Legal mechanism for the protection of personal data in Germany

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Abstract

In this regard, this article examines some of the provisions of the new Federal Law of Germany on data protection via general scientific and private scientific methods such as dialectical materialism, systemic, structural-functional, historical, general-logical, formal-legal, comparative-legal. As a result, the German Law on Data Protection has retained a complex internal structure and the new Law poses new problems of interpretation of the European legislation. In conclusion, design under the influence of the practice of the German Constitutional Court is one of the features that are inherent in the legal mechanism for the protection of personal data in Germany.

Keywords: Human Rights, Information, Personal Data.

Mecanismo legal para la protección de datos personales en Alemania

Resumen

En este sentido, este artículo examina algunas de las disposiciones de la nueva Ley Federal de Alemania sobre protección de datos a través de métodos científicos generales y científicos privados como el materialismo dialéctico, sistémico, estructural-funcional, histórico, general-lógico, formal-legal, comparativo. -legal. Como resultado, la Ley alemana de protección de datos ha mantenido una estructura interna compleja y la nueva Ley plantea nuevos problemas de interpretación de la legislación europea. En conclusión, el diseño bajo la influencia de la práctica del Tribunal Constitucional alemán es una de las características inherentes al mecanismo legal para la protección de datos personales en Alemania.

Palabras clave: derechos humanos, información, datos personales.

1. Introduction

At the present stage of social development, the issues of the legal mechanism for the protection of personal data are relevant. It should be noted that the European law is pragmatic in this area, since it gives protection to those entities that need this protection, and just as much as this protection is justified. This approach has been extremely effective: the measures to protect personal data processing systems do not seem redundant and are very effective: according to a case study, 80% of European operators and personal data subjects consider themselves protected. In Germany, the relations regarding the protection of personal data have been regulated for a long time, both by the federal law and land law. Moreover, the land law was applied more frequently, because the protection of personal data was resolved at the land level by the executive and judicial authorities. In this regard, it is not surprising that the very first personal data law in the world appeared in 1970 in the Federal Land of Hessen. However, despite the prohibition to report the received data to third parties, this law did not require the consent of the personal data subject to process such data. The Federal Law on Personal Data appeared seven years later, namely in 1977. However, this law did not contain all the necessary provisions to protect the data subject in the Federal Republic of Germany (Abdullin, 2006).

On May 25, 2018, the European Union Regulation 2016/679 entered into force in all member states of the European Union. The EU legislature has chosen a form of regulation for the document in order to ensure a uniform level of protection for the data of individuals in the Union. The new EU Regulation directly replaces the Directive 95/46/EU and the German Federal Law on Data Protection (Bundesdatenschutzgesetz). Together with the Regulation, the German Federal Law on Adaptation and Implementation of Data Protection Provisions in the EU (DSAnpUG-EU) is being introduced (Martin and Walther, 2015).

2. Methodology

The methodological basis of the study consists of general scientific and private scientific methods such as dialectical materialism, systemic, structural-functional, historical, general-logical, formal-legal, comparative-legal. Their use in combination with modern achievements of philosophical, political, sociological and legal thought allowed for a comprehensive in-depth analysis of the legal mechanism for the protection of personal data in Germany (Abdullin and Khasanova, 2017).

3. Results and discussion

The revised German Law complements the new European General Regulation on Data Protection, which is applied directly in Germany, the federal government website says. It further notes that Germany is the first country in the European Union that creates legal certainty in this area. The statement made seems quite justified, since Germany is the vanguard of the EU in the field of implementation and application of the EU legislation in its territory today (Kucherenko, 2012). An analysis of the German Federal Law on Adaptation and Implementation of Data Protection Provisions in the EU allows making a conclusion that the essential elements of the

former Federal Law on Data Protection have been retained (for example, the principles of data processing), but some changes have been made to the new German Federal Law that should be taken into account both by the companies (processors) and the individuals (subjects). This is especially important for the companies that should follow the implementation of new rules and create new legal data protection systems. The EU Regulation provides for such remedies for the personal data subject as: complaint to the supervisory authority, legal action against the supervisory authority, lawsuits against the controller or processor. Complaints can be filed not only by the interested parties, but also by the organizations whose activity is to protect the interests of the persons concerned (for example, consumer rights associations) (Genz, 2004).

