FEDERAL ADMINISTRATIVE COURT
RULING

BVerwG 1 C 28.14
OVG 4 LB 20/13

Announced
on 25 February 2016
...
as Clerk of the Court

In the administrative-law proceedings,

the 1st Senate of the Federal Administrative Court on 25 February 2016, through the Chief Judge of the Federal Administrative Court, Prof. Dr. Berlit, the judges of the Federal Administrative Court, Prof. Dr. Dörig and Prof. Dr. Kraft, as well as the judges of the Federal Administrative Court Fricke and Dr. Rudolph,

has decided:

The proceedings will be stayed.

Pursuant to article 267 of the Treaty on the Functioning of the European Union (TFEU), a preliminary ruling will be obtained from the Court of Justice of the European Union on the following issues:

1. Is article 2 lit. d) of Directive 95/46/EC to be interpreted such that it finally and exhaustively governs liability and accountability for data protection violations or does there, within the framework of the "appropriate measures" under article 24 of Directive 95/46/EC and the "effective powers of intervention" under article 28 paragraph 3 indent 2 of

Directive 95/46/EC in multi-level information provider relationships, remain room for a responsibility of a body, which is not responsible for the data processing within the context of article 2. lit. d) of Directive 95/46/EC, in the selection of an operator for its information service?

2. Does it follow, from the obligation of the Member States pursuant to article 17 paragraph 2 of Directive 95/46/EC to prescribe for data processing, that the controller must “choose a processor providing sufficient guarantees in respect of the technical security measures and organizational measures", conversely, that under conditions other that data processing, within the context of article 2 lit. e) of Directive 95/46/EC, no duty of careful selection exists and also cannot be established under national law?

3. In cases in which a non-EU resident parent company maintains legally independent offices (subsidiaries) in different Member States, under article 4, article 28 paragraph 6 of Directive 95/46/EC, is the supervisory authority of a Member State (here: Germany) authorised for the exercise of the powers assigned under article 28 paragraph 3 of Directive 95/46/EC against the subsidiary office in its own sovereign territory, even if this office is solely responsible for the promotion of the sale of advertising and other marketing activities targeted to the residents of that Member State, while independent office (subsidiary) located in another Member State (here: Ireland), under the Group's internal distribution of responsibilities, has the exclusive responsibility for the collection and processing of personal data throughout the territory of the European Union and therefore also in the other Member State (here: Germany), if actually the decision about the data processing is made by the parent company?

4. Are article 4 paragraph 1 lit. a), article 28 paragraph 3 of

Directive 95/46/EC to be interpreted such that in cases where the party responsible for the processing has a subsidiary office in the sovereign territory of a Member State (here: Ireland) and another, legally independent office in the sovereign territory of another Member State (here: Germany), which among other things is responsible for the sale of advertising space and whose activity is targeted at the population of that State, the supervisory authority in that other Member State (here: Germany) can target measures and arrangements for the enforcement of data protection law against the other office (here: in Germany), which under the Group's internal division of tasks and responsibilities is not responsible for data processing, or are measures and orders only possible through the supervisory authority of the Member State (here: Ireland), in whose sovereign territory the Group's internally responsible body has its registered office?

5. Are article 4 paragraph 1 lit. a), article 28 paragraph 3 and 6 of Directive 95/46/EC to be interpreted such that in cases where the supervisory authority of a Member State (here: Germany) makes a claim against a person or body active in their territory pursuant to article 28 paragraph 3 of Directive 95/46/EC due to the non careful choice of a third party included in the data processing procedure (here: Facebook), because this third party is allegedly in breach of data protection law, the acting supervisory authority (here: Germany) is bound to the data protection judgement of the supervisory authority of the other Member State in which the third party responsible for the data processing has its registered office (here: Ireland), in the sense that it may not carry out any differing legal assessment, or may the acting supervisory authority (here: Germany) independently assess the lawfulness of the data processing by the third party domiciled in another Member State (here: Ireland) as a preliminary question of its own autonomous action?

