(2021)696967_EN.pdf)



### 3.5.3. Justification by consent

233. Since in the present case no overriding private interest could or can justify the data processing in question, it must now be examined whether Ricardo or TX Group could or can rely on the consent of the data subjects (and if so, under what conditions).
234. During the preliminary clarification in summer 2017, Ricardo took the position that the new privacy policy would obtain valid consent from the individual members of ricardo.<sup>ch152</sup>. This position was subsequently rejected by Ricardo and TX Group and the justification of legitimate interest was put forward (see 3.5.2). With the use of a consent management platform (CMP) on ricardo.ch, Ricardo assumes that the data processing in question is now justified by the consent of Ricardo users.
235. The extent to which the consent thus obtained can justify the identified violations of personality rights (see sections 3.4 and 3.4.4), including the processing of personality profiles as part of the customer behavior analysis (see section 3.4.3), is examined below.

#### 3.5.3.1 Requirements for effective consent

236. The requirements for consent are set out in Art. 4 para. 5 FADP: "If the consent of the data subject is required for the processing of personal data, this consent is only valid if it is given voluntarily after appropriate information has been provided. When processing particularly sensitive personal data or personality profiles, consent must also be given expressly". If the requirements for valid consent are not met, the declaration of consent is legally invalid.
237. The data subject must have all the information in the specific case that is necessary for them to be able to make a (free) decision (Dispatch FADP 2003, p. 2127). For consent under data protection law to be effective, the processing, in particular its subject matter, scope and purpose, must be sufficiently specific (Dispatch FADP 2017, p. 7027).
238. Consent must be given voluntarily. In particular, this means that the data subject must be informed of the possible negative consequences or disadvantages that may result from refusing consent. On the other hand, the mere fact that a refusal entails a disadvantage for the data subject cannot affect the validity of the consent. This is only the case if this disadvantage is unrelated to the purpose of the processing or is disproportionate to it (BBl 2003 1963, p. 2001 ff., 2127).
239. In its case law on Helsana+, the Federal Administrative Court also states that it is not sufficient for consent to be formulated broadly and without restrictions, as this would mean that the owner of the data collection would obtain consent that goes beyond the necessary purpose of data processing. In addition, consent that is spread over several provisions (e.g. terms of use and privacy policy), which users would approve by clicking on a button, would not meet the requirements of appropriate information for the validity of consent in accordance with Art. 4 para. 5 FADP. This is because this approach makes it difficult for data subjects to recognize which data processing they are consenting to (BVerG, judgment of 19 March 2019, A-3548/2018, E. 4.8.4). In this context, information about the categories of data and the purposes of processing based on the consent of the data subjects is required.
240. If consent is to be obtained by means of GTCs, the rule of unusualness also applies. According to this rule, individual GTC clauses are not considered part of the contract if they are so unusual that the customer did not expect them and, from their point of view, did not expect them at the time.

---

<sup>152</sup> Cf. letter dated July 27, 2017



the conclusion of the contract. In the case of particularly drastic or unexpected processing, the data subject must therefore be made "separately aware" (requirement of a separate notice).<sup>153</sup>

241. The term "expressly" in Art. 4 para. 5 DPA refers both to the content (object of the consent) and to the form (manner of the declaration of consent) (see Epiney, p. 103; Heuberger, p. 197 para. 324; Vasella, para. 41). Only an active affirmative act can therefore be regarded as a sufficient form of expression. Consent to a data protection declaration must be given by an active act. "Silence" cannot be considered "express" consent (Dispatch DPA 2017, p. 7028). With regard to the "content", it is also necessary that the data processing in question is clearly described in the privacy policy. The content of the data processing and therefore the scope of the consent must therefore be clear.

### **3.5.3.2 Consent in the present case**

242. The validity of consent (Art. 4 para. 5 FADP) is closely linked to the principle of recognizability (Art. 4 para. 4 FADP). Consent can only justify data processing of which the users are adequately informed before giving their consent.
243. As already stated in section 3.4.1.1.2, the data subjects were or are not adequately informed about the data processing to be justified. Therefore, it cannot be assumed that they implicitly consent to the data processing in question when they use the platform. In addition, consent must be express if personality profiles are processed in the present case (see 3.2.2).
244. Currently, consent is to be obtained at ricardo.ch by means of a Consent Management Platform (CMP) (see para. 234). The implementation of the CMP has already been reviewed with regard to transparency. As noted (see para. 190), adjustments must be made to ensure that the data subjects are adequately informed via CMP about the data processing to be justified.
245. A "consent" granted by means of a CMP can only justify the data processing that is related to the data collection described therein. It is conceivable that the CMP could be used to obtain comprehensive consent. However, it is important to ensure that a revocation option exists and is implemented technically. It is also conceivable to adapt the registration form (when opening an account) or to communicate this the next time you log in (for existing Ricardo members).
246. However, the data of members who have not consented to the processing of their data for the purpose of displaying personalized advertising or cross-platform data linking may not be processed for these purposes.

### **3.5.4. Conclusion**

247. The transfer of Ricardo data and cross-platform tracking for the purpose of targeted (personal) advertising by the companies connected to the TX data offerings constitutes a violation of personality rights, which can only be justified by the consent of the users of the data processing. Consent presupposes that the data subjects are adequately informed and can voluntarily consent to the data processing. If, as in the present case, personal profiles are being processed, consent must also be given expressly.

---

<sup>153</sup> See Lukas Bühlmann/Michael Schüepp, Information, consent and other focal points in (new) Swiss data protection law, in: Jusletter March 15, 2021.