For example, the German Consumer Protection Association (Verbraucherzentrale Bundesverband, VZBV) filed a lawsuit against WhatsApp. The reason was the change in the terms and conditions of confidentiality, which were announced by the messenger in August 2016. According to the amendments, the personal information of users is transmitted to the analytical centers of the parent company WhatsApp - Facebook, regardless of whether the user has an account in this social network or not. Back in September 2017, VZBV addressed to WhatsApp with the statement that the transfer of personal data of users between the companies contradicts the standards of consumer protection adopted in the country. Given that there was no response from WhatsApp, the Consumer Rights Union was forced to apply to the court (Gorelikhina and Shlinkov, 2012).

The following points are of interest in the new German law. Firstly, §20 of the Law determines that the trial against the decisions of the supervisory authorities without preliminary objection is carried out in the administrative courts. Secondly, §21 of the Law provides the German supervisory authorities with the right to challenge the legality of the decisions on the adequacy of the EU Commission regarding personal data. If the supervisory authority considers the decision of the European Commission to be illegal, the supervisorory authority suspends the execution of this decision and files a complaint against it. The Federal Administrative Court of Germany decides on the suit of the supervisory authority. If this court considers the decision of the European Commission to be unlawful, it should send the question of the decision legality to the Court of Justice of the European Union in accordance with Article 267 of the Treaty on Functioning of the European Union. In accordance with Article 6 (1, f) Legality of Processing of the EU Regulation, processing is necessary to respect the legitimate interests of the controller or a third person, unless the interests or fundamental rights and freedoms of the data subject prevail, especially if the data subject is a child (Galiakberov and Abdullin, 2014).

On this basis, the rights of the personal data subject are now limited by the fact that data processing is required and not only expedient, but only if the subject’s interest does not exceed the controller’s interest. Thus, the European legislation is focused on the interest, which is determined depending on the goals pursued by the operator in the data processing process now. After identifying the targets, it is possible to determine with sufficient clarity whether the interests of the controller are legitimate, and then it will be possible to draw a correspondence between the subject's interests and the controller's interests. At the same time, the EU Regulation focuses first on the fundamental freedoms of personal data subjects, and if the legitimate interests of such persons outweigh the operator's interests, then the data processing is unacceptable. It seems that the legitimate interests will take an even more important place in the data processing process, and consent, on the contrary, will lose its value as a necessary processing condition in the future. In addition, given the increased responsibility of operators, the trend of legislation development based on the legitimate interests of data processing is an acceptable alternative to obtaining consent. For

the time being, Article 6 of the EU Regulation should be interpreted broadly, but the interests of those who participate in relevant relations should always be weighed (Kiselev, 1999).

The EU Regulation mandates the member states to stipulate the protection of employment data in their national legislation provisions. The German legislator took as a basis the provisions of the previously existing Law and additionally included the provisions that are intended to reflect the current state of affairs (§26 of the German Law). In particular, by way of derogation from the EU Regulation, the processing of personal data of an employee is permitted, if the processing is necessary to establish, implement or terminate an employment relationship. The provisions of the Federal Law of Germany stipulate that necessity should not be understood as an urgent need, and that it follows from the balance of the legitimate interests of the employer and the fundamental rights of the employee. All this gives grounds to state that this is a new employee's right in the field of labor and employment relations - the right to confidentiality, that is, the right not to allow the employer invading personal life, in the intimate sphere (Joonyongeun, 2014).