6. Insofar as the acting supervisory authority (here: Germany) has opened an independent review: Is article 28 paragraph 6 sentence 2 of Directive 95/46/EC to be interpreted such that this supervisory authority may only exercise the powers of intervention conferred on it under article 28 paragraph 3 of Directive 95/46/EC against a person or body domiciled in its sovereign territory because of their co-responsibility for the data protection violations of a third party domiciled in another Member State if and when it has previously petitioned the supervisory authority of that other Member State (here: Ireland) for the exercise of its powers?

G r o u n d s:

I

1 The parties are arguing over the legality of a data protection order of the defendant to the plaintiff, to deactivate her Facebook page (fan page) maintained by the co-summoned party.

[…]

3 Fan pages are special user accounts that can be set up on Facebook by businesses, non-profit organisations, artists or celebrities. The fan page provider needs to register for this on Facebook and can then use the platform maintained by Facebook to present themselves to the users of this platform and to introduce statements of all kinds into the media and opinion market. Operators of fan pages on Facebook can receive anonymised statistical information about users using the tool "Facebook Insights" provided for free by Facebook as a non-negotiable part of the conditions of use. The statistics created by Facebook include (aggregated,

anonymised) information about the use of the fan page. For this purpose, when the fan page is retrieved through Facebook, at least one so-called cookie is stored on the user's computer which contains a unique ID number and is valid for two years; the ID number can be linked with the registration data of users who are registered on Facebook, is collected and processed upon retrieval of Facebook pages. There was no indication on the fact of storing and the functioning of this cookie, as well as the subsequent data processing, by the applicant or the co-summoned party - in any case in the relevant period until the decree of the appeal decision.

[…]

II

16 The legal dispute is to be suspended. A preliminary ruling of the Court of Justice of the European Union (hereinafter: Court of Justice) is to be obtained on the questions formulated in the operative part of the ruling (article 267 TFEU). The questions concern the interpretation of article 2 lit. d), article 4 paragraph 1, article 17 paragraph 2 and article 28 paragraph 3 and 6 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of natural persons in the processing of personal data and on the free movement of data (OJ L 281 P. 31). Since it involves the interpretation of Union law, the Court of Justice has jurisdiction.

17 1. The material and legal situation at the time of the last administrative decision, the appeal decision (December 2011), is decisive for the legal assessment of the application for annulment against the data protection regulatory executive order issued by the defendant. At this time, article

2 lit. d), article 4 paragraph 1, article 17 paragraph 2 and article 28 paragraph 3 and 6 of Directive 95/46/EC relevant here had entered into force, and the transposition deadline for them had expired in accordance with article 32 of Directive 95/46/EC. This Directive, as well as subsequent amendments were transposed into national law inter alia through the law amending the Federal Data Protection Act and other laws of 18 May 2001 (Federal Law Gazette I p. 904). The legal framework of this legal dispute is formed by the following national regulations, which - as far as relevant here - also currently still apply unchanged:

18 § 3 paragraph 1 and 7, § 11, paragraph 1 and 2, § 38 paragraph 5 of the Federal Data Protection Act (BDSG) of 20 December 1990 (Federal Law Gazette I P. 2954) as amended by the notice of 14 January 2003 (Federal Law Gazette I P. 66), last amended for the period relevant here by the law amending the data protection regulations (DSRÄndG) of 14 August 2009 (Federal Law Gazette I P. 2814).

§ 3, paragraph 1, and 7 BDSG

(1) Personal data are individual details about personal or factual circumstances of a specific or specifiable natural person (party concerned). ( ) (7) Responsible body is any person or body, which collects, processes or uses personal data for themselves or commissions this performed by others.

