



UNIVERSITÄT
ZU KÖLN

DATA PRIVACY ON TRIAL

A COMPARATIVE ANALYSIS OF ENFORCEMENT, DAMAGES, SANCTIONS, AND STANDING IN EU AND U.S. LAW

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Data Privacy on Trial

I. Introduction

- GDPR 2018: Turning point in Data Protection
 - Up to 20 billion € or to 4 % total worldwide annual turnover maximum fine
 - Damages to individual data subjects in times of Big Data
 - Data Protection Authorities as direct enforcement actors: Law and Order

Data Privacy on Trial

I. Introduction

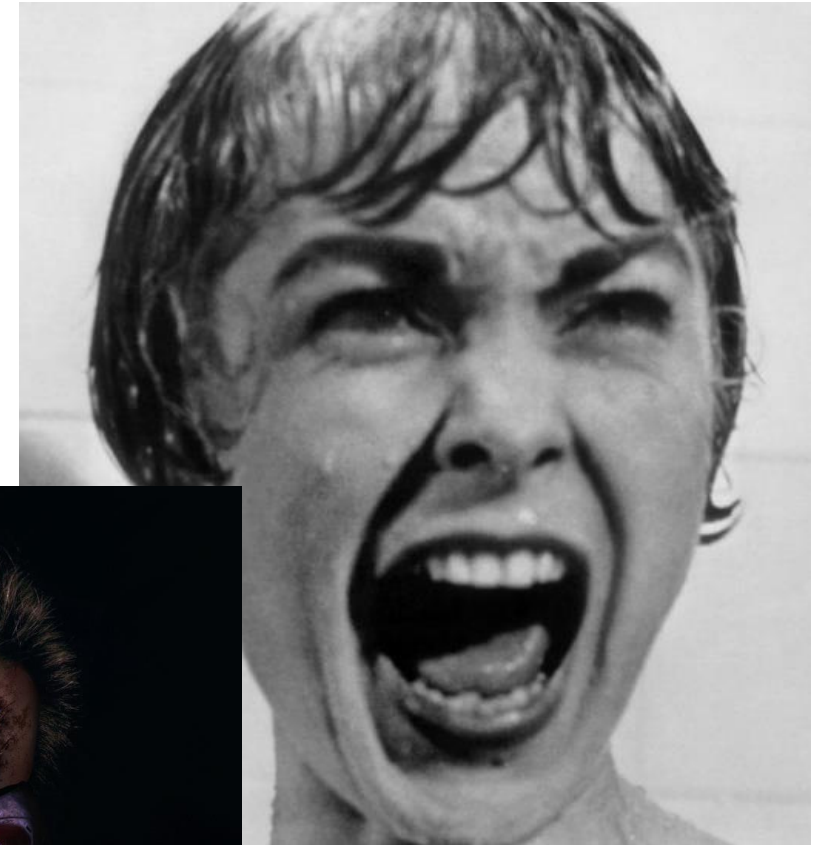
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I. Introduction

- GDPR 2018: Turning point in Data Protection
 - „Brussels Effect“
 - Japan
 - Brazil
 - CCPA?
 - More to come...



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I. Introduction

- Heavy criticism:
 - Shooting Sparrows with Guns?
 - Hindering Innovation: Dominance of the Law over Technology?
 - European Imperialism?
 - „Can't do Anything Anymore“?
 - ...

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I. Introduction

- Cacophony of Actors: EU and Member States; Courts (CJEU, Court of Appeals (e.g. OLG Düsseldorf on competition law) and Supreme Courts, Constitutional Courts, ...), Supervisory Authorities (EDPB+D (16+1+x) + x), Law Firms (GDPR Enforcement Tracker, ...), EU Commission, Companies (Meta; TikTok; Mistral, OpenAI; ...); NGOs (Algorithm Watch, ...); ...
- [Cacophony of Laws: DSA and DMA, Data Act, AI Act, ePrivacy Directive, AI Liability Directive – and, of course, GDPR]
- Data Protection Compliance = expensive, resourceful, strenuous, complicated
- In Effect: Overregulation. Too much, too often, without proportionality.

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I. Introduction

Is that truly so?

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I. Introduction

Does the Mix of Instruments within the GDPR Show (Over-)Extensive Use
by Data Protection Authorities and other Actors?

