

On the concept of personal integrity in the german protection of minors

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Abstract

With the 2. amendment of the Federal Youth Protection Act in Germany, the legislator has introduced the legal concept of personal integrity into the Youth Protection Act. The text presents an understanding of the protection objectives, which is derived from the justification for the reform and other developments in the field.

1 2. Amendment of the Youth Protection Act

On May 1, 2021, the new Federal Youth Protection Act came into force in Germany¹, which was updated in particular regarding the provisions for the protection of children and youths in the media. In this context, the concept of personal integrity was introduced into the Youth Protection Act.

1.1 Objectives of the reform

With their coalition agreement of 2018, CDU, CSU and SPD declared to ensure the protection of personal rights and data of children and youths in digital media.² The previously legislation in force until then, dating back to 2003 had to be considered out of date, as there were no such relevant services and platforms and existing risks for children and young people were not regulated due to their unknown status.³ It now seemed all the more urgent to counter so-called interaction risks such as cyberbullying, cybergrooming or financial exploitation (e.g., through in-app purchases) and to protect the personal integrity of children and youths.⁴ Likewise, the term "media" should be updated, orientation in the use of media should be improved, and law enforcement in the field of media protection for children and youths should be increased.

1.2 New regulations

In order to achieve the agreed goals, new protection objectives were implemented in the Youth Protection Act, the guidelines for labeling of media were updated and new preventive measures were described in the law. Also the development of the former Federal Review Board for Media Harmful to Minors into a new German Federal Agency for Child and Youth Protection in the Media was initiated by the amendment.

¹ BGBl. (Federal Law Gazette) Teil 1, 2021, 749.

² Koalitionsvertrag (coalition agreement) von CDU, CSU und SPD (2018): Ein neuer Aufbruch für Europa, Eine neue Dynamik für Deutschland, Ein neuer Zusammenhalt für unser Land. 19. Legislaturperiode. 12. März 2018. S. 23.

www.bundesregierung.de/resource/blob/974430/847984/5b8bc23590d4cb2892b31c987ad672b7/2018-03-14-koalitionsvertrag-data.pdf?download=1 (16.6.2022)

³ BMFSFJ (Federal Ministry for Family Affairs, Senior Citizens, Women and Youth) (2020): Kabinett beschließt neues Jugendschutzgesetz. Bundesministerium für Familie, Senioren, Frauen und Jugend. Pressemitteilung. 14. Oktober 2020. www.bmfsfj.de/bmfsfj/aktuelles/presse/pressemitteilungen/kabinett-beschliesst-neues-jugendschutzgesetz-161194 (16.6.2022).

⁴ Drucksache (official publication of the German Federal Parliament) 19/24909 (2020): Entwurf eines Zweiten Gesetzes zur Änderung des Jugendschutzgesetzes. Gesetzentwurf der Bundesregierung. 2. Dezember 2020.

1.2.1 Protection objectives (§ 10a and § 10b)

In addition to the previous objectives of protection of children from media that impair the development of children and are harmful to children the reform of the law has made an amendment in regard of the protection of personal integrity and in regard of guidance towards media use and media education as well as protection against risks that are not based in media content but in the interaction with other users (so-called interaction risks). The updated risk monitoring of the German Federal Agency for Child and Youth Protection in the Media provides a comprehensive overview of corresponding dangerous situations and other challenges and threats of online media use by youth.⁵

1.2.2 Labelling (§ 14a)

As a result of the amendment of the Youth Protection Act, providers of games or films that make their content available for users digitally on platforms are now also obliged to label them with an age rating and flag up interaction risks if these are to be considered an essential component of the medium. Exempt from this requirement are platforms that have fewer than one million users in Germany or ensure that their services can only be used by adults.

1.2.3 Precautionary measures

Providers of services that are used by children and young people and store or process their data for their own profit are called upon to take measures to protect young users of these services. To this end, reporting and remedial procedures with child-friendly user guidance shall be provided, the classification of user-generated audiovisual content from the age of 18 shall be defined, technical tools for age assurance shall be used, support services as well as help and reporting options shall be provided or technical usage control by legal guardians shall be implemented. It is also recommended to set user profiles in such a way that they cannot be found by search services and that their location, contact details and communication are blocked. The restriction of contact to a group of people selected by the users themselves, as well as anonymous or pseudonymous usage of services, the prohibition of the transfer of usage data and the provision of child-friendly general terms and conditions shall protect young people when using digital services.