§ 11, paragraph 1 and 2 BDSG

(1) If personal data are commissioned for collection, processing or use by other bodies, the client is responsible for the compliance with the provisions of this Act and other legislation with regard to data protection. The rights referred to in §§ 6, 7 and 8 are to

be asserted in this respect.
(2) The contractor is to choose carefully, focusing specifically on the suitability of the technical and organisational measures taken by them. The order is to be granted in writing, whereby in particular it is to be individually determined that: ( )
The client must satisfy themselves prior to the data processing and then regularly of compliance with the technical and organisational measures taken by the contractor. The result is to be documented.

§ 38 paragraph 5 BDSG

(5) To ensure compliance with this Act and other legislation on data protection, the supervisory authority may order measures to eliminate established infringements in the collection, processing or use of personal data or technical or organisational shortcomings. In case of serious violations or shortcomings, particularly those that are associated with a particular endangering of personal rights, it may prevent the collection, processing or use, or the implementation of individual procedures, if the violations or shortcomings contrary to the order pursuant to sentence 1 are not eliminated in reasonable time despite the imposition of a fine. It may demand the dismissal of the Commissioner for data protection if they do not possess the expertise and reliability required to carry out their tasks.

. 19 As background to this legal dispute, a reference is made to § 12 paragraph 1 and 3 of the Telemedia Act (TMG) of 26 February 2007 (Federal Law Gazette. I p. 179), last amended for the period relevant here by the first act amending the Telemedia Act (1st Telemedia Act) of 31 May 2010 (Federal Law Gazette I p. 692), which in parts also serves the implementation of Directive 2002/58/EC of the

European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in electronic communications (data protection directive for electronic communications) (OJ L 201, p. 37). § 12 paragraph 1 and 3 TMG (1) The service provider may only collect and use personal data for the provision of telemedia, as far as this Act or other legislation, which expressly refers to Telemedia, allows it or the user has consented to this.(2) () (3) Unless specified otherwise, the respectively applicable provisions for the protection of personal data are to be applied, even if the data are not processed in an automated process.

. 20 2. The questions referred are decisive and require clarification by the Court of Justice; whether the revision has success at least in the sense of a remittal depends on their answering.

. 21 a) Under § 38 paragraph 5 BDSG, the supervisory authority may only take measures and issue orders to ensure compliance with the Federal Data Protection Act and other legislation on data protection.

. 22 aa) The contested order to deactivate the fan page maintained on Facebook is, according to the degree of intervention, to be deemed a measure under § 38, paragraph 5, sentence 2 BDSG to prohibit the implementation of a single procedure, which is permitted in case of serious violations or shortcomings. This order is therefore not already unlawful and does not have to be repealed, because no request to eliminate established violations under article 38, paragraph 5, sentence 1 BDSG preceded it. One exception is to be made from the sequence of steps specified in the Act for reasons of proportionality in case of intervention by the data protection supervision authority, if the addressee of the order can not eliminate this shortcoming because they have no direct, controlling or formative influence on the data

processing impugned as unlawful. After the actual findings of the Court of Appeal, which are binding for the Senate (§ 137 VwGO), this is the case. Also the plaintiff and the co-summoned party Facebook Ireland Ltd. are unanimously claiming that the collection and processing of data from visitors to the fan page is performed exclusively by the co-summoned and the plaintiff can neither legally nor otherwise actually shape or influence the nature and scope of the data collection and processing within the context of the user conditions via the fan page. The plaintiff's lacking direct power of intervention and decision-making over the nature and scope of the processing of user data does not also exclude an application of § 38 paragraph 5 BDSG in the case of imputed data protection obligations; for the effective enforcement of data protection law (see also article 28 paragraph 3 of Directive 95/46/EC) the addressee's openly recorded power of intervention is not limited to an approach against the "party responsible for processing" within the context of article 2 lit. d) of Directive 95/46/EC, if and to the extent any other privacy obligations exist. The personal scope of the intervention powers here follows the substantive obligation.

