

A. Introduction ..... 3

B.

Established data processing and processes ..... 4

C. Legal assessment ..... 6

Compatibility with the TTDSG ..... 7

1. Applicability of the TTDSG ..... 7

2. Obligations from § 25 TTDSG for operators of Facebook fan pages ..... 7

3.

Consent requirement according to § 25 TTDSG ..... 7

4. Exceptions according to § 25 Para. 2 TTDSG ..... 7

5. Effective consent in accordance with Section 25 (1) TTDSG i. In conjunction with Art. 4 No. 11 and Art. 7 GDPR. 11

II. Compatibility of the processing of personal data for statistics (so-called Insights) with the

GDPR. .... 15

1. Responsibility under data protection law..... 15

2. Personal reference of the processing by means of cookies ..... 17

3.

Lack of legal basis ..... 17

4. Further obligations of the fan page operators ..... 18

D. Third-country transfer ..... 20

E

Result ..... 20

F. Appendix ..... 21

I

Appendix 1: Documentation process of a Facebook login and essential

Intermediate steps ..... 21

II. Appendix 2: Documentation of a Facebook usage without registration and essential

Intermediate steps ..... 31

III.

Appendix 3: Text rendering of the general cookie banner before login: ..... 35

IV

Appendix 4: The setting options for operators of a Facebook fan page..... 37

V. Appendix 5: Facebook Cookie Policy ..... 38

Page 2 of 40

A

introduction

With its judgment of June 5, 2018, the ECJ decided within the framework of a preliminary ruling that

Operators of so-called Facebook fan pages together with Facebook under data protection law

are responsible (Az. C-210/16, "Wirtschaftsakademie"). The judgments of the

referring BVerwG of September 11, 2019 (Az. 6 C 15.18) and the OVG Schleswig (Az. 4 LB 20/13)

from November 25, 2021. The Schleswig Higher Administrative Court has the legal and factual situation of 2011

based on. However, the findings and legal assessments are - with some exceptions - after

as before relevant, e.g. because the cookies mentioned in the judgment will continue to be used.

The DSK had taken the judgment of the ECJ as an opportunity to take action within the framework of a established task force with questions about the legal compliance of the operation of a fan page too busy. Results of the task force were e.g. through the publications of the DSK from 6.

June

[https://www.datenschutzkonferenz](https://www.datenschutzkonferenz.de/media/en/20180605_en_fb_fanpages.pdf)

[online.de/media/en/20180605\\_en\\_fb\\_fanpages.pdf](https://www.datenschutzkonferenz.de/media/en/20180605_en_fb_fanpages.pdf)) and April 1, 2019

(available at:

[https://www.datenschutzkonferenz](https://www.datenschutzkonferenz.de/media/dskb/20190405_positionierung_facebook_fanpages.pdf)

[online.de/media/dskb/20190405\\_positionierung\\_facebook\\_fanpages.pdf](https://www.datenschutzkonferenz.de/media/dskb/20190405_positionierung_facebook_fanpages.pdf)) to the public

directed.

(available

under:

2018

The aim of this short report is to give the DSK an overview of a current legal assessment of the operation from fan pages. The reason for the judgment of the OVG Schleswig, which has existed since

December 2021 applicable Telecommunication Telemedia Data Protection Act (TTDSG) and the

previous findings of the task force taken into account. The short report is given within the framework of a

Technical check established current implementation status of Facebook fan pages.

The brief report focuses primarily on the storage of information in the

Terminal equipment of the end users and access to information that is already in the

terminals are stored. The OVG Schleswig has - on the basis of the

Initial decision of the ULD - in particular on two cookies, namely on the datr and on the

c\_user cookie. The latter is used - in addition to the datr cookie - only for previously registered and logged in users

Users are set and read out, while non-registered or non-registered users

Users who are not logged in will use the datr cookie.

Another cookie that is taken into account in this report is the fr cookie (see below).

The processes and processing of personal data that were carried out within the scope of this report are decisively considered, are therefore the following:

I. Saving and reading a cookie and subsequent processing of personal data

Data in the form of linking usage data with previously registered data users

About

Statistics (so-called insights) using the c\_user cookie

deposited as part of the registration process

II. Setting and reading a cookie and subsequent processing of personal data

data etc. in the form of linking the usage data to statistics (so-called insights) by means of of the datr cookie

III. Setting and reading a cookie and subsequent processing of personal data

Data in the form of linking usage data for profiling purposes and

Advertising using the fr cookie and others

Page 3 of 40

B.

Identified data processing and processes

Fan pages can (depending on the configuration by the site operator) also without prior

Registration is called and the content available there can therefore also be read by people

who are not registered users of Facebook. Depending on whether users are on a page

access and read after they have logged in with their account or without first logging in

to log in, different cookies are set and then read accordingly. If

a person who registers with Facebook and creates a Facebook account is assigned to the account

unique c\_user cookie assigned. At this point, the c\_user cookie is first set on the

end device of the users: inside, with which they created the account and subsequently

Basically on all other end devices that are used to log into Facebook. Call

Users, while they are logged in under their account, open a fan page automatically

the already existing c\_user cookie is assigned to the loggers on the server side and new

saved. For non-registered users or registered but not logged in users

users, the datr cookie is saved and read.

The following list is a summary of cookies that are set when you visit a fan page

are set regularly:1

1

Depending on the browser or device used and the question of whether a user: in Facebook

is logged in, additional cookies and web storage objects may be saved and read. State of

Accessed: February 2022.

Page 4 of 40

cookie

Surname

Validity Purpose (possibly presumptive)

c\_user

1 year

Unique Facebook account number

datr

2 years

Unique identifier, used elsewhere by Facebook also for non□

Members or non-registered site visitors set

fr

For example, 3 months is used to deliver ads and their

Measure and improve relevance.

Source: <https://www.facebook.com/policies/cookies/>

ooh

5 years

Is only set if you log in with the "Only required cookies" option.

In this case, it is retained even after you log out!

presence

Current session Only held in the browser's main memory. Purpose unclear. Possibly for the

Status of Facebook messenger or chat?

locale

7 days

language preference. Unclear whether determined based on browser or Facebook

Account. Is set after logout

sb

2 years

saves

<https://cookiedatabase.org/cookie/facebook/sb/>)

information

to the

browsers

(Source:

Current session Unclear. Was only set once and temporarily

7 days

Width and height of the screen or browser window in pixels

1 year

unique

<https://cookiedatabase.org/cookie/facebook/xs/>)

session ID

(Source:

sfau

wd

xs

More detailed documentation can be found in the appendix to this brief report.