There is a clear understanding of the personal data, which may by requested by an employer from an employee or applicant in a number of European countries. Thus, the judicial practice of the Federal Republic of Germany identifies legitimate questions that the employer may ask the candidate for the position, and which he/she shall answer truthfully, a well as illegal questions that may be answered or not answered or given a false answer. The lawful practice of Germany recognizes all questions about the professional data of the applicant, the existence of a disability, the passage of compulsory military service. Health questions are considered legal only if such information is important for the successful discharge of duties, including when interacting with colleagues or clients (questions about the presence of contagious or mental illnesses). The judicial practice of the Federal Republic of Germany considers the questions to a woman about marriage planned in the near future, or about planned pregnancy of a woman hiring for work as illegal. In addition, the courts of Germany recognized the question of whether the applicant has debts, as well as movable and immovable property as unlawful. In our opinion, the experience of Germany is useful for Russian labor law. In particular, according to Lushnikov and Lushnikova (2009), it is more expedient to establish a list of information that cannot be obtained from an employee, than to determine those of them that are subject to communication to the employer in the legislative order (Proskuryakova, 2017).

The provision of §35 of the German Law contains some exceptions to the right to deletion (right to be forgotten), namely, if deletion is impossible or possible only with disproportionately high costs, and if the data subject’s interest in deletion is considered low in the manual data processing. In this case, the deletion is replaced by a processing constraint (data lock). The right to deletion has the fact that the data to be deleted have been processed illegally as a significant condition. However, if there are compelling reasons for further use, personal data may be processed. It turns out that the subject’s request to delete his/her data does not mean that the deletion will necessarily be completed. This is especially true of the private sphere, where compliance with the right to deletion is not guaranteed, in particular, by the American Internet companies. So, it can be noted that the entire Facebook business model is based on collecting, processing and transferring data without any restrictions. Data deletion on Facebook, Google and other websites has almost no legal force, since such deletion does not mean that the information will be deleted from the Internet. What was once online will remain online forever? In this regard, as correctly noted in the scientific literature, the legal, technical, economic and political conditions for the personal data protection on the Internet have not yet been determined (Pohlig, 2017).

Another question concerns liability for violation of the personal data legislation. Everyone who works with the personal data of third parties should be responsible for compliance with the relevant legal requirements. The EU Regulation includes provisions on penalties for breaching the personal data. At the same time, given that the European Union does not deal with the criminal law of the member states, such criminal sanctions are established by §42 of the Federal Law of Germany. For example, imprisonment of up to three years or a fine shall e applied to those who knowingly disclose non-public personal information to a large number of persons. The above penal provisions of the Law of the Federal Republic of Germany may be of great practical importance. However, it is not clear what should be understood as a large number of persons. It is highly likely that the courts will have to decide this issue on their own (Schäfers, 2018).

4. Summary

Based on the above, it can be stated that, firstly, the German Law on Data Protection has retained a complex internal structure, and, secondly, the new Law poses new problems of interpretation of the European legislation. In addition, since the legislation integration process acquires an institutional form through a mechanism for coordinating the national legislation of member states, this process is closely connected with the control of compliance with the provisions of the harmonized legislation. On this occasion, some experts believe that part of the legislative rules adopted by Germany does not comply with the union legislation and, in particular, with the EU Regulation. They expect that the EU Court will have to decide whether Germany has exceeded the authority to interpret certain provisions of the Regulation in the near future. In this regard, it becomes obvious that the legally compatible implementation of the EU Regulation in Germany requires further study (Ronellenfitsch, 2015).

5. Conclusions

Thus, the following features are inherent in the legal mechanism for the protection of personal data in Germany: design under the influence of the practice of the German Constitutional Court; use of the general right to personal freedom as a source for the allocation of new basic rights (the right to informational self-determination, the right to confidentiality); focus on ensuring effective legal protection of a person in the personal data processing; dynamism manifested in the adaptation of the mechanism under consideration to modern realities; high standards of legal protection of personal data; effect of constitutional guarantees for the protection of personal data not only in public, but also in private law.

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