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Data protection for Corona guest lists in restaurants in Hessen

The stimulus to misuse existing data

Introduction

The Corona pandemic has changed many everyday behaviors through its uniqueness, including visiting restaurants, bars, or pubs. Sometimes the reopening of establishments is tied to many conditions, such as a documentation of guests wishing to eat on the spot. When using these guest lists, a few points must be observed in terms of data protection

Legal basis

The Hessian Corona Contact and Operating Restrictions Regulation (Hessische Corona-Kontakt- und Betriebsbeschränkungsverordnung) stipulates in § 4 para. 1 no. 2 lit. b:

Restaurants (...) may offer food and drink (...) for consumption on the premises, provided that it is ensured that

*"the **name, address and telephone number** of the guests are recorded by the owner solely to enable the tracing of infections; the owner must keep the data for a period of **one month** from the beginning of the visit, **protected from third party access, available to the competent authorities for the competent authorities and transmit it to them on request, and must delete or destroy it without undue delay after expiry of the period in a secure and data protection-compliant manner**; the provisions of Articles 13, 15, 18 and 20 of the General Data Protection Regulation (GDPR) do not apply; the guests must be informed of these restrictions".*

In principle, the collection of contact data of guests is a processing operation which is subject to a legal basis in accordance with Art. 6 para. 1 GDPR. The Hessian Corona Contact and Operating Restrictions Regulation (Hessische Corona-Kontakt- und Betriebsbeschränkungsverordnung) proves to be a legal obligation within the meaning of Art. 6 para. 1 lit. c GDPR.

Principle of data minimization and accuracy, storage duration

Only the data specified by the state government is to be collected, which is limited to the name, address, and telephone number of the visitor. The collection of other personal data, such as the e-mail address etc., does not fall under the above-mentioned legal basis of Art. 6 para. 1 lit. c GDPR and requires a separate legal basis.

In accordance with the law, the operator is obliged to check the accuracy of the personal data provided in accordance with Art. 5 Para. 1 letter d GDPR. On the other hand, it would be a disproportionate effort for the operator to inquire or check the identity of the guests each time. In this context, it also remains open whether a guest is obliged at all to present identification documents or to participate in a check. In case of doubt, however, this cannot be assumed.

The retention period of the guest lists is limited to one month or until the competent authority has requested it.

Type of storage and access control

Furthermore, it should be ensured that the completed guest lists are kept safe from third parties. For this purpose, it is not sufficient to leave the lists (upside down) in a basket at the

central collection and filling station. The collection of the lists can be solved by the staff themselves or by a mailbox that prevents the lists from being removed.

Furthermore, the guest lists should only be processed by a clearly defined group of persons and kept in a place protected from third parties. To ensure proper disposal and to meet deadlines, it is also advisable to organize them by date.

Erasure or destruction of the guest lists

After the end of the month, restaurant operators must destroy and dispose of the guest lists. By processing personal data, the guest lists must be shredded irreversibly.

Online forms using QR Code

In order to ensure an accumulation of paper and a faster processing of the guest lists, the use of online forms is possible with the help of third-party services. The provision of a registration form through a QR Code at the respective table provides direct access to a website as well as the form. It should be noted, however, that the principles of processing are also observed there (especially data minimization) and corresponding data protection information is provided on the website.

Similarly, in accordance with Art. 28 GDPR, data processing agreements should be concluded with the third-party providers, which should be indicated in the operator's data protection information.

Information requirements

A further obligation of the operators is to inform the data subjects about the processing of their personal data.

The data subject must be informed about

- the type and category of data,
- the purpose of the processing,
- the duration of the storage, and

- what rights he or she has as a data subject

...to clear up the situation. For this purpose, data protection notices can be signposted at central locations of the premises, similar to signs for video surveillance. QR codes could also be placed on the tables or at the entrance, referring to the privacy notice on the website or to specific Corona data protection information.

Misuse of the guest lists

The Hessian Corona Regulation unambiguously limits the purpose of data processing to "*enabling the tracing of infections from the farmer*". Processing of these data for other purposes, such as the prosecution of criminal offences, is not permitted.

Nevertheless, the police have the possibility, with reference to §§ 94 para. 1, 2 German Code of Criminal Procedure (stop), to seize the guest lists as evidence for the prosecution and investigation of a criminal offence. This is, however, subject to the condition that a judicial order for this is also available or, in case of imminent danger, the public prosecutor's office orders the confiscation.

A typical picture of legal uncertainty emerges, according to which the conduct of the investigating authorities must be considered in individual cases. According to the Hessian data protection commissioner Prof. Ronellenfitsch...

*"the behavior supported by reason and sense of responsibility of the Hessian population and the acceptance of the serious restrictions of informational self-determination is explained by the justified assumption that the interventions are only temporary, singular measures. This trust should not be put at risk by misappropriating the intervention measures. For example, it should be taken into account that the provision of correct contact details could be jeopardized by any misuse that is to be expected at any time and thus the important follow-up of infections".*¹

In any event, in special cases, a balance of interests should always be struck between the interests of the data subject and those of the investigating authorities. On the one hand, there is a high level of confidence among citizens in the use of guest lists for specific purposes in order to reduce the impact of the COVID-19 virus. On the other hand, it is also in the interest of citizens to reduce crime in their neighborhood by supporting the police. The police are

¹ HBDI, PM Earmarking of personal data for tracing infection chains.
<https://datenschutz.hessen.de/pressemitteilungen/zweckbindung-von-personenbezogenen-daten-zur-verfolgung-von-infektionsketten>

interested in fulfilling their task as far as the legal means allow. It should be noted that the restriction of civil liberties is only carried out in proportion to the necessity of the measure itself.

However, there is no clear solution to this question. Nevertheless, it is to be assumed that the evaluation of the guest lists is inadmissible in the case of minor administrative offences. On the other hand, there may be a predominance of interests in the use of the guest lists by investigating authorities in cases of murder or manslaughter.

In summary, it is the responsibility of the Government at federal level to adopt clear rules on the use of guest lists by investigating authorities and to provide guidance on how to weigh up the interests involved.

We consult you in all data protection questions and provide an external data protection officer for you. Feel free to contact us!

Kind regards, the NOTOS Xperts Team!