Page 5 of 40

C

Legal assessment

With the

When the TTDSG came into force on December 1, 2021, a new one came into effect at the same time

Telecommunications Act (TKG) and amendments to the Telemedia Act (TMG) in force. In the TTDSG

became the essential data protection regulations for telecommunications and telemedia services

bundled. Neither the TKG nor the TMG contain data protection regulations. The TTDSG has

etc. Effects on the very practical use of cookies and similar technologies.<sup>2</sup>

To differentiate between GDPR and TTDSG, reference is made to OH telemedia. From this:

According to Art. 2 Para. 1, the GDPR applies - with exceptions - to "the whole or part

automated processing of personal data as well as for non-automated

Processing personal data stored in a file system or

are to be saved". The ePrivacy Directive - and thus also the national implementation in the

TTDSG - aims according to Art. 1 Para. 1 and 2 and others. for an equivalent protection of the right to

privacy and confidentiality and aims at "detailing and supplementing" the

Provisions of the GDPR in relation to the processing of personal data in

field of electronic communication. As part of the telemedia offering, there is

Processes that only fall within the scope of one of the two regulatory matters.

For example, through the use of technologies, no personal data is collected

processed, only the specifications of the TTDSG must be observed, but not those of the GDPR.

Regularly, however, processes will be discussed, such as the use of

Cookies for tracking the behavior of users who also perform processing

personal data and thus the areas of application of both the TTDSG and

also the DS-GVO are opened. For this case, Art. 95 GDPR contains a collision rule.

Thereafter, data processing bodies will not have any additional obligations as a result of the GDPR

imposed, insofar as they are subject to special obligations specified in the ePrivacy Directive, which

pursue the same goal. This collision rule also applies to national ones

Implementation standards of the directive, such as the TTDSG. Therefore, the specific ones apply

Provisions of § 25 TTDSG take precedence over the provisions of the GDPR, insofar as

Storage and reading of information in terminal devices personal data

are processed. For the subsequent processing of personal data that

only made possible by reading this data from the end device and not by anyone

Special regulations are recorded, in turn the general specifications of the GDPR apply

note. The central standard of the TTDSG with reference to the technologies to be considered here

represents the regulation of § 25 TTDSG. § 25 TTDSG serves - differently than the regulations of the DS-

GMO - the protection of privacy and confidentiality when using

Terminal equipment, as guaranteed by Art. 7 GRCh. So end users will

protected against third parties storing information on their terminal equipment without authorization or

read and thereby violate your privacy".<sup>3</sup>

Since § 25 TTDSG implements the specifications of Art. 5 Para. 3 ePrivacy Directive into German law,

the same considerations for the delimitation of the national regulation to the GDPR. For the

The use of cookies means that the consent requirement according to § 25 TTDSG

regardless of whether the cookie contains personal data, e.g. B. in the form of a



See OH Telemedia, p. 3, with further information.

OH Telemedien, p. 5 f., w/w N.

Page 6 of 40

unique identification number, are stored or accessed

should".<sup>4</sup>

Obligations from § 25 TTDSG for operators of Facebook fan pages

Compatibility with the TTDSG

Applicability of the TTDSG

I

1.

The c\_user cookie, dat\_r cookie and fr cookie are pieces of information that are stored through access on the end devices of the users: stored inside and accessed subsequently

becomes.

2.

The obligations from § 25 TTDSG apply to the operators of Facebook fan pages. at

Operators of Facebook fan pages are providers of telemedia in the sense of

of § 2 Para. 2 No. 1 TTDSG. In doing so, it meets - in addition to other obligations for providers of

Telemedia services, such as the obligation to provide an imprint in accordance with § 5 TMG - also

the obligation to access the fan page required by visiting the telemedia service

Information that is already stored in the terminal equipment and the storage of

information in the end devices of the users only if the

Requirements of § 25 TTDSG are met.

3.

According to § 25 Para. 1 TTDSG, the storage of information in the terminal equipment of the

End user: inside or accessing information already stored in the terminal equipment,

only permitted if the end users are based on clear and comprehensive information

have consented. If none of the exceptions from § 25 (2) TTDSG apply, it remains with this

Principle.

Consent requirement according to § 25 TTDSG

When calling up a fan page, the user's end devices on Facebook are different

Many cookies are stored and read, depending on whether the users are at this point in time as

member of the network are logged in or not. The difference consists essentially in

that the c\_user cookie is used for logged-in users and non-members of the

network of the datr cookie. The decision of the OVG is based on these two cookies.

The tabular overview under B. shows that during the technical check of several fan pages

in February 2022 a total of eight additional cookies were set and read when a fan page was called up

will. The purposes of these cookies are only partially known. The fr cookie is used as evidence of the

Cookie policy used by Meta to deliver advertisements and their relevance

measure and improve. It has a storage time of 90 days.<sup>5</sup>

4.

There are two exceptions to the principle of requiring consent in Section 25 (2) TTDSG

intended. The first exception is aimed at providers of telecommunications services i. S

v. § 3 No. 1 TKG n. F. This is not considered in the present case. The second exception is addressed in the

Difference between the providers: within telemedia services according to § 2 Para. 2 No. 1 TTDSG.

Exceptions according to § 25 Para. 2 TTDSG

However, an exception according to Section 25 (2) No. 2 TTDSG does not apply. § 25 Para. 2 No. 2 TTDSG requires

exceptionally, no consent if the storage of information in the terminal equipment

or access to information already stored in the terminal is absolutely necessary

4

5

OH Telemedien, p. 9, w/w N.

See <https://www.facebook.com/policies/cookies>.

is, so that the provider of a telemedia service has a user expressly requested it  
be able to provide telemedia service.

Regarding the criteria to be checked in this respect of the "expressly desired by the users

Telemedia service" and the related "absolute necessity" is referred to the

Guidance for providers: Referred to within telemedia services.<sup>6</sup>

The creation of Insights is not a telemedia service expressly desired by the user.