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I. Introduction

I. Introduction

II. Why? Goals of Data Protection

III. What? Enforcement Deficit

IV. How? The Instruments

V. Where? The Claim of Overregulation

1. Dogmatics

2. Fines

3. Damages

4. Complaints

5. Principle of Proportionality

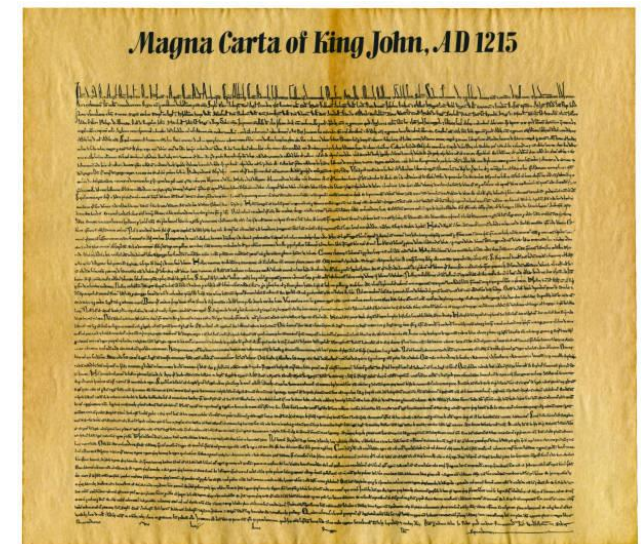
VI. If? Frictions

VII. And Then? Conclusion and Outlook

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II. Why? Goals of Data Protection (European concept)

- Limited Access to data – Technology to Use Data -> Power Asymmetry
- Use of Data in Decision Making -> Power Asymmetry
- Protection of Individuality, Freedom, Autonomy = Protection of Backbone of Democracy



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II. Why? Goals of Data Protection (European concept)

- Limited Access to data – Technology to Use Data -> Power Asymmetry
- Use of Data in Decision Making -> Power Asymmetry
- Protection of Individuality, Freedom, Autonomy = Protection of Backbone of Democracy
- Information as Common Good (Econ.)
 - Non-excludability
 - Non rivalry in consumption
 - > Result: Market failure
 - > Result: Power asymmetry



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III. What? Enforcement Deficit

- Driver of GDPR (succeeding DPD 1995)
 - Common Good Quality of information
 - Decisions \neq information and evaluation of information behind a veil of ignorance
 - Individual information seems irrelevant; causality in result (big data, AI, mass surveillance, ...)
 - External effects in profiling: Consent of my data \neq consent of profiled person.
 - Natural restitution impossible: „Forget, what you know!“
- > Result: Infringements of Data Protection Rights difficult to detect and hard to prove.
- > Result: Control and enforcement deficit

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III. What? Enforcement Deficit

- In addition:
 - Network Effects
 - David against Goliath (Power Asymmetry)
 - Ressources of Controllers v. Ressources of Data Subject/DPA
 - Ignorance of Those Controlling (esp. Courts)



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III. What? Enforcement Deficit

- Finally:
 - Access to Data and IT outside of Europe
 - Different Concepts of Protection
 - Global Actors: Diversity of Normative Orders, Legal Uncertainty, Diverse Rules of Standing and Access to Courts and Remedies, ...
- Not to forget:
 - Different Interests in Use of Data (Geopolitics)



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IV. How? The Instruments

- „Enforcement“ = Compliance with Legal Norms by Force
 - Measures Artt. 57, 58 GDPR by the Supervisory Authorities = Fines, Art. 83 GDPR, by Supervisory Authorities = institutionalized = public law
 - Complaint to the Supervisory Authority to take measures, Art. 77 GDPR = individual → institutionalized = public law
 - *and*: Representation through NGO, Art. 80 → institutionalized → private law



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IV. How? The Instruments

- Damages, § 82 DSGVO = individual = Civil Law
- Relief/claim to abatement because of violation of personality rights etc. = individual = Civil Law
- Indirect Enforcement
 - Competition and Antitrust Law (esp. Misuse of dominant market position – CJEU C-252/21 – Meta v. BKartA)
 - and: Consumer Protection Law, Tax Law, ...