. 23 In the case of the assumed responsibility of the plaintiff as imputed, which under national law can not be justified according to the regulations of the Telemedia Act, rather only according to the regulations of the Federal Privacy Act, as a result the conditions of the order that are likewise disputed between the parties are also fulfilled.

. 24 bb) However, for the collection and processing of the user data from their fan page by the co-summoned party, the plaintiff is not the "body that collects, processes or uses personal data for themselves or commissions others to do this on their behalf" (§ 3 paragraph 7 BDSG) or the "body which determines alone or together with others the purposes,

conditions and means of the processing of personal data" (article 2 lit. d) of Directive 95/46/EC).

. 25 Although, through their decision to set up a fan page on the platform operated by the co-summoned or their parent company, the plaintiff provides the co-summoned objectively with the possibility to set cookies upon retrieval of this fan page and to collect this data. In any case, for fan page users who are registered on Facebook, it also concerns personal data within the context of article 2 lit. a) of Directive 95/46/EC, and in particular even if they were not logged in to Facebook when retrieving the fan page. In the case of unregistered users, the classification of an ID number assigned via a cookie as personal data depends on the exigency for additional knowledge required to identify the person concerned (see also Federal Supreme Court, reference for a preliminary ruling of 28 October 2014 - VI ZR 135/13 - juris).

. 26 In accordance with the binding factual findings of the Court of Appeal, however, it does not follow from this ruling that the plaintiff could influence, control, design or otherwise supervise the nature and scope of the processing of data from users of their homepage by the co-summoned party. Also the terms of use for the fan page do not establish any rights of intervention or supervision for the plaintiff in this respect; the terms and conditions of use, unilaterally applied by the co-summoned party, are not the result of an individual negotiation process and also do not provide the plaintiff with the right to prohibit the co-summoned party from collecting and processing data from users of the fan page. The co-summoned party also does not otherwise allow a fan page to be set up where they do not reserve the authority for collecting and processing user data. Indeed, the plaintiff has no decision-making, design, or supervisory powers.

. 27 Their decision also to take advantage of the Facebook

infrastructure for their information and communication services does not make the plaintiff into a body, which - alone or jointly with the co-summoned party - will decide about the purposes, conditions and means of the processing of personal data (article 2 lit. d) of Directive 95/46/EC) or into the responsible body within the context of § 3 paragraph 7 BDSG. However, the legal definition of the "party responsible for processing" in article 2 lit. d) of Directive 95/46/EC, which significantly informs the interpretation of § 3 paragraph 7 BDSG, should generally be interpreted broadly in the interests of effective protection of privacy (see also Article 29 Working Party, statement 1/2010 on the terms "party responsible for processing" and "processor" of 16 February 2010, Working Paper 169 [00264/10/DE WP 169]). The functional understanding also leaves room for the possibility of a pluralistic control, which permits various degrees of responsibility up to a "joint and several" liability (Article 29 Working Group, at the specified location, Working Paper 169 [00264/10/DE WP 169], 39). The ability also to be able to determine the purposes and means of the respective data processing is however a distinctive, indispensable element of article 2 lit. d) of Directive 95/46/EC. A body that has neither a legal nor an actual influence on the decision regarding how personal data are processed can not be regarded as responsible for the processing.

. 28 The plaintiff can only prevent further processing by the co-summoned party of the data from users of their fan page by abandoning further use of their fan page. This however provides them with no legal or actual influence on whether, how and to what extent data processing is used by the co-summoned party within the power of their own responsibility and policy. A sufficient ability to influence or even a power of (co-)decision therefore does not follow from the fact that informative fan pages may enhance the attractiveness - for the users and the business activities of the co-summoned

party - of the platform operated by the co-summoned party or that the plaintiff can objectively draw benefits from the "Facebook Insights" function operated by the co-summoned party, through which data on the use of their fan page is transmitted to them in anonymous form.

. 29 cc) The plaintiff is also not the principal of a data processing on his behalf of the users of their fan page by the co-summoned party (§ 11 BDSG; article 2 lit. e), article 17 paragraph 2 and 3 of Directive 95/46/EC).

