ICIL 2011
4th International Conference on Information Law

The legal nature of the controller's civil liability according to art. 23 of Directive 95/46 EC (Data Protection Directive)

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1. Introduction

Processing of personal data plays a prominent role in the current social and economic context.[1] It can contribute to financial, scientific and social development. This specifically applies to the territory of the European Union since the free movement of goods, persons, services and capital requires that personal data should be able to flow freely from one Member State to another.[2]

However, processing of personal data has a dark side. It entails a serious threat to one's right to privacy (Privatsphäre), personality (Persönlichkeit) and informational self-determination (informationelle Selbstbestimmung).[3] This threat is associated with a damage risk

[1] Kosmides (2010): 1 et seq., with further references.
[2] See recital 3 of the Directive 95/46 EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, 31), "Data Protection Directive"
[3] Kosmides (2010): 3 et seq.

(Schadensrisiko). Particularly, the illegal processing of personal data can cause damage to individuals. In other words, the illegal processing of personal data may lead to a damage potential (Schadenspotential).[4]

2. The liability rule (art. 23 of the Data Protection Directive)

In view of the above, clause 2 of recital no. 55 of the Data Protection Directive declares that "any damage which a person may suffer as a result of unlawful processing must be compensated for by the controller, who may be exempted from liability if he proves that he is not responsible for the damage, particularly in cases where he establishes fault on the part of the data subject or in case of force majeure". To that end, the Data Protection Directive includes a liability rule in art. 23.

According to art. 23 par. 1 of the Data Protection Directive "Member States shall provide that any person who has suffered damage as a result of an unlawful processing operation, or of any act incompatible with the national provisions adopted pursuant to this Directive, is entitled to receive compensation from the controller for the damage suffered".[5] Par. 2 establishes a possibility of liability reduction or exemption as it states that "the controller may be exempted from this liability, in whole or in part, if he proves that he is not responsible for the event giving rise to the damage".

3. The legal nature of civil liability

3.1 The problem

The EC/EU case law does not deal with the issue of the determination of the legal nature of the controller's civil liability according to art. 23 of the Data Protection Directive.[6] By contrast, the respective discussion in scholarly literature, especially German literature, is old and wide-ranging. Nevertheless, the question about the type of the liability remains to date undecided. Opinions on this issue diverge widely, a lot of them being extremely briefly reasoned.[7]

Despite a shift in emphasis, different opinions can be schematized as follows: According to a first point of view, art. 23 of the Data Protection Directive establishes a fault-based liability, reversing the burden of proof concerning the fault element.[8]

Other authors have a completely different way of interpreting the liability rule of art. 23 of the Data Protection Directive. They classify it as strict/objective liability, more accurately as no-fault liability (verschuldensunabhängige Haftung).[9]

Finally, another group of authors denies the above mentioned opinions. They suggest that the compensation claim according to art. 23 of the Data Protection Directive should be

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[4] Id.: 6-7.

[5] See also Advocate General Colomer (2009): marginal no. 57 footnote 45

[6] On the problem of the legal nature of civil liability according to art. 23 of the Greek Data Protection Law (Law no. 2472/1997) see in detail Kosmides (2010): 154 et seq. According to him, art. 23 par. 1 of the Greek Data Protection Law establishes two liability rules. The first one (art. 23 par. 1 clause 1) sets a no-fault liability for violation of law, whereas the second one (art. 23 par. 1 clause 3) sets a liability for violation of due diligence. For the prevailing opinion, supporting that art. 23 par. 1 establishes a fault-based liability see Ap. Georgiades (1999): § 63 marginal no. 33 et seq.; Iglezakis (2003): 283 et seq.; Kanellopoulou-Boti (2009): 786; AP 1923/2006, NoB 2007, 367, 371.

[7] Ehmann/Helfrich (1999): art. 23 marginal no. 12.

[8] Ehmann/Helfrich (1999): art. 23 marginal no. 14 et seq., especially 17; Born (2001): 82-83; Teschner (1999): 67; v. Burgsdorff (2003): 77; cf. also Schneider (1993): 39; id. (2009): Chap. B marginal no. 90.