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V. Where? Claim of Overregulation – 1. Dogmatics

- Dogmatics: Overlaps? Ne bis in idem?
- Measure v. Fine
 - Same Authority
 - Different goals: prospektiv v. retrospektiv; expression of special negative value of wrongdoing; educatory value
- Damages: retrospektiv; compensation of losses (status quo ex ante)
- Right to lodge complaint
 - Linkage
 - But: no duty to take measures by authority (CJEU: restricted discretion (C-768/21))

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V. Where? Claim of Overregulation – 1. Dogmatics

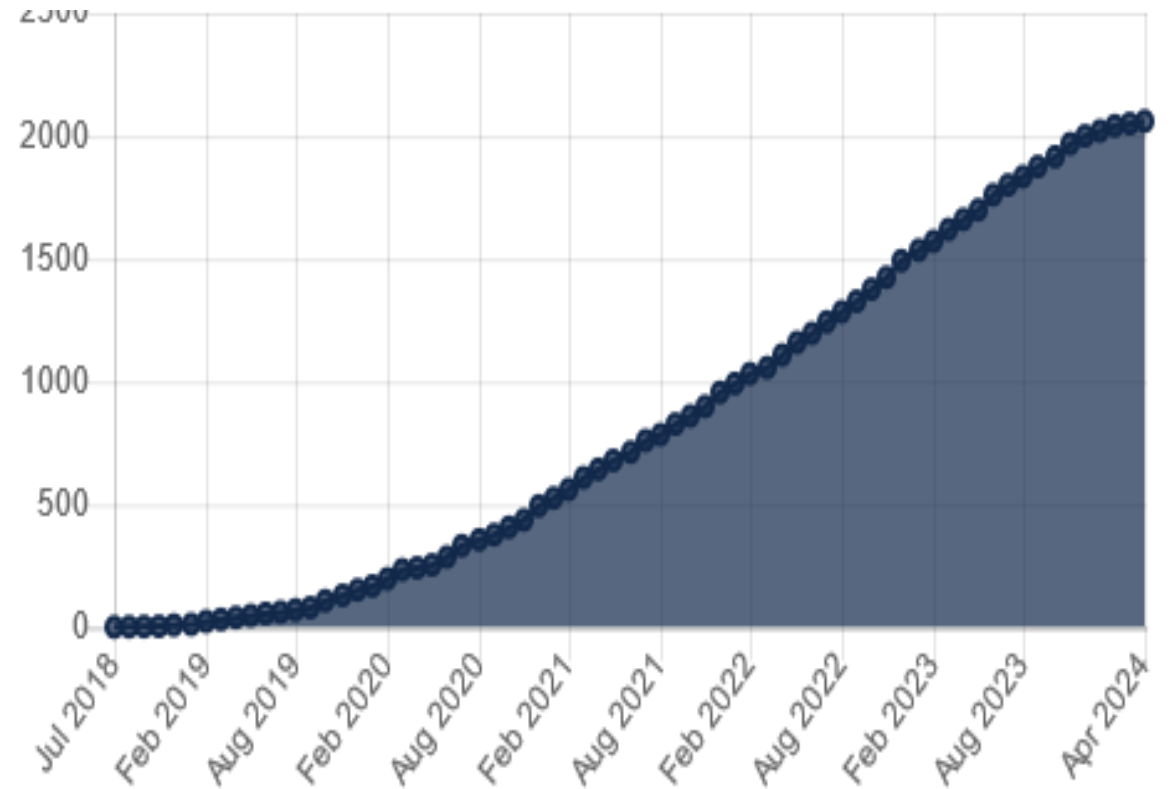
- Dogmatics: Overlaps? Ne bis in idem?
- Fines from different authorities (competition, AI regulation, data protection)
 - Typically for *different* normative violations
 - Amount??? Consumption???

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V. Where? Claim of Overregulation – 2. Fines

€ 4,500,688,064 Fines

app. 2.060 procedures for violations
against the GDPR



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V. Where? Claim of Overregulation – 2. Fines

Germany 2022 (2 DPAs missing):

508 fines
5.5 Mio €

Germany 2023 (2 DPAs missing):