According to the OH Telemedia, the basic service<sup>7</sup> is the service that is inseparable for the entire offer

is, in principle, than the "expressly desired by users".

significant

Telemedia Service" to view. That

each specific operator

Associated subpage in a social network, published by the operator

Content can be perceived and users may receive a relevant notice

Interaction with the content is enabled over the network. The latter can only be done to the full extent

be noticed, provided that the respective users are also registered on Facebook.

is in this case one

The measurement and analysis of usage data as part of the creation of Insights are not

Attributable to basic service. The Insights are provided for the operators of fan pages,

free range measurement tool that is otherwise used when operating a website outside of

Facebook largely through services such as Google Analytics or similar. is offered. One

User orientation in the sense that the functionality has an immediate additional benefit for the

brings users of fan pages, and should therefore be included in the basic service, is not

to recognize.<sup>8</sup>

a. c\_user cookie

Both for the c\_user and for the datr cookie can be used in other contexts

Find use cases that could lead to an exception according to Section 25 (2) TTDSG. If the

c\_user cookie required for providing the basic service "social, interactive network".

is, in the relationship between Facebook users, the exception from Art. 25 Para. 2 No. 2 TTDSG applies.

In this respect, the cookie is a prerequisite for processing personal data on the basis of

of Art. 6 Para. 1 Letter b GDPR.

According to Meta, the c\_user cookie serves e.g. for authentication and other purposes.

authentication

We use cookies to verify your account and to determine when you

are logged in so that we can make it easier for you to access the meta products and you do that

can provide suitable user experience and suitable functions.<sup>9</sup>

See there pp. 19 to 22.

6

S. OH Telemedia: "The basic services can regularly be excluded from the telemedia service category

7

derive Examples of categories are web shops, search engines,

Information pages from

Companies or public institutions, government portals, online banking, blogs, social networks,

called translation services. The basic service of a web shop is the sale of products. Basic service one

Search engine is that when you enter a search term, suitable websites are found on the internet and via

Hyperlinks are listed as search results.", p. 21.

8th

9

See OH Telemedien, p. 21 f.

Cookie Policy, <https://www.facebook.com/policies/cookies>.

Page 8 of 40

From this information, in addition to the purpose of authentication, there are registered

Users: the other very abstractly formulated purposes, that access to meta products

facilitated and suitable user experiences and suitable functions can be provided.

The OVG has dealt very intensively with the c\_user cookie and is ultimately in the

Essentially arrived at the following two statements:

□

□

"The linking of fan page calls and Facebook cookies made possible via the c\_user cookie

Member saves Facebook in the profiles created about the member, which in turn

be used for advertising purposes." 10

"The creation of these statistics - means those within the scope of the Insights service by

Facebook created statistics about the use of fan pages - Facebook is in particular

possible due to the c\_user cookie, since it is used to call up a fan page with the

Facebook members and the information already obtained about them

can be. [...] Fan page operators receive the page statistics in Insights

aggregated and anonymous form, without the granting of a

corresponding order to Facebook. [...] The creation of page statistics

serves the purpose of adapting the operation of a fan page to the users, d. H. the fan page

to make it more attractive. At the same time, these should enable Facebook to

to increase the advertising value of the network." 11

According to the findings of the court, the c\_user cookie is used to create user profiles,

Page statistics about the use of fan pages and for advertising purposes.

The aforementioned purposes cannot be classified as functions that are used by users

are expressly requested or are attributable to the basic service.

b. datr cookie

Regarding the datr cookie, the OVG Schleswig states:

"However, it remains unclear what the function of this cookie is. According to the

[Note: Facebook], the datr cookie plays a central role in protecting the social network and does not serve the purpose of disseminating targeted advertising."<sup>12</sup>

Meta's Cookie Policy does not apply to the datr cookie.

Meta has suggested in the past that the "datr" cookie could help false profiles to filter out and prevent cyber attacks. If a browser within five minutes visits hundreds of pages, that is a clear sign that the computer is being used by online criminals had been hijacked. The data that the cookie collects would not be given to individuals attributed to and could not be associated with them.<sup>13</sup>

On the other hand, the specification of the cookie corresponds to a typical cookie, such as it is used for Profiling is used, which is the long-term and targeted tracking of behavior individual users have as their goals.

10

11

12

13

OVG Schleswig, Urt. November 25, 2021, Az. 4 LB 20/13, p. 33.

OVG Schleswig, Urt. 25.11.2021, Az. 4 LB 20/13, *ibid*.

OVG Schleswig, Urt. November 25, 2021, Az. 4 LB 20/13, p. 59.

ZD-Aktuell 2015, 04886, see a. later judgment of the ECJ v. 06/15/2021, Case C-645/19.

Page 9 of 40

If the datr cookie is actually used solely to ensure the security of the social network would be used, the exception under Section 25 (2) No. 2 TTDSG applies in this regard however, only if the associated processes are required for this.

fr cookie

When evaluating the absolute necessity, the ones shown in the OH Telemedia are included criteria to be considered. In particular, it must be checked whether the duration of the storage of the datr□

Cookies and the associated possible access is necessary for the pursued purpose.

This is not the case with a storage period of 2 years. Therefore, the datr cookie in the specific technical design itself for the purpose of fraud prevention as not necessary be considered.

c.

In the Cookie Policy, under the heading Advertising, Recommendations, Insights and Measurements, first the general note that cookies are used to enable those

Individuals who may be interested in those of companies and other organizations advertised products, services or purposes, advertisements related to them

Show companies and organizations and make recommendations for them. As concrete

For example, it is explained below that the "fr" cookie is used to display advertisements deliver and measure and improve their relevance. 14 Are used with the set cookies

Purposes, such as creating profiles and advertising, cannot do this either

under the exception according to § 25 Para. 2 No. 2 TTDSG. The playout of advertising is not technically necessary to provide the service desired by the user - the display of the

Website [www.facebook.com](https://www.facebook.com) - to be able to provide. In this respect, additional reference is made to the relevant Specifications of the EDSA on Art. 6 Para. 1 Letter b GDPR referred.15

The principle remains that it is necessary for storing and reading out the cookies during the visit a fan page requires consent according to § 25 Para. 1 TTDSG.

Cookie Policy, <https://www.facebook.com/policies/cookies>.

14

15

Guidelines 8/2020 on the targeting of social media users, p. 16 f. , par. 49, under reference to the

Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, par. 18.

5.