. 30 Indeed between the plaintiff and the co-summoned party, there exists a legal relationship in relation to the provision of a fan page; in that regard, the plaintiff is user of the platform, which is operated by the co-summoned party. Through the user relationship, however, the plaintiff does not issue the co-summoned party an order for the collection and processing of data from the users of their fan page on his behalf. This use of this data is not a primary nor a secondary obligation from the fan page user relationship. Due to the technical features of the platform operated by the co-summoned party, the plaintiff does not at any time have the ability to access the data of their users which are in discussion here. The data processing by Facebook is also neither objectively shaped by the parties to the fan page user relationship as a jointly responsible use of data nor subjectively by them as jointly desired. The fact that the plaintiff was aware when choosing the platform of the co-summoned party that they collect and process data from fan page users does not change the user relationship or contractual relationship regarding the fan page into a data processing contract. Processing carried out on behalf is the result of controllership of another body, but does not establish controllership. The high number of users of the social network of the co-summoned party and the benefits for the diffusion of their own information hoped-for thereby rule out the possibility that the plaintiff could simply

have chosen the platform of the co-summoned party in order to evade controllership.

. 31 b) The national court considers a clarification necessary, as to whether or under which conditions the powers of supervision and intervention of the data protection supervisory authority can refer solely to the "responsible body" within the context of article 2 lit. d) of Directive 95/46/EC (§ 3 paragraph 7 BDSG) in multi-tiered provider relationships, such as are characteristic for social networks, or whether in addition there remains room for the responsibility of a body, which is not responsible for data processing within the context of article 2. lit. d) of Directive 95/46/EC, for the selection of an operator for their information. This is the focus of the first question referred.

. 32 aa) Article 28 paragraph 3 indent 2 of Directive 95/46/EC provides that every supervisory authority must have effective supervisory powers including the ability to allocate a provisional or definitive ban on processing. Article 24 of Directive 95/46/EC gives Member States the power to take appropriate measures to ensure full application of the provision of the Directive. The Data Protection Directive is aimed at an effective and comprehensive protection of the right to private life (article 8 of the European Convention on Human Rights) at a high level of protection (recitals 2 and 10 of Directive 95/46/EC). In settled case-law, the Court of Justice of the European Union (CJEU) stresses the importance both of the fundamental right to privacy also guaranteed by article 7 GRC and of the fundamental right to protection of personal data guaranteed by article 8 GRC (cf. CJEU, judgements of 7 May 2009 - C-553/07 [ECLI: EU: C: 2009:293], Rijkeboer - Recital 47; of 8 April 2014 - C-293/12, C-594/12 [ECLI: EU: C: 2014:238], Digital Rights Ireland including recital 53; of 13 May 2014 - C-131/12 [ECLI: EU: C: 2014:317], Google Spain and Google - recital 53, 66 and 74

and of 6 October 2015 - C-362/14 [ECLI: EU: C: 2015:650], Schrems - recital 39).

. 33 bb) In information provider relationships, where providers of information (also) targeted to a wider public use an infrastructure such as the one offered by the co-summoned party in which due to the terms of use they themselves can not control the processing of personal data by the infrastructure provider (tiered or multi-tiered information provider relationships), it is considered necessary, in the interests of the effective protection of fundamental rights and freedoms of users of the information service, also to hold the information provider themselves liable (in detail Martini/Fritzsche, co-responsibility in social networks. Facebook fan page operator in the data protection grey area, Neue Zeitschrift für Verwaltungsrecht (NVwZ) extra 21/2015, 11 et seq.). Indeed this data protection responsibility does not relate to the collection and processing by the infrastructure provider themselves of data which can not be controlled legally and materially by the information provider in an infrastructure such as the one offered by the co-summoned party. It refers however to the careful selection of the operator of the infrastructure that is used for their information service. For the users of the information service, it is regularly not recognisable that the information provider is not the "controller" for data processing of mere usage data, but rather the infrastructure operator; also insofar as it can be seen from the page design of the information service that it is an information service within the context of a specific infrastructure, the distribution of the responsibilities is not deducible from this.