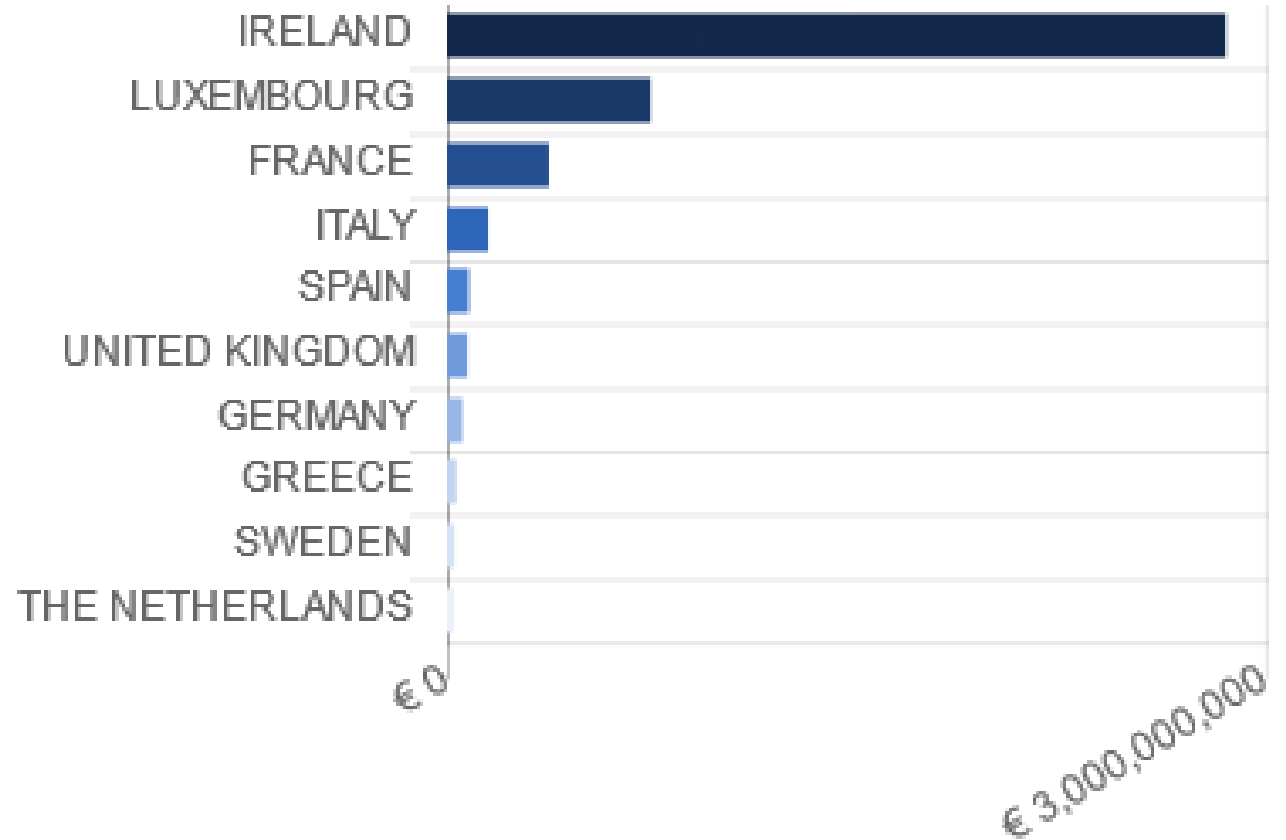
377 fines
5.0 Mio €

2022					2023				
Anzahl Bußgeldbescheide	Gesamthöhe Bußgelder	Durchschnitt	Median		Anzahl Bußgeldbescheide*	Gesamthöhe Bußgelder	Durchschnitt	Median	
	EUR			EUR					
55; 1 BDSG	25.915 €	594,52 €	300 €	Thüringen	32	30.740 €	984,06 €	400 €	Thüringen
0	0 €	0	0	Bayern LDA	15 DSGVO	3.776.070 €	251.738 €	251.738 €	Bayern LDA
19	145.950 €	7.681 €		Baden-Württ	11	15.800 €	1.436,36 €		Baden-Württem
4	63.271 €	15.817,75 €	k.A.	Rheinland-Pf	9	3.930 €	436,67 €	k.A.	Rheinland-Pfal
15 DSGVO	60.473 €	4.031,53 €	450 €	Hamburg	8 DSGVO	86.480 €	10.810 €	1.650 €	Hamburg
35	716.575 €	20.473,57 €		Berlin	26	549.410 €	21.131,15 €		Berlin
20	200.415 €	10.021 €	500 €	Sachsen-Anh	15	16.340 €	1.089,33 €	900 €	Sachsen-Anhal
				BfDI					BfDI
85/ 12 BDSG	80.350 €	945 €	500 €	NRW	65/ 8 BDSG	64.650 €	994 €	500 €	NRW
11	135.550 €	12.322,73 €	2.950 €	Saarland	8	208.375 €	26.046,88 €	850 €	Saarland
13	123.000 €	9.442 €	350 €	Brandenburg	9	13.450 €	1.495 €	450 €	Brandenburg
30*	2.067.070 €	68.902,33 €		Bremen	*32/ 20 rechts	147.465 €	7.373,25 €	900 €	Bremen
113	44.350 €	392,48 €		Hessen	124	56.810 €	458,15 €		Hessen
Tätigkeitsbericht fehlt				Mecklenburg	Tätigkeitsbericht fehlt				Mecklenburg-Vc
				Bayern LfD					Bayern LfD
* 34	28.910 €	850,29 €		Sachsen	* 23	33.090 €	1.438,70 €		Sachsen
51/ 45 rechts	2,2 Mio. €	39.215,69 €		Niedersachs	Geldbußen mit Erstbescheid iHv. 5,3 Mio. € verhängt, ke				Niedersachsen
2 keine Angaben				Schleswig-H	0 keine Angaben				Schleswig-Hols
* 21 erlassen und 19 rechtskräftig.					* 51 Geldbußen insg.				