[9] Simitis, in: Simitis (2011): § 7 marginal no. 4; Brühann, in: Roßnagel (2003): Chap. 2.4 marginal no. 48; id., in: Grabitz/Hilf (2009): art. 23 marginal no. 5; Kautz (2006): 140 et seq., especially 163) or endangerment liability (Gefährdungshaftung) (Ellger, RDV 1991, 121, 130; Kautz (2006): 140 et seq., especially 152 et seq., 162.

approached as one arising from a liability between a fault-based and an endangerment liability ("zwischen einer Verschuldens- und einer Gefährdungshaftung).[10]

3.2 Compilation of critical questions

The above presented disagreement clearly shows that the determination of the legal nature of the controller's civil liability according to art. 23 of the Data Protection Directive is a rather difficult issue. In order to achieve this, one must answer two questions: first of all, what would the type of the liability be if par. 2 did not exist? To answer this question, an isolated assessment of art. 23 par. 1 is required.[11] The second question to answer is the following: how does art. 23 par. 2 influence the legal nature of the liability? Here, it is important to determine which circumstances fall under par. 2 and lead to liability exclusion. In this context, a total assessment of art. 23 par. 1 and 2 is necessary.[12]

3.3 Qualification of the civil liability according to art. 23 par. 1 of Data Protection Directive (isolated assessment)

If it is fictitiously assumed, that art. 23 par. 2 does not exist, the controller's civil liability has to be classified as an objective liability for violation of law. This is the case since par. 1 does not provide the controller with any liability exoneration possibility.
As seen above, authors categorizing the controller's liability as strict/objective liability regard it either as a "no-fault liability" or an "endangerment liability". In both cases, one is liable for damage regardless of his fault.[13] However, a "no-fault liability" and an "endangerment liability" are not coincident terms. Endangerment liability presupposes neither fault nor violation of law (Rechtswidrigkeit).[14] The establishment and operation of a source of danger is permitted.[15] Liability for damage arises if the danger is realized. In this context it is irrelevant if there is a violation of law or not.
From this point of view, an endangerment liability is a no-fault liability. However, not every no-fault liability is an endangerment liability. This is the case when a liability rule, on the one hand, does not presuppose a fault of the person who is responsible for the event giving rise to the damage suffered, but, on the other hand, requires a violation of law. One such case is the liability rule of art. 23 par. 1 of the Data Protection Directive. According to this rule, "any person who has suffered damage as a result of an unlawful processing operation, or of any act

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[10] Cf. Kilian, in: Tinnefeld/Phillips/Heil (1995): 106; Dammann/Simitis (1997): art. 23 marginal no. 1, 6 et seq., especially 9; Tinnefeld/Ehmann/Gerling (2005): 415.
[11] Kosmides (2010): 61.
[12] Id.: 61.
[13] Id.: 62, with further references.
[14] Esser (1969): 90-91; Larenz (1963): 597-598; Larenz/Canaris (1994): § 84 I 3a, 3b, 610; Deutsch (1996): marginal no. 9, 644; id., (1976): 367; id., (1992): 74; Enneccerus/Nipperdey (1960): § 217 I, 1341 et seq.; Spindler, in: Bamberger/Roth (2008): § 823 marginal no. 0.2; Kötz/Wagner (2006): marginal no. 491; Medicus/Petersen (2009): marginal no. 604, 631; Deutsch/Ahrens (2002): marginal no. 523; Hager, in: Staudinger (1999): Vorbem. zu §§ 823 et seq. marginal no. 30; Kosmides (2010): 62-63; id., GPR (2009): 179; cf. Teichmann, in: Jauernig (2009): Vor § 823 marginal no. 9; Fikentscher/Heinemann (2006): marginal no. 1684-1685; Staudinger, in: Schulze (2009): Vor §§ 823-853 marginal no. 6; RGZ 141, 406, 407; BGH, Beschl. v. 4.3.1957 – GSZ 1/56, BGHZ 24, 21, 26 = NJW 1957, 785; BGH, Urt. v. 14.3.1961 – VI ZR 189/59, BGHZ 34, 355, 361 = JZ 1961, 601 = MDR 1961, 403 = NJW 1961, 655; BGH, Urt. v. 5.7.1988 – VI ZR 346/87, BGHZ 105, 65, 68 = LM Nr. 61 zu § 7 StVG = MDR 1988, 1047 = NJW 1988, 3019; Kornilakis (1982): 155 et seq., 161; id., (2002): § 109, 668 et seq.; Valtoudis (1999): 84 et seq.; see also Ap. Georgiades, (1999): § 4 marginal no. 61; Stathopoulos (2004): § 15 marginal no. 91; AP 447/2000, EllDni 2000, 1309-1310; EfLar 598/2006, ArchN 2007, 487, 489; EfPeir 121/2004, EllDni 2006, 1687-1688; different viewpoint: BGH, Entscheidung v. 28.10.1971 – III ZR 227/68, BGHZ 57, 170, 176 = DB 1971, 2468 = WM 1972, 45; BGH, Urt. v. 24.1.1992 – V ZR 274/90, BGHZ 117, 110, 111 et seq. = LM Nr. 21 zu § 833 BGB = NJW 1992, 1389; v. Bar (1980): 131 et seq.; Seiler (1994): 291-292; Eberl-Borges, in: Staudinger (2008): § 833 marginal no. 27.
[15] Deutsch (1976): 367, with further references; id., (1992): 74.