The legislator leaves it up to the services to independently decide which precautionary measures they consider to be meaningful and effective for countering specific risks and dangers in their services or on their platforms. They can also go beyond the measures mentioned as examples and use other methods or support to offer a safe digital environment for children. The Federal Agency for Child and Youth Protection in the Media monitors whether they offer adequate solutions in terms of the protection of minors.

In analogy to the labelling requirement pursuant to § 14a, platforms with fewer than one million users in Germany are also exempt from taking precautionary measures in this case.

1.2.4 Law enforcement (§17, §17a and §17b)

The new Federal Agency for Child and Youth Protection in the Media is the successor of the former Federal Department for Media Harmful to Young People. In addition to maintaining the list of media harmful to minors, the new authority, which reports to the Federal Ministry for Family Affairs, Senior

⁵ BPjM (*Federal Review Board for Media Harmful to Minors*) (2022): Gefährdungsatlas. Digitales Aufwachsen. Vom Kind aus Denken. Zukunftssicher handeln. Aktualisierte und erweiterte 2. Auflage. Bundesprüfstelle für jugendgefährdende Medien. www.bzkg.de/resource/blob/197826/5e88ec66e545bcb196b7bf81fc6dd9e3/2-auflage-gefaehrungsatlas-data.pdf (16.6.2022).

Citizens, Women and Youth, is responsible for further development of the protection of children and young people. In addition, it monitors compliance with the precautionary measures mentioned above and promotes measures for the protection of children and young people. In carrying out their tasks, they are supported by an advisory board consisting of 12 members representing relevant organisations of society, particularly committed to children's rights and the protection of children. Three of the 12 seats are reserved for the representation of children's interests. Two of these three delegates must not be older than 17 years when appointed to the advisory board.

2 Derivation of the conceptual understanding

The described new mechanisms for the protection of minors in the media are essentially based on §10a and §10b as well as the concept of personal integrity listed therein. It is therefore necessary to clarify this term, which has not yet been recognised in the protection of minors. This text sets out an understanding of the term that relates to the genesis of the 2. amendment of the Youth Protection Act, related areas of law and parallel developments in the field of regulation.

2.1 Integrity

The term integrity is derived from the Latin noun *Integritas* and generally refers to (physical) integrity. However, other translations with similar content are also possible, referring to mental freshness, health and moral integrity.⁶ The concept of integrity can also be found in ethics and education. In these contexts, the term is understood in the sense of a correspondence between one's own needs, attitudes and values and one's own actions and behaviour.⁷ The development of integrity is closely linked to the development of one's own personality and is a long-lasting process that can be disrupted and disturbed by influences from third parties, for example by seducing them into actions and behaviour that contradict their own expectations and values.

The concept of personal integrity has so far not played a role in German case law. A decision by the Federal Constitutional Court in 1970 came close to this in terms of language. It states that the "protection of the integrity of the human person in mental and emotional relationship" is to be accorded a „particularly high value".⁸ It is stated that this is a different matter of regulation than interference with physical integrity, and that the two protection objectives are rather coexistent. This decision gives evidence that the case law of the Federal Constitutional Court at that time already recognised that the protection of the human individual does not only comprise a physical component.

This deliberate naming of both physical and mental integrity is reflected in the Charter of Fundamental Rights of the European Union in art. 3(1) and emphasises the right to physical and mental integrity. The General Data Protection Regulation also formulates integrity as a protection objective in Art. 32(1)(b), which is intended to prevent the manipulation of data and enable the exchange of data without unauthorised modifications. The concept of integrity covers both the integrity of the data itself and the correct functioning of the systems and services used for data processing.⁹

In the previous discourse on data protection law, data was therefore regarded as an independent object of protection its integrity. However, new voices are calling for regulations that do not differentiate between the integrity of the human individual and the inseparably associated data.

⁶ Langenscheidt Online-Wörterbuch (*dictionary*): *Integritas*. www.de.langenscheidt.com/latein-deutsch/integritas (16.6.2022)

⁷ Pollmann, Arnd (2005): *Integrität: Aufnahme einer sozialphilosophischen Personalie*.

⁸ BVerfGE (*judgement of the federal constitutional court*) 27, 344, 351.

