

Consumer and Competition Policy in Times of Rising Corporate Power

The view of a Data Protection Commissioner

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Schleswig-Holstein, Germany

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www.datenschutzzentrum.de

Setting of ULD

- Data Protection Authority (DPA) for both the public and private sector
- Also responsible for freedom of information

| Schleswig-Holstein | |
|---|---|
| State of Germany | |
|  |  |
|  | |
| Coordinates: 54°28'12"N 9°30'50"E | |
| Country | Germany |
| Capital | Kiel |
| Government | |
| • Body | Landtag of Schleswig-Holstein |
| • Minister-President | Daniel Günther (CDU) |
| • Governing parties | CDU / Greens / FDP |
| • Bundesrat votes | 4 (of 69) |
| Area | |
| • Total | 15,763.18 km ² (6,086.20 sq mi) |
| Population (2016-12-31) ^[1] | |
| • Total | 2,881,926 |
| • Density | 180/km ² (470/sq mi) |

Berlin

Source: en.wikipedia.org/wiki/Schleswig-Holstein



Consumer and Competition Policy in

Source: www.maps-for-free.com

General Data Protection Regulation

- Idea:
 - One for All
 - and
 - All for One
- Objective:
 - real harmonisation
- But: 70 opening clauses ("variables" for Member States)



https://upload.wikimedia.org/wikipedia/commons/8/85/Unus_pro_omnibus%2C_omnes_pro_uno.jpg

GDPR as "Game Changer"



 Source: Astryd_MAD via Pixabay

Powerful **toolbox** if applied appropriately

- Market location principle (Art. 3 GDPR) 
- Responsibility (Art. 24 GDPR)
- Data protection by design (Art. 25(1) GDPR) 
- Data protection by default (Art. 25(2) GDPR)
- Security (Art. 32 GDPR)
- Data protection impact assessment (Art. 35 GDPR – "Rights and freedoms of natural persons")
- Certification (Art. 42+43 GDPR) 
- Fines & sanctions by Data Protection Commissioners (Art. 83+84 GDPR) 
- Courts 

Data protection principles

Whenever **personal data** are processed,

Art. 5 (1) GDPR:

- a) 'lawfulness, **fairness and transparency**'
- b) 'purpose limitation'
- c) 'data minimisation'
- d) 'accuracy'
- e) 'storage limitation'
- f) 'integrity and confidentiality'

Personal data:
any information relating to an identified or identifiable natural person ('data subject')

Art. 5 (2) GDPR:

'accountability'

"Dark Patterns"!

Forbrukerrådet (Norway 2018):
Report „Deceived by Design”,
<https://www.forbrukerradet.no/dark-patterns/>






Lawfulness

Art. 6 GDPR:

- a) **consent** by the data subject
- b) processing is necessary for a **contract**
- c) processing is necessary for a **legal obligation** Public service: c)+e)
- d) processing is necessary in order to protect the **vital interests** of natural persons
- e) processing is necessary for the performance of a task carried out in the **public interest**
- f) processing is necessary for the purposes of the **legitimate interests** pursued by the controller, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject

Rights of the data subject

Strengthening the rights of the data subject:

- Art. 7: **Consent**: freely given, informed, withdrawable 
- Art. 12: Transparent **information** [...] 
- Art. 13+14: Information obligations
- Art. 15: Right of **access** by the data subject
- Art. 16: Right to **rectification**
- Art. 17: Right to **erasure** ("right to be forgotten")
- Art. 18: Right to restriction of processing
- Art. 19: Notification obligation w.r.t. 17/18
- Art. 20: Right to **data portability** 
- Art. 21: Right to object
- Art. 22: **Automated decision making** / profiling

Article 20
Right to data portability

1. The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided, where:
(a) ...

GDPR: leverage on business? High fines. Theory or reality?

Article 83

General conditions for imposing administrative fines

1. Each supervisory authority shall ensure that the imposition of administrative fines pursuant to this Article in respect of infringements of this Regulation referred to in paragraphs 4, 5 and 6 shall in each individual case be effective, proportionate and dissuasive.

GDPR: leverage on business? High fines. Theory or reality?

Article 83

General conditions for imposing administrative fines

5. Infringements of the following provisions shall, in accordance with paragraph 2, be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher:

- (a) the basic principles for processing, including conditions for consent, pursuant to Articles 5, 6, 7 and 9;

- (b) the data subjects' rights pursuant to Articles 12 to 22;

ECJ case on Facebook fan pages



 Photo: kalhh via Pixabay

Question:

Is a company (co-)responsible for Facebook's data processing when administering a fan page?

- No, never?
- In a controller-processor relationship?
- Joint controllership?

Original Schleswig-Holstein case in 2011

ECJ ruling: Joint controllership

- **Broad definition** of the controller to protect individuals: alone or jointly with others determines purposes and means of the processing
- **Primarily Facebook controller** (No. 30)
- **And the fan page administrator?**
- Processing enables advertising business model
- Processing enables fan page administrator to obtain statistics:
 - Definition of **parameter** for producing statistics (No. 36)
 - In particular demographic data (No. 37)
 - Opportunity to place cookies (No. 35)
- ⇒ Fan page administrator **takes part in determination** of purposes and means (Rn. 39)

ECJ case on Facebook fan pages



Question:

Is a company (co-)responsible for Facebook's data processing when administering a fan page?

- No, never
- In a controller-processor relationship
- Joint controllership!** (Art. 26 GDPR)

Note: **own purposes** of FB
Transposition to **other providers?!**

“Leaving Facebook”

Public service as role model



<https://www.spiegel.de/netzwelt/netzpolitik/sachsen-anhalt-bundesland-steigt-wegen-datenschutz-bei-facebook-aus-a-1272306.html>

- Chances by and for different business models
- For instance:
 - Payment by those who want to present themselves for legally compliant services (nothing new, is it?). E.g. no tracking by the platform, built-in privacy
 - Interoperability
- Because of GDPR not a minority position

Data Protection by Default

Article 25

Data protection by design and by default

2. The controller shall implement appropriate technical and organisational measures for ensuring that, by default, only personal data which are necessary for each specific purpose of the processing are processed. That obligation applies to the amount of personal data collected, the extent of their processing, the period of their storage and their accessibility. In particular, such measures shall ensure that by default personal data are not made accessible without the individual's intervention to an indefinite number of natural persons.

“by default”:
data protection-friendly pre-settings as a starting point for all data processing!

Bridging the gap between law and code ... and business



Source: Free-Photos via Pixabay

Conclusion



Source: congerdesign via Pixabay

- Data protection by design and by default
 - Demanded by the GDPR
 - Thereby to be demanded by the controllers

- GDPR as game changer?
 - Promise of a level playing field
 - Innovation with data protection should conquer ignorant or even privacy-invasive services

- Standing shoulder-to-shoulder with consumer protection + anti-trust regulators