incompatible with the national provisions adopted pursuant to this Directive, is entitled to receive compensation from the controller for the damage suffered".
Since art. 23 par. 1 of the Data Protection Directive explicitly presupposes a violation of law, this provision does not establish an endangerment liability. In contrast, it sets an objective liability for the violation of law (objektive Haftung für Rechtswidrigkeit), a liability for no-fault tort (Haftung für unverschuldetes Unrecht) or an objective tort liability (objektive Unrechtshaftung).[16]

3.4 Qualification of civil liability according to art. 23 par. 1 and 2 of the Data Protection Directive (total assessment)

3.4.1 The Problem – clarification

The controller's civil liability cannot be determined on the grounds of an isolated assessment of art. 23 par. 1 of the Data Protection Directive. Instead, an overall assessment of art. 23 par. 1 and 2 is required.[17] According to par. 2 an exemption from this liability is possible if the controller "proves that he is not responsible for the event giving rise to the damage".
Par. 2, first of all, reverses the burden of proof in favor of the victim. However, what is important for determining the type of liability is basically to define the meaning of the 'event' for which the controller is not responsible. If the controller, according to par. 2, is exempted from his liability because the event giving rise to the damage cannot be attributed to his fault; art. 23 establishes a fault-based tort liability. If the event for which the controller is not responsible is not related to the controller's fault (absence of fault), art. 23 sets an objective tort liability. This is the case when the person obliged to pay can only exempt himself from liability by proving objective circumstances. Finally, the event leading to liability exemption according to par. 2 may consist of both an absence of fault and other, objective facts. In this case par. 2 sets an open rule concerning liability reduction or exemption (offener Tatbestand hinsichtlich der Haftungsminderung oder Haftungsbefreiung).[18]
The event for which the controller is not responsible according to art. 23 par. 2 of the Data Protection Directive is not defined by the Directive. Thus, it is an indefinite legal term (unbestimmter Rechtsbegriff).[19] In order to determine the legal nature of the controller's civil liability, a concretization of this indefinite legal term is required. This demands an interpretation of the liability exoneration rule of art. 23 par. 2 of the Data Protection Directive. This rule is a secondary Union law rule. Therefore, an autonomous interpretation has to be made, namely on the grounds of the interpretation criteria of Union law.[20]

3.4.2 Initial point: Interpretation of art. 23 par. 2 of the Data Protection Directive

Despite its special characteristics,[21] Union law should basically be interpreted according to the same criteria applicable to national law.[22] Viewed that way, a literal, systematic, historical and teleological interpretation of art. 23 par. 2 is required. In addition to that, this rule has to conform to primary Union law.

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[16] Kosmides (2010): 64.
[17] Ehmann/Helfrich (1999): art. 23 marginal no. 14.
[18] Kosmides (2010): 65.
[19] Id.: 65.
[20] Wolf (1992): 783; Franzen (1999): 475.
[21] Kosmides (2010): 67-68, with further references.
[22] Franzen (1999): 445 et seq.; Riesenhuber, in: Riesenhuber (2006): 191 et seq.; Anweiler (1997): 34; Schulze, in: Schulze (1999): 13; cf. also Dederichs (2004): 24 et seq.

3.4.3 Literal interpretation

The textual interpretation, being the first criterion to apply,[23] seeks to ascertain the literal sense of the wording of the law in question. In common language one is "not responsible, for the event giving rise to the damage" if he is not to blame for this event. This phrase contains a subjective behavior reproach. Viewed in this light, the controller can be exempted from his liability if he proves that he has taken due care. A similar meaning have amongst others the french ("le fait qui a provoqué le dommage… ne lui est pas imputable"), the german ("der Umstand, durch den der Schaden eingetreten ist, (kann) ihm nicht zur Last gelegt werden") and the greek („δεν ευθύνεται για το ζημιογόνο γεγονός") wordings of art. 23 par. 2 of the Data Protection Directive.