⁹ Martini, Mario (2021), In: Paal, Boris /Pauly, Daniel (Hrsg.), *Kommentar zur Datenschutzgrundverordnung*, 3. Auflage.

Accordingly, personal data are elements that represent a person in digital space and which are inalienable.¹⁰ Personal data refers to the person in digital environment. In this respect, it is argued that integrity should be extended beyond the dimensions of physical and mental integrity in order to also include the protection of personal data from interference and breach. Any misuse of this data would therefore be considered a violation of the person themselves.

2.2 Protection mandate

Article 1(1) of the German constitution (*Grundgesetz*) obliges the state to respect and protect human dignity and guarantees general freedom of action in Art. 2(1). The concept of General personal rights is based on these fundamental rights.¹¹ While it can be supposed that adults have developed a stable personality in view of their age and maturity, it can be assumed that a child's personality is still unstable and in the process of development. To ensure that this process is not hindered or even affected, the state is obliged to provide special protection for children. This is to ensure that children can develop into confident individuals being able to participate in society. The state's mandate to protect children from influences that could impair or even threaten their personal development therefore arises directly from the constitution.¹²

The Youth Protection Act is a concrete implementation of this mandate. With regard to the media it regulates how the personal integrity of children and young people shall be protected and their development should be safeguarded.

With the new phrasing of § 10a as the basic standard for the protection of personal integrity and the establishment of the term in other norms of the Youth Protection Act, the scope of protection is expanded both in terms of the cause of the risk and the type of impairment. According to § 10b, the legislation refers to new risks, particularly in communication, contact and purchasing functionalities, gambling-like and addiction-provoking mechanisms, the unauthorised use of data and impermissible advertising to children and young people. Taking this into account, the concept of personal integrity must be interpreted broadly in order to cover the various causes of danger and effects on children and young people and to be able to protect them accordingly. This is also indicated by the location and position of the protection objective at the beginning of the media law section of the Act as well as the subsequent references and citations.

The embeddedness of personal integrity in § 10a as a protection objective in the area of media suggests that this is to be understood as an objective for all subsequent regulations. Personal integrity is also referred to in the context of § 10b in connection with media that impair the development of children. Risks to this protection objective must be taken into account with reference to the precautionary measures pursuant to § 24a. Service providers are obliged to ensure that the protection objective is warranted and provide an option to report violations of personal integrity. Potential impairment of personal integrity is also of particular importance in the context of the labelling obligation pursuant to § 14 (2a).

¹⁰ Internet Governance Forum (2020): IGF 2020 WS #352 Digital Human Rights: Digital integrity of the human person. www.intgovforum.org/multilingual/content/igf-2020-ws-352-digital-human-rights-digital-integrity-of-the-human-person (16.6.2022).

¹¹ BVerfGE (*judgement of the federal constitutional court*) 54, 148, 153; 72, 155, 170.

¹² BPjM (*Federal Review Board for Media Harmful to Minors*) (2022): Gefährdungsatlas. Digitales Aufwachsen. Vom Kind aus Denken. Zukunftssicher handeln. Aktualisierte und erweiterte 2. Auflage. Bundesprüfstelle für jugendgefährdende Medien. www.bzkm.de/resource/blob/197826/5e88ec66e545bcb196b7bf81fc6dd9e3/2-auflage-gefaehrungsatlas-data.pdf (16.6.2022).

The legal standardisation of safeguarding measures also confirms the important position of personal integrity in the Youth Protection Act. On the one hand, § 17a states that the realisation of the protection objectives should be promoted through a joint assumption of responsibility by the state, industry and civil society to coordinate an overall strategy. Secondly, in accordance with § 29b, the implementation of the protection objectives shall be assessed three years after the Act comes into force and then every two years, the Advisory Board of the German Federal Agency for Child and Youth Protection in the Media shall be informed of the results every two years and the German Bundestag every four years.

Taking all of this into account, it can be stated that personal integrity affects all regulations in the media sector protecting children and young people and must be interpreted comprehensively in order to fulfil the state's constitutional duty to protect children and young people.