Data Privacy on Trial V. Where? Claim of Overregulation – 2. Fines

Highest fines acc to member states:

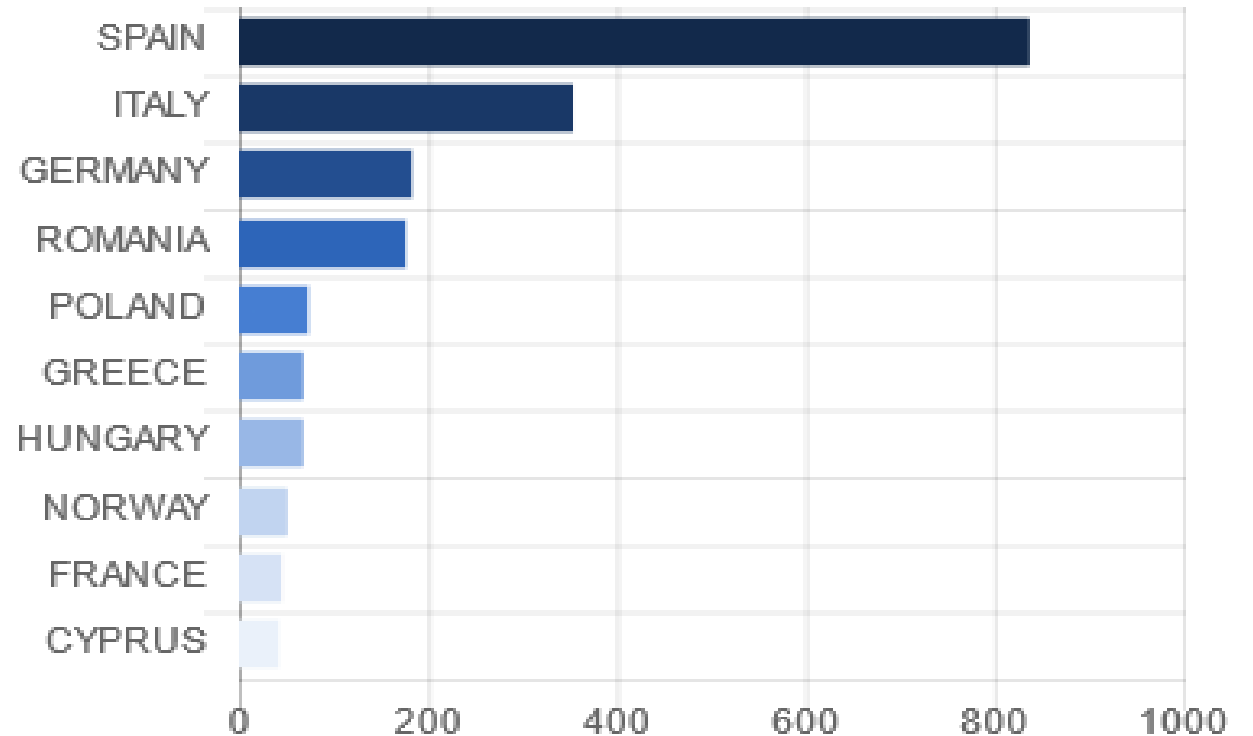
€ 2,855,363,400 (in 27 cases) by Irish DPA



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V. Where? Claim of Overregulation – 2. Fines

- **Most fines:** 838 (closed) cases in Spain



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V. Where? Claim of Overregulation – 2. Fines

