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Federal Commissioner
for Data Protection and
Freedom of Information

Experiences from recent case law on administrative fines under the GDPR and the guilty concept under German law

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German Act on Administrative Offences („Gesetz über Ordnungswidrigkeiten“, OWiG)

- OWiG is drafted in the **image** of the **Act on Criminal Offences** („Strafgesetzbuch“, StGB).
- *De lege lata*, German **Criminal Law** does not (yet) know criminal liability of corporations (*societas delinquere non potest*).
- *De lege ferenda*, a debate is currently ongoing that aims at introducing an Act on Corporate Sanctions („Verbandssanktionsgesetz“) in context of criminal offences.

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- OWiG **requires** that an **administrative offence** is committed by way of a **culpable act** (or failure to act) in form of a **misdemeanor**.
- **Presumes** that the **offender** of an administrative offence **is a natural person**.
- OWiG knows only an **indirect form of liability for corporations** in context of certain persons with managing powers.
- As GDPR's fining provisions are - by their legal nature - not administrative offences in form of misdemeanors, the **OWiG does not apply directly** to the fining procedure of German data protection authorities.
- The German Federal Data Protection Act therefore regulates that the OWiG shall be applied for GDPR fines "***mutatis mutandis***".

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Example of a German administrative offence, § 130 (1) OWiG:

„**Whoever**, as the **owner of an (...) undertaking, intentionally or negligently omits** to take the supervisory measures required to prevent infringements, within the (...) undertaking, of duties incumbent on the owner and the infringement of which carries (...) an administrative fine, shall be deemed to have committed an administrative offence in a case where such infringement has been committed as would have been prevented, or made much more difficult, if there had been proper supervision.“

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Examples of GDPR fining provisions, Article 83 (3), (4) GDPR

„(3) If a **controller or processor intentionally or negligently**, for the same or linked processing operations, **infringes several provisions** of this Regulation, the total amount of the administrative fine shall not exceed the amount specified for the gravest infringement.

(4) **Infringements of the following provisions shall**, in accordance with paragraph 2, be **subject to administrative fines** up to 10 000 000 EUR, or **in the case of an undertaking**, up to 2 % of the total worldwide annual turnover of the preceding financial year, whichever is higher:

(a) the **obligations of the controller and the processor** pursuant to Articles 8, 11, 25 to 39 and 42 and 43;

(...)”

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Indirect Corporate Liability, § 30 (1) OWiG:

„(1) **Where someone** acting

1. as a **body** authorised to represent a legal entity or as a member of such body,
2. as **chairman** of the board of an association without legal capacity or as a **board member**,
3. as a **partner** authorised to represent a partnership with legal capacity, or
4. as the **authorised representative** with **power of attorney** (...) of a legal entity (...),
5. as **any other person** acting **on behalf of the management** (...) of a legal entity (...),
including **supervision and controlling powers** (...) in a **position of managing powers**,
has committed (...) an **administrative offence** as a result of which **duties incumbent on the legal entity** (...) have **been violated**, or where the **legal person has been enriched** or was intended to be enriched, an administrative fine may be **imposed on such legal entity** (...). “

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German Federal Constitutional Court (BVerfG, 1 BvR 2172/96, paragraph 84):

“[§ 30 OWiG] contains neither an accusation of guilt nor an ethical disapproval, but aims at a compensation for the benefits gained by an offence.”

- The exact nature of § 30 OWiG remains uncertain and is subject to academic debate.
- Federal Court of Justice uses the neutral term “liability” instead of “offence”.
- The form of liability is often understood as an **Indirect Corporate Liability** as it requires an **administrative offence** sanctionable against a natural person (with managing powers) as an **objective condition**.