Valid consent according to § 25 Abs. 1 TTDSG i. In conjunction with Art. 4 No. 11 and Art. 7 GDPR

From the directly from the one displayed when calling up the website [www.facebook.com](https://www.facebook.com)

Consent banner shows that it is intended to use cookies when using Facebook pages

to use.

Further information on the use of cookies on the Facebook fan pages can be found in the cookie

Company policy (see <https://www.facebook.com/policies/cookies/>). This results in

It is also clear that several cookies are used when using a Facebook fan page

will.

The BVerwG determined the following in its judgment of September 11, 2019:

"The OVG will have to check which data is collected when the fan page is called up for the

decision relevant time took place. Insofar as it arises from the use of

Facebook set cookies resulted in processing of personal data, the court will

between the case groups of Facebook members and those not registered on Facebook

Internet users have to distinguish. The processing of personal data would only be possible

lawfully, if the first group has effective consent to the collection and

subsequent processing existed and in the latter group for the collection

personal data had a legal basis and a possibly required one

briefing has been given."

This statement referred to the lawfulness of the processing at the time

personal data. However, it can since it relates to data processing

Page 11 of 40

with the set cookies refers to § 25 TTDSG. Since 12/01/2021 is in two

Steps to check whether first for setting the cookies and for the subsequent reading of the

Cookies a consent according to § 25 Abs. 1 TTDSG and secondly for the use of

Cookies, subsequent processing of personal data requires consent in accordance with Art. 6 Para. 1



GDPR is required. The Schleswig-Holstein Higher Administrative Court ruled on 11/26/2021 determined that the use of personal data from in the Facebook network registered and registered persons is neither legally permitted, nor would the users have and users consented to this. 16 § 25 Para. 1 S. 2 TTDSG refers in relation to the information of the end user and consent to the GDPR. Therefore, the consent for the setting and Read out cookies to make the same requirements as to data protection law Consent according to Art. 6 Para. 1 lit. a GDPR.

As already mentioned, there is now a consent banner on the Facebook website for integrated the use of cookies. It cannot be clearly inferred from this that a Consent according to § 25 TTDSG should be obtained. In the Meta Cookie Policy, which is im consent banner is linked, there is also no express reference to § 25 TTDSG.

However, there is the following note:

"This policy explains how we use cookies and what choices you have

be available. Unless otherwise stated in this Policy, the

Data policy governing our processing of the data we collect via cookies."<sup>17</sup>

From the distinction made here between the use of cookies, for which the cookie

Directive applies, and the processing of the (personal) data collected via cookies for which

the data policy applies, it could be concluded that the consent banner refers to § 25 TTDSG

relates. Ultimately, however, it remains unclear for the users whether they have given their consent in accordance with § 25

Para. 1 TTDSG and/or consent according to Art. 6 Para. 1 Sentence 1 Letter a GDPR is requested.

The consent banner offers two options on the first level. It can be either "All" cookies

permitted" or via the "More options" button a second level can be opened on which

further options are available. If users are on the second level only

allow the necessary cookies, depending on whether the users of the website as

Facebook users: are logged in or not, set several cookies.<sup>18</sup>

Section 25 (1) sentence 2 TTDSG refers to both the end user and the

Formal and substantive requirements for consent to the GDPR. It is therefore decisive the definition according to Art. 4 No. 11 GDPR. The other requirements for effective consent result from Art. 7 and Art. 8 GDPR. For evaluating the effectiveness of a consent According to § 25 Para. 1 Sentence 1 TTDSG, the same evaluation standards are to be applied as for a Consent according to Art. 6 Para. 1 lit. a GDPR.

See the press release of the court dated November 26, 2021, available at: [https://www.schleswig-holstein.de/DE/Justiz/OVG/Presse/PI\\_OVG/2021\\_10\\_27\\_Ausbaubeitrag\\_hat\\_Bestand\\_kopie.html](https://www.schleswig-holstein.de/DE/Justiz/OVG/Presse/PI_OVG/2021_10_27_Ausbaubeitrag_hat_Bestand_kopie.html).

Cookie Policy, <https://www.facebook.com/policies/cookies/>

Further details can be found in the documentation in the attachment.

Page 12 of 40

17

18

These legal requirements essentially result in the following test points for the

Assessment of the effectiveness of the consent:

time of consent,

extent to which the consent was informed,

☐

☐

☐ clear confirmatory action,

☐

Voluntary consent, in particular no inadmissible influence on the user decision

(so-called nudging),

☐ revocation of consent,

☐ Consent for data processing by minors.

The information provided in advance in the consent banner meets the requirements of a informed consent in accordance with Art. 4 No. 11 and Art. 7 Para. 3 S. 3 GDPR. When using a

Consent banners do not have to comprehensively display all information at the first level

will. However, on the first level, the affected person does not have to open additional windows

to provide the following information:

☐ specific purposes of processing,

☐

if applicable, that individual profiles are created and with data from other websites

be enriched with comprehensive usage profiles,

provided that data is also processed outside the EEA and

☐

☐ to how many responsible persons the data will be disclosed.

From Art. 7 Para. 3 S. 3 GDPR there is an additional obligation of the operator to protect affected persons

point out your right of withdrawal before you give your consent.

On the first level of the consent banner on Facebook web pages, only the ones before that

inserted screenshot given to the users. It will

Although three purposes mentioned. With these, however, there is not a sufficient degree of specificity.

In addition, there is no express reference to the creation and enrichment of individual user profiles

and data processing outside the European Economic Area (EEA). In addition

is about the use of cookies in general for Facebook products and by others

Company informed, however, the information is missing for how many Facebook products and by

like many other companies that use cookies. In addition, the sentence "There

you can also review or change your selection at any time.", not as a sufficient

Explicit reference to the right to revoke consent at any time in accordance with Art. 7 Para. 3

p. 1 GDPR.