. 34 cc) In light of this, the first question referred seeks clarification of whether the term of "party responsible for processing" (article 2 lit. d)of Directive 95/46/EC) also conclusively and exhaustively circumscribes the possible

addressee of intervention measures or whether within the framework of the "appropriate measures" under article 24 and the "effective powers of intervention" under article 28 paragraph 3 indent of Directive 95/46/EC there remains in addition room for a responsibility for the selection of the operator of an information service.

35 c) The second question referred focuses on the legal starting point for a selection responsibility upstream of the responsibility under article 2 lit. d) of Directive 95/46/EC in multi-tiered provider relationships. Under national law, it comes into consideration in this respect to include correspondingly the selection and verification duties (§ 11, paragraph 2, sentence 1 and 4 BDSG), which the national legislator has provided for in implementation of article 17 paragraph 2 of Directive 95/46/EC in the case of a data processing on behalf of another body (see Martini/Fritzsche, Co-responsibility in social networks. Facebook fan page operator in the data protection grey area, Neue Zeitschrift für Verwaltungsrecht (NVwZ) extra 21/2015, 12). The common fundamental idea, and one which may consequently be sufficient for an analogy, is that an information provider should not be allowed, through the selection of a specific infrastructure provider, to absolve himself form data protection obligations in relation to the users of their information service, which they would otherwise have to fulfil in the case of a pure content provider. The fact that an information provider in a social network like that of the co-summoned party is at the same time its user creates a specific potential risk situation not covered by the division of responsibility under article 2 d) of Directive 95/46/EC, because of a division of responsibility which is not sufficiently clear for the users of the information service; this applies all the more so when the information service is directed not only to users registered and logged in to the network.

. 36 In an interpretation compliant with Union law, a corresponding application of the selection and supervision duties from § 11 paragraph 2 sentence 1 and 4 BDSG does not however come into consideration if it follows conversely from article 17 paragraph 2 of Directive 95/46/EC that selection and supervision duties can only be imposed on an information provider in case he acts as a processor on behalf. The imposition of additional duties is however not excluded in the wording; It also effects no new or additional substantive conditions in relation to the admissibility of the processing of personal data (see CJEU, judgement of 24 November 2011 - C-468/10, C-469/10 [ECLI:EU:C:2011:777], ASNEF/FECEMD-). A clear and unambiguous assignment of responsibility solely to the infrastructure provider may, however, speak for a reverse; users of infrastructure services and platforms also remain exempt from the need to (implicitly) examine the lawfulness of the processing of data by the selected provider.

. 37 d) In the event that an information provider is responsible for the selection of their infrastructure provider in multi-tiered provider relationships, the legality of the data protection order still presumes that this selection responsibility has not been met, because the selected provider - here the co-summoned party - is committing sufficiently significant breaches of data protection law in the collection and processing of data from the users of the information service of the plaintiff. This question is disputed between the parties and has not been resolved conclusively by the Court of Appeal. The Court can not conclusively answer on the basis of actual findings. In order to answer this, it is also necessary to clarify the questions raised in 3 to 6 regarding the jurisdiction of the data protection authority acting here and the scope of its investigative power.

