A landmark judgment turns 40: The German Census judgment of 1983.

On December 15th 2023 we celebrate the 40th anniversary of one of the most important European judgments in the field of personal data processing – the German "Volkszählunsurteil".

"… decision-making processes no longer require recourse to manually compiled card indexes and files as in the past, but rather because today, with the help of automatic data processing, individual details about personal or factual circumstances of a specific or identifiable person (personal data) can be stored indefinitely from a technical point of view and retrieved at any time in a matter of seconds regardless of distance. Furthermore, they can be combined with other data collections - especially when setting up integrated information systems - to form a partial or largely complete personal image without the person concerned being able to adequately control its accuracy and use. As a result, the possibilities of gaining insight and exerting influence have expanded in a previously unknown way, which can influence the behaviour of the individual through the psychological pressure of mere public participation."

December 1983, German constitutional court 65,1 §145 (translation by the authors).

These sentences show how modern and visionary this court decided with respect to the ideas of data protection in response to the development of technology and the consequences for the citizens. Formulated at a time when in Germany first IBM PCs became available, the risks connected with this development seem much more obvious today then at the end of year 1983 – one can read it as a prophecy.

Besides this fundamentally true and basic insight on the relevance of technological developments, the decision provided the legal perspective with a number of fundamental principles which still hold in today's legislation and jurisdiction:

"Informational self-determination" as a goal and principle stressed the importance of consent, with the requirement for other basis for processing to be legally defined. Exactly how it is formulated in Article 8 of the Charter of fundamental rights of the European Union. The term and idea were not originally invented here, but the following description is an unavoidable German data protection classic cite:

"Under modern conditions of data processing, the free development of personality presupposes the protection of the individual against the unlimited collection, storage, use and disclosure of their personal data. This protection is therefore covered by the fundamental right of free development of personality in conjunction with human dignity. In this respect, the fundamental right guarantees the power of the individual to determine the disclosure and use of their personal data themselves."

December 1983, German constitutional court 65,1 Principle 1 (translation by the authors).

It is valid ever since. Although the term of informational self-determination originated from an expertise from 1971 by Wilhelm Steinmüller and colleagues, the court deduced this right to the constitutional rights.

Alongside with the requirement to control who is processing which kind of data about oneself, it is equally important to be transparent about the processing. This is part of the GDPR principles of "Lawfulness, Fairness and Transparency". This judgment can thus be seen as one of the origins of

these principles (together of course with other sources such as the text of Convention 108 adopted by Council of Europe in 1981).

For the legislation restricting the informational self-determination, several requirements were set on the agenda.

Any limitation of the right to self-determination by the state requires an appropriate legal basis. This legal basis shall follow an important public interest. But the legal basis also needs to be proportionate in weighing the interests of the public with the interests of the individual. We could see this requirement and argumentation as blueprints for many of the current decisions of the CJEU.

Understanding the importance and the influences of the judgment, one may also note one principle becoming neglected in nowadays legislation: The court also formulated an important goal in separating the informational powers. We see this principle in the discussion about limiting the powers of the large international oligopolies or in highlighting the risks of excessive data sharing within state authorities. Let us hope that the risks highlighted by this visionary decision do not end up being a reality.

All in all, the Census Judgement can be seen as one of the most influential judicial decisions formulating contemporary data protection law. In this sense it remains very modern and young, although it turns 40 – which is a long time particularly in the field of IT. So, it is time to give thanks and to celebrate a little too.

Census Judgement from a foreign perspective

The significance of the "Volkszählungsurteil" extends well beyond the borders of the Federal Republic of Germany. Although a number of legal systems have in the meantime that passed since this decision was adopted, expressly enshrined the right to the protection of personal data as a constitutionally anchored right., The Census Judgement and the right to informational self-determination defined in it continue to be a source of further inspiration for courts from other European countries. One example is the Czech Republic, where the right to the protection of privacy and personal data is enshrined, inter alia, directly in Article 10(3) of the Czech constitutional Charter of Fundamental Rights and Freedoms, which states, that: „*Everybody is entitled to protection against unauthorized gathering, publication or other misuse of his or her personal data* “. The Czech Constitutional Court considers this article to be the basis for the right to informational self-determination in the Czech legal system and interprets it, inter alia, through the lens of the Census Judgement. The Czech Constitutional Court has referred to this decision in a number of its rulings, the most important of which is probably the ruling Pl. ÚS 24/10 from 22 March 2011, which annulled the then Czech legislation on data retention.

The Census Judgement is still commonly cited in Czech academic literature and, together with the equally important work of Samuel D. Warren and Louis Brandeis, "The Right to Privacy", is recognized as a one of the historical cornerstones of the protection of personal data and the right to informational self-determination. From the point of view of the former communist country, this judgment is perhaps even more significant because until the fall of the Iron Curtain in 1989, the issuance of such a judicial decision protecting the citizen against the state interference would have been in the reality of a socialist state completely unimaginable.

The forty years that have elapsed since the Census Judgement only reinforced the visionary approach that the German judges of the time took to the need to protect citizens against the unlawful collection and processing of personal data by the state (and not only by the state). They probably did

not foresee the extent to which this would influence the courts of other countries, but with the distance of time it must be said that there have been very few judicial decisions that have had such an impact on the development of data protection law as the German Census Judgement.