The consent banner satisfies the requirement that the consent be voluntary in accordance with Art. 4

No. 11 GDPR not fulfilled. In Recital 42 GDPR it is explained that it is assumed

should be that the data subject has "voluntarily given their consent if they

Has real or free choice and is therefore able to refuse consent or to withdraw without suffering any disadvantages". Users are therefore not allowed to make any significant Have to put in extra effort if you don't want to give a declaration of consent. Below of the text, you will find the two buttons labeled "More options" and "Allow all cookies". By clicking on the "Allow all cookies" button Users already give their consent on this first level of the consent banner. Users only receive further information if they either click on a "cookie Policy" named link or click the "More Options" button. Only on the second level there is another button "Allow only necessary cookies". This is first

Page 13 of 40

Legally misleading, since there are no required cookies within the meaning of Section 25 (2) No. 2 TTDSG Permission is required and these cookies are not excluded by users be able. Second, due to the label of the button, users can't right now conclude that they do not give their consent. There is also no way that Simply close the consent banner on the first or second level in a different way to to be able to continue using the website.

In connection with declarations of consent on websites, it can be observed that a so-called nudging is operated. This is a methodical procedure that Consciously influencing the behavior of users in their own interest. For example, is the "Agree" option compared to "Reject" option made more conspicuous and the colors are used according to the meanings assigned to them, e.g. "approval" in green and text in bold and "Reject" in red or gray with small font.

Exactly this form of nudging about the color schemes is in the consent banner of Facebook to recognize. While the "Allow all cookies" button due to the bold blue background color catches the eye, the light gray More Options button is fairly inconspicuous designed.

This means that it can be stated that the requirements for consent are not met and therefore no effective consent according to Section 25 (1) TTDSG is obtained via the consent banner.

Page 14 of 40

Data Protection Responsibility

Compatibility of the processing of personal data for statistics (so-called Insights)

II.

with the GDPR.

1.

Joint responsibility exists according to Art. 26 Para. 1 Sentence 1 GDPR if two or more Controllers jointly determine the purposes of and the means of data processing, i.e. they must actually be able to influence the decision. The essential elements for the joint responsibility between the fan page operator and Facebook (today Meta) has that BVerwG summarized as follows:

21. [...] The ECJ relies significantly on the consideration that the operator of a Facebook maintained a fan page with the establishment of such a page on Facebook the possibility on the computer or any other device of the person who creates his or her fan page visited to place cookies, regardless of whether that person was on a Facebook Account available (ECJ, judgment of June 5, 2018 loc.cit., para. 35). With this, the operator provides a significant contribution to the processing of personal data of visitors to the fan page (ECJ, judgment of June 5, 2018 loc.cit. para. 36). In addition, the from Facebook the data created anonymous visitor statistics enable the operator in general, to make its information offer as targeted as possible (ECJ, judgment of June 5th 2018 loc.cit. para. 37). For the affirmation of a data protection responsibility not necessary that in the case of joint responsibility of several operators for the same processing everyone has access to the personal data concerned (ECJ, judgment of June 5, 2018 loc.cit. para. 38). 19

In its decision, the OVG Schleswig confirms the joint responsibility of the operator the fan page in relation to the processing of personal data in connection with the Use of Cookies. For the subsequent processing in the form of linking the Usage data with the registered users as part of the registration process stored data by means of c\_user cookies, the court carries out:

"As for the purposes of the use of personal data relevant here, is

Crucially, the data processing for the purpose of creating Insights statistics enables the plaintiff [note: business academy = fan page operator] to

To gain knowledge of certain characteristics of the visitors who appreciate their fan page or who use their applications to provide them with more relevant content and features to be able to develop that could be of greater interest to them (ECJ, judgment of 5.

June 2018 - C-210/16 -, Rn. 34, juris). By setting up the fan page, which with sufficient

Frequenting necessarily leads to the creation and provision of Insights statistics, has die plaintiff

relevant in this respect

data processing." 20

at least tacitly about the purpose of the

On the other hand, the OVG sees no responsibility for storing the link to this data

with the fan page call to create profiles and for advertising purposes.<sup>21</sup> It is missing in this respect

In any case, in a joint decision about the purpose of the data processing. This

Data processing does not take place in the interests of the plaintiff and does not offer any advantages for the plaintiff.

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Federal Administrative Court, ruling by 09/11/2019, Az. 6 C 15.18 (1 C 28.14).

OVG Schleswig, Urt. November 25, 2021, Az. 4 LB 20/13, p. 55.

Page 15 of 40

there is therefore a lack of objective starting points

It

tacit codecision by the plaintiff about these purposes of data processing. 22

for accepting at least one

However, the task force for Facebook fan pages still assumes that the operators: inside

a fan page a personal interest in the processing of the personal data of

Visitors: inside their fan page for advertising purposes, because only through this business model for them

free use of the service is enabled. The Facebook service is exclusively provided by

advertising funded. The court itself states that the data processing is for the purposes of

Profiling and for advertising purposes for the purpose of providing the telemedium. That's what it's called

Page 38 of the decision:

"The same applies to the registration data for a Facebook member

data used, which was already used for the purpose of profiling and for advertising purposes and

ultimately also for the purpose of providing a telemedia within the meaning of Section 12 (1) TMG

a. F. had been raised because they were previously involved in the financing and realization of the offer served."

The so-called network effect also speaks for the interest of the operators of fan pages. This

states that the utility of a network increases when the number of participants increases.

Network effects thus have direct effects on the number of users

platform as well as the added value that the users receive through the use of the platform

arises. This applies equally to registered users, fan page operators and to

advertisers. Transferred to Facebook, the overall concept works, primarily because of the

Advertising network that finances and implements free use of Facebook

allows. Accordingly, it is precisely the network effect and the associated increased

Widespread effect and accessibility of interested target groups, the purpose of operating a Facebook fan page are. The provision and improvement of this network is in turn the purpose and Facebook business interest (meta). Thus, both Facebook and the track Operators of fan pages for related, complementary purposes, as many interested parties as possible to display the content of the operators, since this processing is mutual for both Benefit grows.<sup>23</sup>

Even if the OVG in its determinations regarding the joint responsibility behind the The case law of the ECJ and the BVerwG shown above can still apply for large Parts of the processing operations by Facebook share responsibility with the fan page operator with the company Meta. Largely unlit remained in the Judgment of the OVG Schleswig the extensive problem of unregistered users of the fan pages. In this regard, the ECJ had already explicitly pointed out that operators of Fan pages even have increased responsibility here, because when you call up the fan page, Personal data is also collected from users who are not themselves Have a user account on Facebook. Also in the "Fashion-ID" procedure, the ECJ follows up on the question of joint responsibility solely depends on the fact that the website operator Facebook Setting and reading of cookies on the end devices of its users is possible.<sup>24</sup> This is true especially on the use of the datr cookie and the associated downstream processing personal data.