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Concept	German OWiG	GDPR
offender / infringer	acting natural person	controller / corporation
corporate liability	indirect liability	1) either strict liability 2) or direct liability
culpability / guilt	culpable act of a natural person with managing powers is objective condition for corporate liability	1) non, if strict liability 2) culpable act of natural person is attributed and considered as an own culpable act of the corporation itself (if direct liability)
addressee(s)	1) acting natural person 2) & corporation, if natural person had managing powers	controller / corporation (in joint and several liability within the Single Economic Unit?)
individualization of the offence in sentencing of the decision	natural person does not need to be named or individualized, but it must be determined that it was a person with managing powers	natural person does not need to be named or individualized in the sentencing

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Regional Court Bonn (Judgement in case 29 OWi 1/20; ECLI:DE:LGBN:2020:1111.29OWI1.20.00):

- In terms of material liability, **Art. 83 GDPR** holds the concept of **direct corporate liability** and supersedes § 30 (1) OWiG.
- **Member States** can only regulate the **procedure**, but not the material provisions of liability.

“A restriction and undermining of the Union’s fining liability model by national provisions such as in § 30 (1) OWiG are **not covered by Art. 83 (8)** of the GDPR.”

“Therefore, **in borderline cases** where **national provisions** have **not only a procedural but also a material nature**, **only such** national **provisions of material nature** may be **applied – if at all –** that are **strictly necessary** for the national **procedure** to work. **However**, this **can only apply** to national material provisions **that do not thwart effective enforcement.**”

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- Art. 83 (4) to (6) GDPR were **intentionally modelled** in the **image of European antitrust law**.
- Recital 150 GDPR **refers to Articles 101 and 102 TFEU**.
- The **wording** in Art. 83 GDPR **addresses the controller** or processor directly and in its **definition is not tied to a culpable misconduct** of the organs or **managers** of that legal entity.
- According to the **recitals**, the European legislator clearly wanted to introduce **uniform sanctioning**. There is **no discretion for Member States for** a restriction of corporate liability by **limiting it to** individual misconduct of **managers**.
- Member States can **only regulate the procedure**. This procedure **must be effective** with regard to the directly applicable material scope of liability.
- § 30 (1) OWiG would lead to a considerable **restriction** of the ability to impose fines on corporations **if internal responsibilities** would need **to be investigated despite** an **infringement** of data protection law **being certain**.

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How did the Regional Court Bonn (Judgement in case 29 OWi 1/20) apply the guilty concept in case of direct corporate liability?

“As data controller, the accused **company** has **culpably** infringed Art. 32 para. 1 of the GDPR and is therefore **guilty** (...)”

“(...) was **not** subject to any **misconception in terms of fact.**”

“(...) the **error in legal awareness** and thus the infringement of data protection were **avoidable** for the accused company.”

“The **expertise** required for this **existed at the accused company.** The company has its **own legal department**, and, as telecommunications company, deals with data protection issues on a daily basis and must have special competences in this field of law.”

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In contrast to the Regional Court Bonn (Judgement in case 29 OWi 1/20), the Regional Court Berlin (526 Owi LG) decided the opposite:

- The fine imposed by the Berlin Data Protection Authority **did not name a natural person with managing powers**.
- The Berlin Court held that **direct corporate liability** is **not in line** with the **guilty concept of German law** and **not procedurally foreseen in § 30 (1) OWiG**.
- It therefore **terminated the fining procedure**.
- The Berlin Attorney General **challenged** the decision at the **Berlin Court of Appeals** (“Kammergericht”).
- The Kammergericht **stayed the procedure** and **referred** the question of corporate liability to the **European Court of Justice**.

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Kammergericht's questions in essence (simplified) aim at clarifying the following (case 3 Ws 250/21; ECLI:DE:KG:2021:1206.3WS250.21.00):

- Does Art. 83 (4) to (6) GDPR incorporate the concept of **corporate liability** as established in case of **Art. 101 and 102 TFEU** without the condition of a fully delinquent misdemeanor of an identified natural person and with the consequence that the fining procedure is directed **against the corporation directly**?
- If so, is this corporate liability to be understood as an **attribution of the culpable act of an employee to the corporation** or is an objective infringement of duties sufficient (**strict liability**)?

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