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"Like" - the ECJ sees website operators and Facebook as jointly responsible The "Like" button is a social plugin from Facebook that operators of websites can integrate on their site to optimize advertising for their products and via the Usage data of the site visitors are transmitted to Facebook. Without further action on the part of the site visitor, Facebook learns when and from which IP address – and in the case of Facebook members often from which person specifically – which Internet page was accessed. Facebook thus gains insight into the surfing behavior of many users, including those who are not members of the social network. The ECJ has now decided in its judgment of July 29, 2019 that the site operators are to be regarded as responsible for these transmissions within the meaning of data protection law. The background to the proceedings is a legal dispute that was dealt with by the Düsseldorf Higher Regional Court. The consumer advice center NRW had sued the German fashion retailer Fashion ID, which had integrated the Facebook button into its websites. Just calling up the website triggers the transmission to Facebook, it is not necessary to press the button for this. Specifically, the ECJ ruled:

- Associations that protect consumer interests can already file suit against violations of data protection law on behalf of consumers under the legal situation of the EU data protection directive, which was in force until May 24th, 2018 (the background is that the questions of the consumer advice center are still pending former Privacy Policy);
- Fashion ID and Facebook are jointly responsible. Although Fashion ID is not responsible for the data processing operations carried out by Facebook Ireland after the data has been transmitted, it is responsible for the collection on the website and for the transmission of the data to Facebook. In principle, these statements also apply to the General Data Protection Regulation;
- The operator of a website (here: Fashion ID) must, as (co-)responsible, inform its visitors about the data processing at the time (including about the data transmission to Facebook and the purposes of the Processing);
- The operator of the website only has to obtain the consent of the users for the processes for which he is jointly responsible (here: the collection and transmission of the data), but before the data is collected and transmitted;
- If the data processing is to be justified with the protection of legitimate interests in accordance with Article 6 (1) (f) GDPR, each of those responsible for processing must pursue such an interest. The ECJ leaves it open whether the collection and transmission to Facebook can be justified with Art. 6 (1) lit. f GDPR. This depends on weighing the interests of those responsible against the rights and freedoms of the data subjects in the individual case. However, the fact that the transmission is already triggered by calling up the page and can neither be recognized nor

prevented by the users speaks strongly against admissibility according to Art. 6 Para. 1 lit. f GDPR. The State Commissioner for Data Protection and Freedom of Information (LfDI), Prof. Dr. Dieter Kugelmann, welcomes the judgment of the ECJ. "The judgment not only substantiates the concept of joint responsibility, but also underlines the principles of transparency and lawfulness of processing, which are key requirements of the General Data Protection Regulation. Users need to know where they are when they visit a website. The German and European data protection supervisory authorities will evaluate the judgment in detail with a view to the current legal situation. Prof. Kugelmann states: "It will also be necessary to examine the consequences of the current case law for the operators of internet offers and Facebook pages and accordingly for the supervisory practice of the LfDI. Other methods of user tracking, in which site operators use analysis tools provided by third parties, must also be measured against these legal requirements. In particular, the question of the prior consent of the users comes into focus here." As early as 2018, the ECJ had ruled on the joint responsibility of Facebook and the operators of so-called "Facebook fan pages" and affirmed joint responsibility between the operator and Facebook here as well.

Further information: - CJEU judgment C-40/17 of July 29th, 2019 (FashionID) - CJEU judgment C-210/16 of June 5th, 2018 (Facebook fan pages) - Press release of the LfDI Rhineland-Palatinate of June 6th, 2018 - Decision of the data protection conference on responsibility and accountability for Facebook fan pages of April 1, 2019 - Resolution of the data protection conference on Facebook fan pages of September 5, 2018 - Orientation guide of the data protection conference for providers of telemedia

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