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OVG loc.cit., page 56, paragraph bb).

See Guidelines 07/2020 on the concepts of controller and processor in the GDPR, para. 61.

ECJ, ruling by 29.7.2019, Az. C-40/17 "Fashion ID", Par 75 f.



Personal reference of the processing by means of cookies

2.

The sense and purpose of the c\_user cookie is to record the interactions of registered users

to be able to clearly assign a certain profile already created in Facebook. Upon registration

give users etc. their first and last name, place of residence; if necessary, contact details such as a

Mobile phone number and other personal data. Without a doubt, it is the

c\_user cookie therefore, if only because of the association of the unique identifier with the

Registration data of the users: inside, around a personal data i. p.d. Art. 4 No. 1 GDPR.

Likewise, with regard to the datr and fr cookies, it can be assumed that a sufficient

Personal reference is to be assumed. Even if the information contained in the datr cookie is isolated and

taken by themselves, do not yet have sufficient personal reference, it comes to the question of

Personal reference always depends on whether the processing of a data in the context considers a

has personal reference. According to Art. 4 No. 1 GDPR, it is sufficient if "by means of attribution to

an identifier such as a name, an identification number, location data, an online identifier"

a personal reference can be established.

Recital 36 shows that the normative processing in connection with cookies

from the protection of the GDPR and even explicitly refers to cookies:

"Natural persons may be given online identifiers such as IP addresses and

Cookie identifiers that his device or software applications and tools or protocols

provide, or other identifiers such as radio frequency identifiers assigned. This can

Leave traces that, in particular, in combination with unique identifiers and

other information received by the server can be used to create profiles

of individuals and to identify them."

If only because of the fact that when you call up a fan page and save as a result

or reading out the previously saved cookies at the same time - for technical reasons - the IP address of the

User: internally transmitted and processed, exists with regard to the c\_user□, the datr□ and the fr□

Cookies personal reference.

3.

Due to the joint responsibility, at least for the processing of insights

Operators of fan pages can prove a corresponding legal basis.

Lack of legal basis

Facebook itself writes about this in the so-called "page insights supplement regarding the person responsible":

"Site operator: You should make sure that you also have a legal basis for the

processing of Insights data. In addition to the information that affected

Individuals provided by Facebook Ireland via the Page Insights information

you should identify your own legal basis, including yours, if any

pursued legitimate interests, the responsible person(s) on your side,

including

of the

contact details

Data protection officer (Article 13 para. 1 lit. a - d GDPR), if relevant."<sup>25</sup>

Contact details,

his/her

such as

the

For the operation of a fan page by a public body as part of public relations

come into consideration - not undisputed - neither Art. 6 Para. 1 Letter a nor Letter f GDPR. Provided

an applicability of Art. 6 Para. 1 Letter a GDPR is being considered, the above apply

Explanations under C.

I. 5. accordingly. Both public and non-public

Site operators: are - still - not based on the information available to them

See [https://www.facebook.com/legal/terms/page\\_controller\\_addendum](https://www.facebook.com/legal/terms/page_controller_addendum).

Page 17 of 40

able to carry out the necessary verification of legal conformity before admission

carry out a responsible processing. This applies e.g. B. also for a weighing of interests

within the framework of Art. 6 Para. 1 Letter f GDPR.

The legal basis of Art. 6 Para. 1 Letter e GDPR, which is to be primarily checked for public bodies

(in conjunction with the relevant national regulations), which are necessary for the exercise of

Public relations work is fundamentally an option, can in turn only go as far as

personal data also actually in own or joint responsibility exclusively

processed for public relations purposes. Further processing to

other purposes, such as the enrichment of advertising profiles, cannot be used by

be covered by this legal basis.

4.

As responsible persons, operators of fan pages are also obliged to comply with the principles of the

to comply with Art. 5 Para. 1 GDPR and to be able to demonstrate compliance with it. To the principles

in Art. 5 Para. 1 GDPR it counts, among other things, that personal data is lawfully processed,

processed in good faith and in a manner that is comprehensible to the person concerned

(Letter a), that they are collected for specified, explicit and legitimate purposes and

may not be further processed in a manner incompatible with these purposes

(letter b).

Further obligations of fan page operators

Joint controllers are also obligated to enter into an agreement in transparent form

to determine which of them fulfills which obligation of the GDPR. Such an agreement must

According to Art. 26 Para. 2 Sentence 1 GDPR, the respective actual functions and relationships of the

joint controllers to data subjects due, d. H. especially

truthful, reflect.<sup>26</sup>

Sense and purpose of an agreement according to Art. 26 Para. 2 GDPR is first that the respective Functions in the processing operation or the contributions to the processing of the various parties involved are displayed transparently. In order for it to meet these requirements, it must be in an agreement according to Art. 26 GDPR clear information with explanations of the different phases and actors of the processing.<sup>27</sup>

In September 2018, Facebook published a so-called "Page Insights Supplement" regarding of the Responsible" and "Information on Page Insights".

The conference of the independent data protection supervisory authorities of the federal and state governments has its Position on responsibility and accountability for Facebook fan pages by resolution of 1.

April 2019 drafted and published (available at: [https://www.datenschutzkonferenz-online.de/media/dskb/20190405\\_positionierung\\_facebook\\_fanpages.pdf](https://www.datenschutzkonferenz-online.de/media/dskb/20190405_positionierung_facebook_fanpages.pdf)).

In October 2019, Facebook released a slightly updated version of the Page Insights Supplement regarding the person responsible" and the "Information on Page Insights" (available at: [https://www.facebook.com/legal/terms/page\\_controller\\_addendum](https://www.facebook.com/legal/terms/page_controller_addendum)).

The information contained there only outlines the scope of services of Page Insights. If the data processing processes used for this purpose take place in compliance with data protection, can be based on of the information there cannot be judged. In this respect, a mere reference to these is sufficient

Information does not allow those responsible to exercise their accountability under Art. 5 Para. 2 GDPR

26

27

See also Guidelines 8/2020 on the targeting of social media users, p. 36 ff.

S. Guidelines 07/2020 on the concepts of controller and processor in the GDPR, version 2.0, p. 43 f.

Page 18 of 40

progeny. The same applies to the so-called Facebook data guidelines (available at: <https://de-de.facebook.com/privacy/explanation>). There, too, there are only general and relatively unspecific information e.g. about which data (types) are processed and to

what purposes this is happening.