38 aa) It is rightly not disputed between the parties that the

collection and processing of data from the users of the fan page operated by the plaintiff through Facebook as the infrastructure provider falls under the territorial scope of Directive 95/46/EC, insofar as this concerns personal data within the context of article 2 a) of Directive 95/46/EC. Because the parent company based in the United States of America, Facebook Inc., in addition to the subsidiary company Facebook Germany GmbH (headquartered in Hamburg, Germany) which is entrusted with the promotion of the sale of advertising and other marketing measures focusing on the inhabitants of the Federal Republic of Germany, also maintains the subsidiary company Facebook Ireland Ltd. based in the Irish Republic, - the co-summoned party -, which by its own admission within the group bears the exclusive responsibility for the collection and processing of personal data (inter alia) throughout the territory of the European Union. In any case, all persons resident in the territory of the Union who want to use Facebook conclude a contract with Facebook Ireland Ltd. when registering (see also CJEU, judgement of 6 October 2015 - C-362/14 - recital 27). The defendant, however, has claimed that effectively the decision about the type and scope of data processing and the data processing itself is not performed by the co-summoned party, because the personal data of the users of Facebook resident in the territory of the European Union are transmitted entirely or partially to servers of Facebook Inc. that are located in the United States, and processed there (see also CJEU, judgement of 6 October 2015 - C-362/14 - recital 27).

. 39 Within the framework of determining the supervisory authority responsible for any supervisory and monitoring measures, it is necessary to clarify the question raised by the 3rd question referred. The conditions are to be determined under which one (of several) branches of a parent company based outside the European Union can be viewed as the "party

responsible for processing" within the context of article 4 and article 2 lit. d) of Directive 95/46/EC. In particular, it must be clarified whether it is sufficient for this that one of the branches in the European Union (here: the co-summoned party Facebook Ireland Ltd.) designates itself as the party responsible for data processing in the entire territory of the European Union, even if the data processing is physically performed entirely or partially by its parent company outside the Union territory and is largely controlled by them. Is this is affirmed, the details of the internal decision-making and data processing structures are irrelevant. Is this denied, however, another branch (here: Germany) can also be regarded as the party responsible, which is subject to supervision and monitoring in accordance with article 28 paragraph 6 of Directive 95/46/EC, if the data processing actually does not take place in the territory of the community. Then the details of the internal decision-making and data processing structures must first of all be explained by the national court for the determination of the responsible branch.

. 40 bb) The question referred relating to 4. focuses on the division of responsibility between the data protection supervisory authorities in cases where a parent company (here: Facebook Inc., USA) maintains several branches in the Union territory which however have different tasks. In its judgement of 13 May 2014 (CJEU, judgement of 13 May 2014 - C-131/12 -) the Court of Justice of the European Union interpreted article 4 paragraph 1 lit. a) of Directive 95/46/EC such that within the context of this provision a processing of personal data is carried out within the framework of the activities of a branch which has responsible parties in the sovereign territory of a Member State for the processing, if the party carrying out the processing establishes a subsidiary or branch office in a Member State for the promotion of the sale of advertising space for its data processing services and this sale itself, whose activities are

focused on the population of that State. It needs to be clarified whether this reference to a branch office which is (solely) responsible for marketing and sales in a Member State (here: Germany), for the applicability of the data protection directive and the jurisdiction of the supervisory authority, is also transferable to a constellation where a subsidiary based in another Member State (here: Ireland) also acts externally according to the internal division of tasks and responsibility as the "party responsible for the processing" in the entire Union territory. In his respect, from the perspective of the submitting Court, the judgement of the Court of Justice from 1 October 2015 (CJEU, judgement of 1 October 2015 - C-230/14 [ECLI: EU: C: 2015:639], Weltimmo-) effects no clarification; it was not a judgement on the constellation of two legally independent subsidiaries of a parent company based outside the territory of the Union, to whom different internal material and regional tasks had been assigned. In the constellation of the case in question, it concerns the range of monitoring and supervisory powers of supervisory bodies based in Germany which are linked to the branch Facebook Germany GmbH responsible for the advertising and marketing, and also due to the choice of addressee of a measure pursuant to article 28 paragraph 3 of Directive 95/46/EC (and § 38 paragraph 5 BDSG). An action against the plaintiff might then - regardless of the lawfulness of data processing by Facebook - be contrary to judgement and therefore unlawful, if the breaches of data protection law assumed by the supervisory authority could be remedied by an action directly against Facebook Germany, the branch located in Germany.