If the controller could only be exempted from his liability if he could prove that he had taken due care, the wording of art. 23 would give evidence of a fault-based liability. This is not the case here. This happens as there are liability exempting events in the sense of art. 23 par. 2, that are not related to a subjective behavior reproach of the controller. For example the controller may be exempted from the liability of art. 23 par. 1 in cases where he establishes fault on the part of the data subject. This is stated expressively in recital 55 clause 2 of the Data Protection Directive.

Though recital 55 does not define the meaning of an event for which the controller is not responsible, this recital is crucial concerning the meaning of this event. This recital cites as an example for such an event alternatively a fault on the part of the data subject or force majeure. This means that it is consistent with the wording of art. 23 par. 2 of the Data Protection Directive if the controller can only exonerate himself from his liability in case of a fault on the part of the data subject. If so, art. 23 establishes a no-fault liability.[24] On the contrary, a fault-based liability exists if the controller may be exempted from his liability in case of force majeure.[25]

Consequently, the grammatical interpretation of art. 23 of the Data Protection Directive leads to the conclusion that this provision sets per se neither a no-fault nor a fault-based liability. Instead, it provides the national legislator with the authority to concretize the open rule of art. 23 par. 2 concerning liability reduction or exemption. The national legislator has the discretion to determine the type of the controller's civil liability as long as the Data Protection Directive targets are respected.

3.4.4 Systematic interpretation

Literal interpretation of an isolated legal text does not suffice. One must penetrate into the field of systematic interpretation[26] since this legal text does not exist in isolation and therefore cannot be understood isolatedly. Looked at in that light, the meaning of art. 23 par. 2 of the Data Protection Directive can be ascertained if it is considered as a part of this Directive. This Directive has to be consistent in its entirety.

However, all possible solutions (fault-based, no-fault liability and liability with an open rule concerning liability exoneration) are consistent with the Directive.[27] As a result, a systematic interpretation provides no decisive criterion for the determination of the type of the controller's civil liability according to art. 23.

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[23] Larenz (1991): 320 et seq.; Bydlinski (2005): 11 et seq.; id. (1991): 437 et seq.; Kramer (2010): 57 et seq.; Wank (2008): 41 et seq.; Pawlowski (1999): marginal no. 360 et seq.; Papanikolaou (2000): 131 et seq.; Stamatis (2009): 383 et seq.

[24] Kosmides (2010): 70.

[25] Id.: 70 with further references to ECJ case law.

[26] See hereto Larenz (1991): 324 et seq.; Bydlinski (2005): 16 et seq.; id. (1991): 442 et seq.; Kramer (2010): 85 et seq.; Wank (2008): 55 et seq.; Zippelius (2006): 52 et seq.; Pawlowski (1999): marginal no. 362 et seq.; Papanikolaou (2000): 147 et seq.; Stamatis (2009): 388 et seq.

[27] Cf. hereto Kosmides (2010): 72 et seq.

3.4.5 Historical interpretation

The historical interpretation[28] seeks to identify the meaning of the legal phrase in question in the light of the ruling intention (Regelungsabsicht), objectives (Zwecke) and norm perception (Normvorstellung) of the historical lawmaker.[29]
Art. 21 par. 1 of the first draft of the Data Protection Directive set the first version of the liability rule in question. Art. 21 par. 2 established a liability exemption possibility if the liable party proved, that he adopted all appropriate measures to secure data processing as well as selecting the processor carefully. In this respect, one could exempt himself from his liability if he has shown due diligence in terms of par. 2.[30] In the second draft of the Data Protection Directive there existed a similar liability exoneration rule concerning the events leading to liability relief (art. 23 par. 2). Finally, a third draft of the Directive contained the existing art. 23 par. 2.
This rule abandons the wording of art. 21 par 2 of the first draft of the Data Protection Directive and art. 23 par. 2 of the second draft of the Data Protection Directive. Both of them combined expressively the possibility of liability exemption with the event of showing due diligence. Unlike the above mentioned rules, art. 23 par. 2 of the Data Protection Directive abstracted and generalized the event leading to liability exoneration. This finding indicates that the legislator did not intend to establish a fault-based liability. On the contrary, he wanted to introduce an open rule with regard to liability reduction or exemption, providing the national legislator with the authority to concretize it.[31]