The information given in the addendum is also public in conjunction with the other information

Retrievable information provided by Facebook, such as the information contained in the

Facebook data policy can be viewed via the link <https://www.facebook.com/policy>

sufficiently meaningful to be able to evaluate on the basis of whether processing on

Basis of a legal basis from Art. 6 GDPR is legally possible. This is below

Among other things, that the actions of users who are subject to further processing in so-called

events, are not complete, but only exemplified. In addition, the

User interactions are described, but not the data processing triggered by them

shown. An agreement according to Art. 26 GDPR does not necessarily have to include this information

included if this information is otherwise available to those responsible. Lying regularly

Fan page operators: no information beyond the publicly available information

that would put them in a position to verify the lawfulness of the processing operations they

Responsibility to be able to determine positively.

Also the purposes intended with the use of fan pages, which in themselves do not exist

are objectionable and completely understandable, cannot have any significant influence on the evaluation

the legal conformity of the company. Of course, it is of great relevance that

public bodies carry out wide-ranging and target group-oriented public relations

also, for example, to be able to adequately counter misinformation circulating.

However, this goal must not be pursued using means contrary to data protection law.

Simply due to a lack of sufficient information about the processing that is related

are carried out with Insights, legally compliant operation of a fan page is ruled out

Operators off. For this reason, the obtaining of effective consent also differs

Art. 6 Para. 1 Letter a GDPR, since the necessary information is available within the framework of the informed

Consent must be transmitted to the persons concerned, not due to lack of personal knowledge

can be given (see above). The information given by Facebook so far is only an outline

the interactions of users to whom processing of personal data also applies

purposes of the Insights. However, the information is so superficial and incomplete that that an evaluation as the person responsible is not possible on the basis of this information (see also above).

For the same reasons, site operators cannot fulfill their obligations under Art. 13

GDPR compliance. In this respect, the OVG Schleswig also ruled that the site operators against have violated the transparency obligations of § 13 TMG applicable at the time. This statement can also be met today.

Page 19 of 40

D

Third country transfer

Any transfer of personal data that is already being processed or after it

Transmission to a third country or an international organization to be processed is only permitted if the specifications of Art. 44 ff. GDPR are complied with.

After the judgment of the ECJ in the case C-311/18 ("Schrems II") the so-called Privacy Shield Decision 2016/1250 of the European Commission has been declared invalid, other suitable guarantees according to Art. 44

legally compliant transmission

personal data to a third country. Whether any additional technical equipment used

or organizational measures sufficient to ensure compliance with the EU level of protection for to ensure personal data,

is to be checked by those responsible and

if necessary, as part of their accountability.

ff. GDPR for

Questions in this regard were not conclusively examined in this report.

E

result

For the storage of triggered when visiting a fan page

in the

Terminal equipment of the end users and access to information that is already in the

terminal devices are stored, as well as for the processing of personal data, which

site operators are responsible, there are no effective legal bases. About that

Furthermore, the information requirements from Art. 13 GDPR are not fulfilled.

information

Page 20 of 40

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Appendix

Appendix 1: Documentation of a Facebook registration process and important intermediate steps

Browser used for the test: Google Chrome, version 97.0.4692.99 on Windows 7 Professional

When you first call up the Facebook page [www.facebook.com](http://www.facebook.com) with previous cleanup of the entire browser

Chronicle options, a cookie notice appears with the buttons "Allow all cookies" or "More."

options". At this point in time, no cookies will be set.

Page 21 of 40

If the information window is confirmed with "Allow all cookies", the "datr" cookie is randomized with a

generated, presumably unique string and a validity of 2 years:

After login, for which the account that was no longer used by Facebook allegedly did not

can be clearly determined, 2 additional cookies are set:

□ "wd": Width and height of the browser window (1324 x 437 pixels), valid for 7 days

- "sb": String of letters/numbers, validity: 2 years

Page 22 of 40

After confirmation with "Yes, continue" for the account suggested by Facebook, it is still not

can be found and an empty login mask is presented again.

The additional cookie "sfau" (session cookie only) has now been added:

After entering the same login parameters again, Facebook will still accept the login.

Now, updated Facebook terms and conditions must first be confirmed. The others are coming

Cookies "c\_user" with the internal Facebook account number and "xs" with a string of letters/numbers and 1 year validity each. The previous session cookie "sfau" no longer exists.

Page 23 of 40

After renewed confirmation, a thumb appears as a success message, nothing changes in the cookies.

After this window has been confirmed with "Close", a cookie banner appears again in which the

Users are addressed by name. Again with the two options "All cookies

allow" and "More options". Initially, nothing has changed about the cookies.

Note: The second cookie notice only appeared once during the "restart" of the previous one

account that has not been used for a long time. It will no longer be displayed for subsequent logins.

Page 24 of 40

After the "Allow all cookies" option has been confirmed, the login is complete and the

Account overview is displayed. Another cookie is "presence", a temporary session cookie with a relatively long mixed string, added:

While surfing within your own profile or calling up friend profiles or other Facebook members: initially, these 6 cookies will remain.

Page 25 of 40

When calling up the Hamburg Facebook fan page (by manually entering the URL

[www.facebook.com/Hamburg](http://www.facebook.com/Hamburg)) an additional cookie is added: "fr", with a validity of 3 months:

The last cookie added "fr" is already directly after the

Registration available. It probably serves to deliver advertising.

The number of cookies reached with this of 7 cookies remains with further use (e.g. with calling up the

Fan page of the Hamburg Senate, [www.facebook.com/senat.hamburg](http://www.facebook.com/senat.hamburg)) is constant and does not change anymore.



These cookies are also set again by default for subsequent logins (only "wd" for the screen size is not always included).

Page 26 of 40

Cookies persistence after logout

After performing a logout from Facebook via the "Logout" navigation item, the time is reduced

Cookie count to 4.

"datr", "sb" and "wd" remain. A new addition is "locale" with a validity of 7 days and a value "de\_DE".

Even with subsequent logouts, these 4 cookies are always retained.