2.3 International legal framework

In addition to the national legislation, various international regulations provide reference and connecting factors to sharpen the concept of personal integrity and apply it to personal data. The right to informational self-determination arise from the General personal rights under art. 1(1) of the constitution in conjunction with art. 2(1) of the constitution and ensures that individuals can decide for themselves how third parties handle their own data. The General Data Protection Regulation and the EU Charter of Fundamental Rights also protect personal data under EU law.¹³

The EU Audiovisual Media Services Directive¹⁴ also protects minors from the disclosure of their personal data for commercial purposes¹⁵ and stipulates that audiovisual commercial communications must not lead to physical, mental or moral harm to minors¹⁶. Together with the directive on combating the sexual abuse of children¹⁷, it can be assumed that the scope of protection of personal integrity is to be understood broadly in order to guarantee the requirements of EU law.

In a recent United Nations General Comment¹⁸, the Committee on the Rights of the Child emphasises the comprehensive validity of the Convention on the Rights of the Child¹⁹ in the digital environment and, in addition to the urgent need for protection, also stresses the need to promote and involve children.²⁰ It can also be quoted as an argument in favour of a broad interpretation of the concept of personal integrity and at the same time points out that all measures undertaken to protect children in the area of media must be weighed against their rights to freedom of expression and information. The legal obligation to protect the personal integrity must be fulfilled in a way that does not close off access to information and allows the expression of opinions and participation in political decision-making processes in an age- and development-appropriate manner.

¹³ Art. 4 DSGVO (GDPR), Art. 8 GRC

¹⁴ ABl. L 303/69 (*official journal of the European Union*) vom 28.11.2018.

¹⁵ ABl. L 303/84 (*official journal of the European Union*) vom 28.11.2018.

¹⁶ ABl. L 303/85 (*official journal of the European Union*) vom 28.11.2018.

¹⁷ ABl. L 335/3 (*official journal of the European Union*) vom 17.12.2011.

¹⁸ CRC (2021): General comment No. 25 (2021) on children's rights in relation to the digital environment. Committee on the Rights of the Child. 2. März 2021. <https://childrens-rights.digital/hintergrund/index.cfm/key.1661/topic.280target=> (09.11.2023)

¹⁹ UN (1989): Convention on the Rights of the Child. United Nations. 20. November 1989. <https://childrens-rights.digital/hintergrund/index.cfm/aus.11/key.1452/StartAt.1/page.1> (09.11.2023).

²⁰ Krause, Torsten (2021): Kinderrechte im digitalen Raum. Ein Überblick. In: Medien und Erziehung. Zeitschrift für Medienpädagogik Heft 3/2021, S. 72-78.

2.4 Understanding the term "personal integrity"

To summarise, one can state the regulation aims at ensuring children can safely to participate in digital environments. In doing so, it provides guidance how these environments should be designed to protect children from potential risks and harms. This precautionary concept is intended to minimise the realisation of dangers and, at best, avoid them altogether. These safety by design and privacy by design approaches are therefore essential prerequisites for ensuring that the best interests of the child are prioritised in the digital world. In accordance with the UNCRC, protection and provision measures should protect and safeguard the well-being of children so that their best interests are given primary consideration.

In our evolving understanding of the concept of personal integrity, the development of the child plays a central role. This follows from the above and, regardless of this, is a fundamental perspective to be considered in all child-related aspects. Precisely because childhood is a developmental phase, children require special protection - in general, but also with regard to ensuring their ability to develop. However, this protection cannot be organised one-dimensionally, but is also subject to the changing conditions and needs during this phase. In principle, it can be assumed that younger and/or less digital literate children need to be safeguarded by more far-reaching and extensive protective measures than older and/or more digital literate children (*evolving capacities*).

The open and unpredictable development of children may be affected by the processing of personal data by the providers. Algorithmic generated suggestions and recommendations correspond to general and, at best, individual current tastes and interests. In this way, they perpetuate patterns and habits of recipients and artificially shape future usage patterns. Algorithms designed in this way can restrict options and thus hinder deviations and irritations among listeners, readers and viewers. However, these deviations are prerequisites for initiating and enabling developments in children and young people. As a result, there is a risk that potential new interests and talents may remain undiscovered or be hindered.

Accordingly, personal integrity includes the protection of physical and psychological integrity as well as personal data. In particular, the age-appropriate and future-open development as well as the informational and sexual self-determination of minors must be ensured. The abuse of inexperience and age, economic exploitation and the commercial or other improper processing and dissemination of user data are, conversely, contrary to the protection of personal integrity.