41 cc) It is disputed between the parties whether and to what extent the processing by Facebook of data from the users of the plaintiff's fan page breaches (German or Irish) data protection law. The plaintiff and the co-summoned party claim that the data protection supervisory authority

responsible for the co-summoned party, the Irish Data Protection Commissioner, has extensively tested the data processing by the co-summoned party in total and in particular also the functions for the collection and processing of data from fan page users which are contested by the defendant, and did not raise any objections. The defendant represents a different legal assessment and considers themselves not bound to the findings and assessments of the Data Protection Commissioner. The question referred relating to 5. aims at clarifying whether/to what extent such an independent legal assessment may be taken as a preliminary matter.

. 42 The statements in the judgement of the Court of Justice from 1 October 2015 (CJEU, judgement of 1 October 2015 - C-230/14 - recital 51 et seq.) on the determination of the applicable law and the competent supervisory authority do not clarify this question. Article 28 paragraph 1 and 3 of Directive 95/46/EC shows that every supervisory body exercises all powers that were assigned to it in the sovereign territory of its Member State, in order to ensure compliance with the data protection regulations in that sovereign territory; a supervisory body may not impose sanctions outside of the sovereign territory of their Member State and also may not otherwise impose sovereign measures beyond their territorial jurisdiction. The subject-matter of the main proceedings, however, is an order against a body situated in the sovereign territory in which the lawfulness of the data processing by the co-summoned party is only a preliminary matter. A sovereign procedure against the co-summoned party itself does not follow from this.

. 43 Under article 28 paragraph 6 of Directive 95/46/EC, every supervisory body in the sovereign territory of its Member State is responsible for the exercise of the powers conferred on it pursuant to article 28 paragraph 3 of this Directive,

regardless of the applicable individual State law. This, however, does not clearly establish that the respective responsible supervisory authority is authorised to comprehensively independently inspect and assess the data protection conformity of data processing by a body established within a Member State. However articles 28 et seq. of Directive 95/46/EC do not explicitly regulate a priority or even exclusive inspection and assessment responsibility solely for the domicile of the responsible branch; also, a legal binding to the legal assessment of the supervisory authority responsible for the branch from another Member State is not prescribed and would result in a problematic effect on its activity beyond its territorial jurisdiction. Although the so-called Article 29 Working Party has inter alia the task of contributing to the uniform application of the data protection directive (article 30 paragraph 1 lit. a) of Directive 95/46/EC); it has however no responsibility for making a binding decision in case of divergent legal reviews of different national supervisory authorities. All of this can support the fact that every supervisory body may inspect and assess the compliance of data processing with data protection law without being bound to the assessments of the supervisory authority of another Member State which is responsible for the respective branch, insofar as this is significant as a precondition for action within its own jurisdiction.

44 dd) In case that an independent review of data processing in a branch situated in another Member State is submitted to the supervisory body, which is operating within the framework of its jurisdiction, it must be clarified with regard to article 28 paragraph 6 sentence 2 of Directive 95/46/EC whether the possibility provided there for every supervisory body to request the supervisory body of another Member State to exercise its powers, can comprise an obligation also to make use of this possibility. The question referred with regard to 6 therefore raises this question because the

defendant, within the context of their order against the plaintiff, while deviating from the evaluation of the Irish Data Protection Commissioner in their independent assessment of the preliminary matter of data protection conformity by the co-summoned party, however has not formally requested them to exercise their powers over the co-summoned party. An order against the plaintiff because of failure to comply with their selection responsibility that is linked to data protection violations by the co-summoned party would anyway be an error of assessment, if article 28 paragraph 6 sentence 2 of Directive 95/46/EC would implicate an unconditional and comprehensive obligation to ask the Irish Data Protection Commissioner to exercise their powers, in any case, if there should be derogation from their assessment of the data protection conformity of the data processing by the co-summoned party.

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Fricke Dr. Rudolph