### 3.6. Recommendations

With regard to the transparency and information obligation (cf. section 3.4.1.1) and the right to object (cf. section 3.4.2) and based on Art. 29 para. 3 FADP, the FDPIC issues the following

#### Recommendations (A)

Ricardo AG adapts the Ricardo platform in such a way that users are clearly informed about the data processing.

Ricardo AG has adapted the Ricardo platform in such a way that:

1. it is clearly recognizable for Ricardo users for which purposes which personal data is processed;
2. it is clearly recognizable for Ricardo users whether and, if so, which data processing leads to personality profiles;
3. it is clearly recognizable for Ricardo users which platforms are involved in tracking or data linking for advertising purposes;
4. it is clearly recognizable for Ricardo users for which data processing Ricardo AG relies on which justifications and how the data processing can be objected to if necessary.
5. the privacy policy is easy to find, comprehensible and clear. One obvious implementation option is the multi-level information approach: At the top level, concise and easy-to-understand information provides an initial overview of the key aspects of data processing; the detailed privacy policy can then be accessed via a link;
6. if reference is made to the legal basis, the privacy policy refers, as far as applicable, to the provisions of the applicable Data Protection Act (DSG) and not only to those of the GDPR;
7. the privacy policy reflects or lists the data processing actually carried out;
8. the privacy policy describes the correct deletion or objection option depending on the justification for the data processing and its practice regarding deletion or objection requests is implemented correctly in this regard;
9. it is comprehensible and recognizable for users in the Consent Management Platform (CMP) which data processing takes place for which purposes, as well as the respective objection options. Ricardo must ensure that no data processing takes place if the selection in the CMP is set to "inactive".

With regard to consent as a ground for justification, the FDPIC states that Ricardo must rely on a ground for justification in relation to the violations of personality rights (see section 3.4).



has. Since no overriding private interest can justify the data processing for advertising purposes in the present case (see section 3.5.2) and there is no legally valid consent of the data subjects (see section 3.5.3), the data processing examined in the present case is unlawful. Unless Ricardo can rely on the justification of consent, no data may be passed on to TX Group for advertising purposes. However, if the legal requirements are met accordingly, consent may justify the data processing in the future. Ricardo must take measures to ensure that the data subjects can give legally valid consent.

On the basis of Art. 29 para. 3 FADP, the FDPIC therefore issues the following

### **Recommendations (B)**

1. Ricardo AG adapts the Ricardo platform in such a way that in future it obtains the consent of Ricardo users to the processing carried out by Ricardo AG and TX Group for advertising purposes of the TX data offer companies before it collects usage data and passes on personal data to TX Group AG for these purposes. This must be done voluntarily and expressly after appropriate information has been provided (see recommendation A). Consent can be obtained, for example, by displaying a one-off pop-up at the next login, by adapting the registration form or by means of CMP (in each case by ticking a box). As cross-platform tracking may only take place with the consent of the user, the button with the text "object to legitimate interests" should not be displayed.
2. TX Group AG deletes the existing data of Ricardo users that have already been collected for advertising purposes by the TX data offer companies, unless the Ricardo users have given their legally valid consent or such consent has been obtained.

## **4. Procedure**

### **4.1. Legal hearing and further procedure**

248. In a letter dated April 11, 2024, the FDPIC submitted this final report with recommendations to Ricardo AG and TX Group AG. Ricardo AG and TX Group AG were requested to comment on the report within 30 days of receipt and to state whether they accept or reject the recommendations.
249. If the recommendations are accepted in full or in part, the FDPIC will set a deadline for Ricardo AG or TX Group AG to comment on the implementation of the recommendations, including an implementation deadline. Should a need for coordination arise as a result of this statement, the FDPIC may invite Ricardo AG and TX Group AG to discussions in due course.
250. If the recommendations are not accepted, the FDPIC may submit them to the Federal Administrative Court for a decision (Art. 29 para. 4 FADP).

### **4.2. Statements by Ricardo AG and TX Group AG**



251. By letter dated July 8, 2024, Ricardo AG and TX Group AG submitted their comments within the extended deadline.
252. Both Ricardo AG and TX Group AG essentially claim that the FDPIC's recommendations relate to a situation that no longer exists and to a law that is no longer in force. The FDPIC's recommendations are therefore invalid and the clarification of the facts should therefore be written off. Ricardo AG and TX Group AG declare that they neither accept nor reject the FDPIC's recommendations. From a material point of view, the recommendations are unfounded. The parties reject the finding of violations of the FADP and dispute the legal conclusions of the factual investigation: the data transmitted to TX Group AG is not personal data, which is why the FADP is not applicable to the data processing under investigation. Furthermore, TX Group AG does not process personality profiles. The general data protection principles, in particular the recognizability of the data processing, are complied with, so that there is no violation of personality rights. Although no justification would be required for the data processing in question, consent would be obtained from Ricardo users or an overriding private interest would exist.

#### **4.3. Publication of the final report with recommendations**

253. There is a general interest in sensitizing the public to this type of data processing and informing them about the FDPIC's findings and recommendations. Based on Art. 30 para. 2 FADP, the FDPIC will therefore publish this final report in an adapted form on his website ([www.edoeb.admin.ch](http://www.edoeb.admin.ch)).
254. The publication of the full report, including recommendations, is subject to the proviso that, from the point of view of Ricardo AG and TX Group AG, no confidential data is disclosed that could reveal business secrets or affect competitiveness. Ricardo AG and TX Group AG were therefore requested to examine the report for such content and to submit written comments to the FDPIC within the 30-day deadline (point 248).
255. Ricardo AG and TX Group AG examined the report for such confidential content and requested redactions, which the FDPIC accepted in full.

The authorized representative:

Adrian

The responsible lawyer:

LobsigerOdile Rossier