3.4.6 Objective-teleological interpretation

Playing an exceptional role within the frame of EU law[32] the objective-teleological approach[33] seeks to interpret the legal provision in question so as to maintain the spirit, object and purpose (Sinn und Zweck) of the law.
In order to do this, one has to take into consideration first and foremost recital 55 of the Data Protection Directive.[34] Out of this recital arises the spirit and purpose of the liability rule of art. 23. Recital 55 states that the controller may only be exempted from liability "if he proves that he is not responsible for the damage, in particular in cases where he establishes fault on the part of the data subject or in case of force majeure". The use of the phrase "in particular" in recital 55 and the enumeration of only exemplary cases (Beispielsfälle), not regular examples (Regelbeispiele), the Directive provides the national legislator with a wide scope of discretion regarding the formulation of the national liability reduction or exemption rule. The range of liability reduction or exemption possibility is thus left open for the member states within the limits set by the spirit and purpose of the Directive.[35]
The above conclusion is confirmed by the disjunction of the above mentioned exemplary cases leading to liability reduction or exemption. Were it for the controller only possible to exonerate himself from his liability in case of force majeure, a fault-based liability would exist. If a liability exoneration was only possible in case of a fault on the part of the data subject, a no-fault liability would have to be assumed.

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[28] See hereto (1991): 328 et seq.; Bydlinski (2005): 19 et seq.; id. (1991): 449 et seq.; Kramer (2010): 116 et seq.; Wank (2008): 63 et seq.; Zippelius (2006): 49 et seq.; Papanikolaou (2000): 160 et seq.; Stamatis (2009): 386 et seq.; cf. also Fikentscher (1976): 674 et seq.
[29] Larenz (1991): 328 et seq.
[30] Kosmides (2010): 76-77.
[31] Id.: 78.
[32] Franzen (1999): 452 et seq.; Riesenhuber, in: Riesenhuber (2006): 201 et seq.; Bleckmann (1982): 1177, 1178; Schmidt (1995): 579
[33] See hereto Kramer (2010): 146 et seq.; Wank (2008): 67 et seq.; Zippelius (2006): 49 et seq.; Bydlinski (2005): 26 et seq.; id. (1991): 453 et seq.; Papanikolaou (2000): 175 et seq.; cf. also Larenz (1991): 333 et seq.
[34] For further objective-teleological arguments with regard to this issue see Kosmides (2010): 82 et seq.
[35] See hereto Kosmides (2010): 89 and 117 et seq.

3.4.7 Interpretation result

Interpreting art. 23 par. 2 of the Data Protection Directive leads to the following result: an "event giving rise to the damage for which the controller is not responsible" is an indefinite legal term. This indefinite legal term can be concretized by member states within the scope of spirit and purpose of the Data Protection Directive. Viewed in this light, art. 23 par. 2 sets an open rule concerning liability reduction or exemption. An event allowing liability reduction or exemption in terms of the Directive may consist either in the absence of fault on the part of the controller or an objective event or in both of them.
Moreover national legislator is free to abandon the possibility provided by Data Protection Directive to establish a liability exoneration rule. National regulation may contain no such rule. In other words, the implementation of art. 23 par. 2 is optional for the member states.[36]

3.4.8 Conformity of the interpretation result with primary Union law

The obtained interpretation result is compliant with primary EU law since accepting a civil liability with an optional open rule concerning liability exoneration contradicts no provision of primary EU law.[37]

4. Conclusion

Considering its characteristics, the controller's civil liability according to art. 23 of the Data Protection Directive is **a non-contractual liability for violation of law (tort liability) with an optional, relatively open rule concerning liability exoneration reversing the burden of proof in favor of the victim** (außervertragliche Haftung für Rechtswidrigkeit (Unrechtshaftung) mit fakultativer, relativ offener Entlastungsmöglichkeit mit umgekehrter Beweislastverteilung).
In order to determine the type of the controller's civil liability, national legislators have to set a respective liability rule establishing either an **objective liability for violation of law without any liability reduction or exemption possibility** (verschuldensunabhängige Unrechtshaftung ohne jede Haftungsminderungs- bzw. -befreiungsmöglichkeit), or an **objective liability for violation of law with a liability reduction or exemption rule reversing the burden of proof in favor of the victim** (verschuldensunabhängige Unrechtshaftung mit Haftungsminderungs- bzw. -befreiungsmöglichkeit mit Beweislastumkehr), or a **fault-based liability reversing the burden of proof in favor of the victim with regard to the fault element** (verschuldensabhängige Unrechtshaftung mit Beweislastumkehr für das Verschuldenselement/Haftung für vermutetes Verschulden).

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[36] Id.: 89.
[37] Id.: 87.

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