- **The biggest Sinners:** Meta, TikTok, Amazon und Google

	Controller	Sector	Country	Fine [€]	Type of Violation	Date
1	Meta Platforms Ireland Limited	Media, Telecoms and Broadcasting	IRELAND	1200000000	Insufficient legal basis for data processing	2023-05-12
2	Amazon Europe Core S.à.r.l.	Industry and Commerce	LUXEMBOURG	746000000	Non-compliance with general data processing principles	2021-07-16
3	Meta Platforms, Inc.	Media, Telecoms and Broadcasting	IRELAND	405000000	Non-compliance with general data processing principles	2022-09-05
4	Meta Platforms Ireland Limited	Media, Telecoms and Broadcasting	IRELAND	390000000	Non-compliance with general data processing principles	2023-01-04
5	TikTok Limited	Media, Telecoms and Broadcasting	IRELAND	345000000	Non-compliance with general data processing principles	2023-09-01
6	Meta Platforms Ireland Limited	Media, Telecoms and Broadcasting	IRELAND	265000000	Insufficient technical and organisational measures to ensure information security	2022-11-25
7	WhatsApp Ireland Ltd.	Media, Telecoms and Broadcasting	IRELAND	225000000	Insufficient fulfilment of information obligations	2021-09-02
8	Google LLC	Media, Telecoms and Broadcasting	FRANC	90000000	Insufficient legal basis for data processing	2021-12-31
9	Facebook Ireland Ltd.	Media, Telecoms and Broadcasting	FRANCE	60000000	Insufficient legal basis for data processing	2021-12-31
10	Google Ireland Ltd.	Media, Telecoms and Broadcasting	FRANCE	60000000	Insufficient legal basis for data processing	2021-12-31

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V. Where? Claim of Overregulation – 3. Damages

- Damages: Too much? Too often?
 - New: immaterial cost included in damages
 - Indirect Effect: Integrated Costs (cp. Learned Hand (1947): Duty of Care established acc. to cost of prevention and calculated damages (Model-T-case) -> Compliance and Internalization



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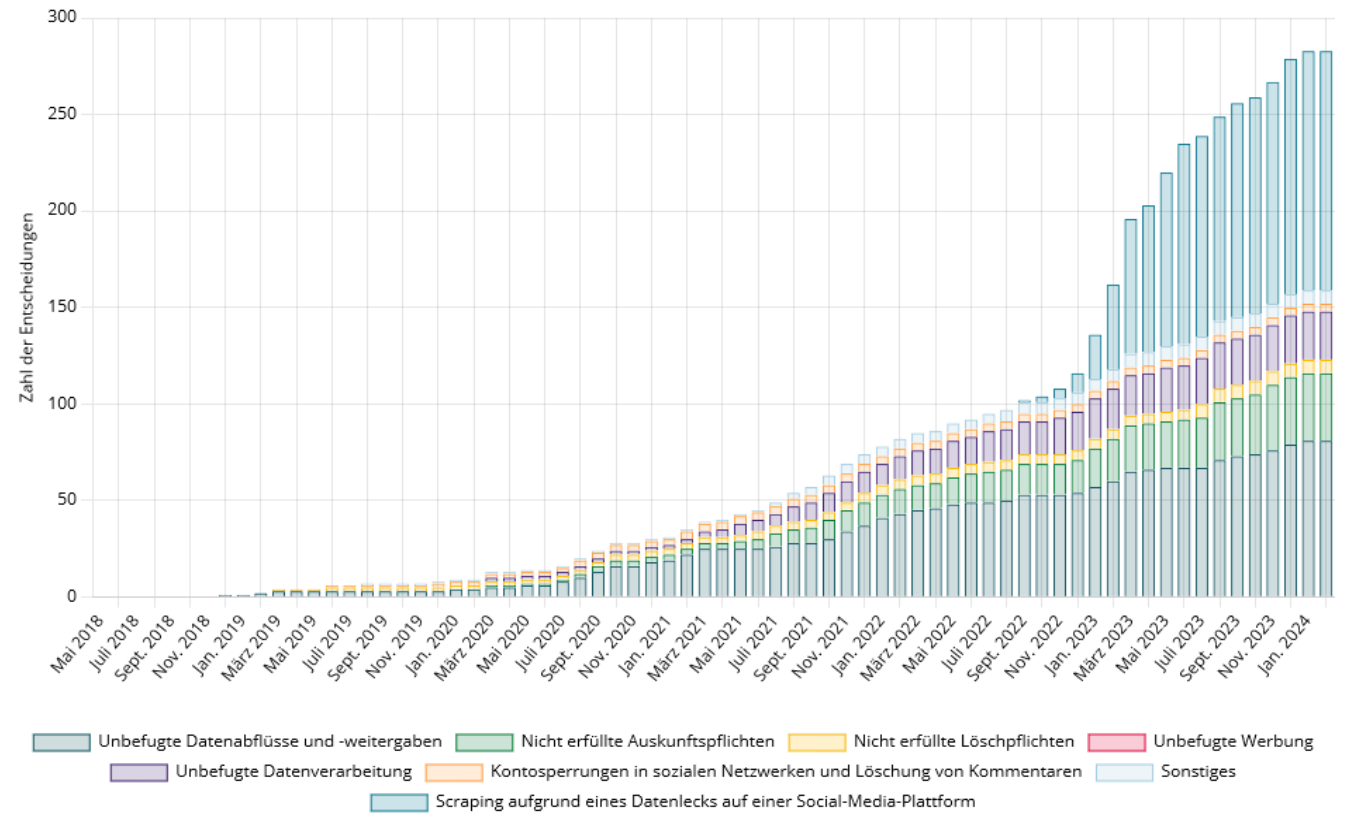
V. Where? Claim of Overregulation – 3. Damages