Page 27 of 40

VARIANT: Registration only with "required cookies"

If the option "More options" is selected in the cookie notice window before logging in, the

Users are offered additional options. Here, the option is Required

Cookies" are pre-activated and cannot be deactivated. In addition, however, the "Optional

Page 28 of 40

Cookies" listed. This is disabled by default:

Will the option "Allow only necessary cookies" with the default setting (i.e. without "Optional

Cookies"), this means that after you log in to Facebook, another cookie, "oo" with the

Value "v1" and validity 5 years is set.

In return, the advertising cookie "fr" does not seem to be set in this case.

Page 29 of 40

After logging out of Facebook with "only necessary cookies", the cookie "oo" remains with the value

"v1" and validity 5 years in addition to the 4 other cookies datr", "locale", "sb" and "wd" via the get beyond logout.

Page 30 of 40

Appendix 2: Documentation of the process of using Facebook without registration and essential

II.

intermediate steps

Browser used for the test: Firefox, version 97.0 on Windows 10 Pro

When you first call up the Facebook page [www.facebook.com](https://www.facebook.com) with previous cleanup of the entire browser

Chronicle options, a cookie notice appears with the buttons "Allow all cookies" or "More."

options". At this point in time, no cookies will be set.

Page 31 of 40

If the information window is confirmed with "Allow all cookies", the "datr" cookie is randomized with a generated, presumably unique string and a validity of 2 years:

In addition, a session key is set in the browser's local storage, which presumably uniquely identifies you. String sets and in the browser's session storage a key with the name "TabId" and probably also appears a unique identifier set.

The website can subsequently be used without registration, despite the prompt to register, without further cookies being set.

Page 32 of 40

Cookies persistence after closing the browser

After closing the browser and opening it again, the datr cookie is still present, additionally there is a cookie with the name "dpr" and the value "1.25" with a validity of one week. In the Local storage of the browser, various entries are available when you visit the website again.

VARIANT: Registration only with "required cookies"

Page 33 of 40

If only necessary cookies are selected when entering a Facebook page, the behavior will change. Nothing on the website, both cookies and objects in web storage are set in the same way.

VARIANT: Facebook pages without cookies

Individual Facebook pages (e.g. Facebook page of the Free State of Saxony) set cookies despite the cookie dialog

Connection no cookies. Instead, the described objects are stored in the browser's web storage

filed.

Page 34 of 40

III.

Appendix 3: Text rendering of the general cookie banner before login:

Facebook's use of cookies in this browser

to allow?

We use cookies to provide you with our products and your experience with them  
personalize and improve products. We also use them for advertising and analytics  
and to increase your security. You can find more information about this in our cookie policy,  
how we use cookies.

We save your cookie choices and apply them whenever you use this browser.

Necessary cookies

These cookies are required for the use of Facebook products. They are necessary for these sites to like  
work as intended.

Optional cookies

Cookies from other companies

☐

☐

We use tools from other companies for advertising purposes and measurement services outside of the Facebook  
products, for analysis purposes and to provide certain functions and to improve our services for  
you. These companies also use cookies.

If you allow these cookies:

- Can we better personalize ads outside of Facebook Products for you and theirs  
measure performance
- Doesn't affect the functionality of our products
- Do other companies receive information about you through the use of cookies?

If you do not allow these cookies:

- We do not use cookies from other companies to display ads outside of Facebook to personalize products or to measure their performance
- Some features of our products may not work

More ways for you to control tracking

Settings in your Facebook account

If you have a Facebook account, you can use these tools to manage how different data is used to personalize advertisements.

Ad Settings

Page 35 of 40

To show you better ads, we use information that advertisers and other partners provide us about your activity outside of Facebook Company Products, such as on their websites and apps. You can control whether we may use this information to show you advertisements.

Advertisers can use the Facebook Audience Network to show you ads in apps and on websites outside of the Facebook Company Products. To provide relevant advertisements to deliver, Audience Network determines to which, for example, based on your advertising preferences we show advertisements you might be interested in. You can do this in your settings for Manage Ads.

advertising preferences

In your advertising preferences, you can see why you are seeing a particular ad and set out how we may use the information we collect to show you ads.

Activities outside of Facebook

You can view your activity outside of Facebook. This is a summary of your interactions with companies and organizations that share them with us. The interaction applies to you. For example, when you open an app or visit a website, companies and organizations

use our business tools such as Facebook login or the Facebook pixel to collect this information

to share with us. This allows us to offer you a more individual user experience on Facebook. Learn more about off-Facebook activity, how we use it, and how you can manage it.

Learn more about online advertising

If you opt out of interest-based online ads from Facebook and other participating

If you want to see more companies, you can contact the Digital Advertising Alliance (USA), the Digital Advertising Alliance of Canada (Canada), the European Interactive Digital Advertising Alliance (Europe) or via the settings of your smartphone (if you have Android, iOS 13 or an earlier version of using iOS) opt out of it. Please note that ad blockers and tools that support the use of

Restricting cookies by us could affect these settings.

The advertising companies we work with usually use cookies and

similar technologies as part of their services. Learn more about how advertisers use cookies

and what options they offer, check out the following resources:



Control cookies via browser settings

Your browser or device settings may allow you to choose whether

Browser cookies should be accepted or deleted. These settings differ depending on the

browsers. Manufacturers can change both the settings available and how they work at any time

change. As of October 5, 2020, you can find additional information on the links below

Settings options of the most popular browsers. If you use browser cookies

If you opt out, certain portions of Facebook Products may not work

perfect. Please note that these settings are different from the Facebook settings.



☐

☐

☐

☐

Digital Advertising Alliance

Digital Advertising Alliance of Canada

European Interactive Digital Advertising Alliance

Google Chrome

Internet Explorer

Firefox

safari

Safari (mobile devices)

Opera

<Allow only required cookies>

<Allow selected cookies>

Page 36 of 40

Appendix 4: The setting options for operators of a Facebook fan page

IV

Worth mentioning here are v. a. the "Country Restrictions" and "Maturity Restrictions" options. Will

there by the operator: inside restrictions, the page is no longer free for everyone

Page visitors: can be accessed from within, but only for Facebook members (unless these are under

the exclusion criteria fall). In this case, when the URL is called up, a restricted fan page of

Facebook only one login mask is displayed.

"Settings general":

Page 37 of 40

Appendix 5: Facebook Cookie Policy

V

Page 38 of 40

Page 39 of 40

Page 40 of 40