- CJEU: Restrictions on immaterial damages
 - No punitive dimension; general burden-of-proof on claimant (if not violation of obligation to demonstrate, CJEU C-175/20 (2022)); need of some material connection
- Courts tend to correct damages (lower)
- Problem: No official data available; publication of Court decisions

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V. Where? Claim of Overregulation – 3. Damages

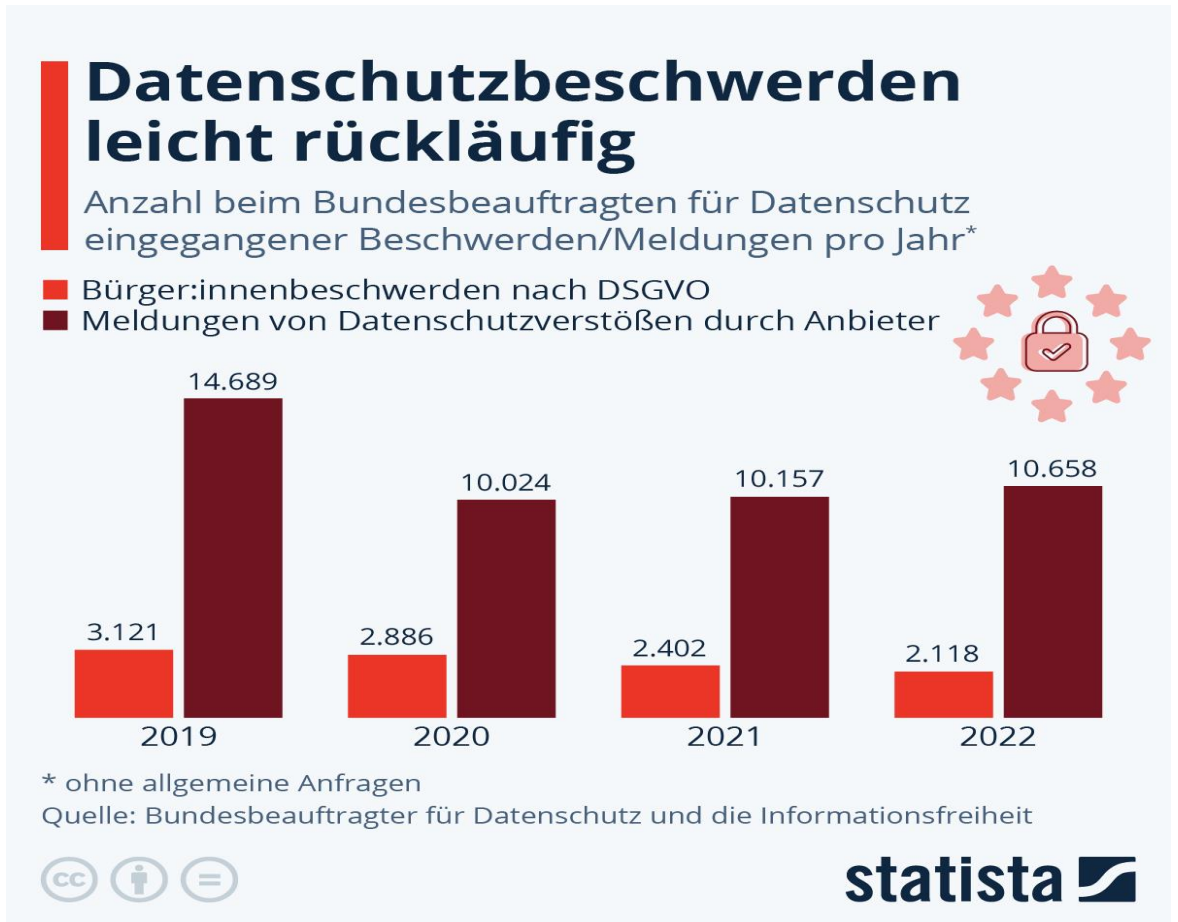
- App. 300 Court Decisions for damages in Germany
- App. 2/3 because of illegal data sharing or It-security leaks (scraping)



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V. Where? Claim of Overregulation – 4. Complaints

- Complaints to DPAs (mandatory investigation, Art. 77 GDPR)
- Inconsistent, in Lower Saxony (VW) 2023 > 10% to 2022, but < to 2020 und 2021; different with Federal DPA
- Typically: Advertisement, Scoring, Employment



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V. Where? Claim of Overregulation – 5. Proportionality

- Exuberant?
- Fines and Measures: Too high? Wrong Addressees? Too indeterminate?
 - Calculation of Fines according to Standardized Model (NL; Germ., EDPB)
 - Fines: Ultima Ratio after long stepping up process
 - CJEU 807/21 (Dt. Wohnen): 2017 objection by DPA; 2018 defendant promises new it system; 2020 objection because of inactivity; Oct. 2020 Fine: > 3 years
 - DPA v. Government Fanpage: 06/2018 CJEU Wirtschaftsakademie S-H; 09/2018 DSK; 05/2019 objection DPA; 2021 Denial Gov/Meta; 2022 another objection; 2023 DPA: prohibition: > 5 years

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V. Where? Claim of Overregulation – 5. Proportionality

- Time
 - EDPB decisions
 - Years of prior consultation with data controllers

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V. Where? Claim of Overregulation – 6. Conclusion

- No high fining, no exceeding fines
- No surprises: Right to hearing etc. executed repeatedly
- Fines never come singly: addresses, obvious and:
- According to substantial law:
 - Mass data
 - Quality of data breaches
 - Business modell based on data breaches
 - High impact
 - Consequences
 - Ongoing violation (CJEU September 2024 C-768/21)

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V. Where? Claim of Overregulation – 6. Conclusion

- Too much uncertainty for Fining, Measures and Damages?
 - Instruments of Enforcement and Compliance clarify
 - Full judicial control
 - App. 100 EDPB-Guidelines etc.
 - About 50 CJEU Decisions on GDPR

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VI. If? Frictions

- Remedies/Actions in Court
 - Parallel, unconnected procedures and decisions in administrative (DPA) and civil courts, no res iudicata/no stare decisis/no rules for pending
 - CJEU C-132/21 (2023)– Nemzeti Adatvédelmi és Információszabadság Hatóság: Civil Law not bound by DPA
 - Little Knowledge of Data Protection Law in Courts, in particular by indirect enforcement (competition law, consumer protection law, medical product liability law, ...) -> increase of legal uncertainty and cost (court-of-appeals)
 - Little Knowledge of Data Subjects of typical amount, procedure etc.

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VI. If? Frictions

- Remedies/Actions in Court
 - Remedies only as good as Courts are within Reach
 - Individual subjective right of a data subject, possibility of violation sufficient
 - Low procedural cost (amount in dispute low) = low legal costs
 - Downside: litigation lawyers
- Extension GDPR:
 - Anyone under scope of GDPR = worldwide
 - Right of data subject to mandate NGO, Art. 80, but: no third party action, no objective right/standing

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VI. If? Frictions

- Remedies/Actions in Court
 - Remedies only as good as Courts are within Reach
 - For privileged Non-US-Citizens: highly difficult, executive order 14086 „Enhancing Safeguards for United States Signals Intelligence Activities” = Data Protection Review Court against intelligence data measures; no direct complaint; no direct access to court; character of EO
 - CCPA: California Consumer Residents only
 - High Scrutiny for standing acc. to Spokeo (2016) and TransUnion LLC v. Ramirez (2021): injury/harm (concrete, particularized, and actual or imminent) plus likelihood of causality and redress

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VII. Conclusion and Outlook

- Data Protection Law / GDPR boiling topic
- Dogmatics / Empirics : no legal / factual overregulation
- Enforcement creates:
 - Trust in Rule of Law, equal treatment, level playing field
 - No power asymmetry (primary goal of GDPR!)
 - Room for negotiation
 - Recution of enforcement cost

And

- Desired Alteration of behaviour of addressees



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VII. Conclusion and Outlook

Data (and Informationstechnology) are Special Goods.
They appropriate Power.

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Politically, Too.

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Politically, Too.

This needs regulation.

And Enforcement.

Data Privacy on Trial

VII. Conclusion and Outlook



Data Privacy on Trial

VII. Conclusion and Outlook

