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Legal compliance requests for social networks, as shown by „greydate.com“, a mock social community network site, based on German law / EC Directives

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LEGAL COMPLIANCE REQUESTS FOR SOCIAL NETWORKS, AS SHOWN BY „GREYDATE.COM”, A MOCK SOCIAL NETWORK SITE BASED ON GERMAN LAW / EC DIRECTIVES

Oliver M. Habel, PhD., teclegal Habel Rechtsanwälte, Munich, Germany

Introduction

The European Commission has issued several directives to its member states related to data protection and electronic commerce topics during the last two decades. These directives have in the meantime been adopted into national legislation by the member states. As it mostly happens, the members do have some sphere of tolerance to decide about details for themselves when EC directives are adopted into national law. The basic principals decided by the European Commission are, however, applicable in all member states of the European Union. This is why a legal review based on German law will also create an idea for the reader of this document as to what needs to be considered if a company wants to start with a new social network as a provider located in Germany / EU member state.

Basic principals for the collection, processing, using, and transmission of personal data

The collecting, processing, using and transmission of personal data is forbidden by law, unless it is expressly permitted by an authorization by a law or the involved individual. That principle applies to everybody who does not want to act only within his private sphere, cf. § 12 TMG (German Telemedia Act); § 28 BDSG (German Data Protection Act)

This legal review is based, in particular, on the TMG (German Telemedia Act), as the offering of services of a social network constitutes the offering of telemedia within the meaning of § 1 TMG.

§ 14 TMG permits a SNS provider to collect that personal data of a user which is necessary to conclude and fulfill a contract by both parties.

§ 15 sub-para 1 TMG permits a provider to collect personal data about a use of telemedia by a user for billing purposes or to assist, e.g., in the navigation of a user through the social network.

§ 15 sub-para 3 TMG permits the provider to create user profiles for advertising, market research and for user comfort through, e.g., cookies but only if the data is anonymous, so that the individual user cannot be identified.

Any further collecting, processing, use and transmission personal data requires the approval by the individual.

According to § 13 sub-paras 1 to 3 TMG, an approval will only be effective if it meets specific legal requirements:

- an “informed consent” of the individual is necessary, therefore,
- which personal data are collected
- within what scope,
- and for what reason
- if processed outside the territory of EU-member states.
- The aforementioned information needs to be provided before the start of any collecting of personal data.
- The information needs to be provided in an easily understandable manner.

The information provided by the provider about the purpose for collecting those personal data, as well as the approval, must be stored and be accessible for the individual at any time.

The individual must be informed about her/his right to revoke the approval with effect for the future at any time. That information must be provided before the approval by the individual, including an address for the individual to make use of her/his right.

The business model of the provider in “Greydate.com” is an offer of a social network site free of costs for the user but also for collecting, processing, using, and transmitting personal data. At least, the collecting, processing, and use of personal data for this purpose requires a permission by the legislator can be based on § 29 sub-para 1 BDSG (German Data Protection Act). § 29 sub-para 2 BDSG, however, does not grant a permission to transmit personal data to any third party. Subsidiaries and affiliates of the provider are also third parties within the meaning of § 29 sub-para 2 BDSG.

Conclusion: The SNS provider may collect, process and use personal data of users to the extent as is necessary to fulfill the contract by both parties, § 14 TMG; to collect personal data for invoicing a use of telemedia, or to assist a navigation for the user, § 15 sub-para 1 TMG; the provider may create user profiles for advertising etc. also by making use of cookies but only if the individual user cannot be identified. For all further collecting, processing, use, and/or transmission of personal data, the SNS provider will require an approval by the individual user, which must be in conformity with the legal requirements of § 13 sub-paras 1 to 3 TMG.

The necessary approval by the individual user may be part of the Terms of Use of the provider or of its Data Protection Declaration if these legal conditions are part of the contract with the individual user.

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ABOUT US

Greydate.com is an exclusive online dating service for men and women who are 50 years of age or over. Our service allows you to enter your details to our database and then browse through thousands of eligible partners to find the perfect Greydate.com match for you. We only hold details of mature people, saving you the trouble of searching other websites and lonely hearts columns that are filled with irrelevant adverts.

Register now and let us find the perfectly matured partner for you!

Greydate.com is a subsidiary of Silver Fox plc.
Products from Silver Fox Publishing include:

[Golden Years Holidays magazine](#)
[Silver Fox magazine](#)
[Fashion at 50 magazine](#)

(click a link above for more information)

HOME PAGE

ABOUT US:

On the homepage of a social network, there should be a navigation installed with links to Terms of Use and the Data Protection Declaration of the provider.

If the provider makes use of foreign trademarks like Silver Fox, a license for use of the provider should exist.

The provider should have filed for a trademark registration for “greydate” as well as for the design “a red heart with a grey coloured greydate.com” in front.

As far as greydate.com has links to “Golden Years Holidays Magazine”, etc. there should exist an agreement with the owner of the publication. Also, links might be a liability issue for the provider, if the provider makes the content of a linked site a part of its own presentation.

An absolute MUST is a statement as to who provides detailed information about the provider in accordance with § 5 TMG. If the provider offers its own content such as articles, it must be stated who, as an individual, is responsible for it as the editor.

Even a copyright notice is not required to enjoy copyright protection, as, for example, the design of the Internet sites it could be helpful to state who owns the copyright with respect to the design of the sites.



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REGISTRATION

Please fill in the registration form to allow us to find the perfect Greydate.com match for you!

Name:

Address:

Email Address:

Confirm Email Address:

Password:

Confirm Password:

Please supply your details:

Sex:

Age:

Ethnic Origin:

Employment details:

Hobbies and interests:

Marital history:

Will you be supplying a photo?

Find a friend service: Are you interested in our 'find a friend' service for mature pen pals?

Click here when you are ready to register

REGISTRATION:

The SNS provider of greydate.com is only allowed to ask for the e-mail address of the individual user, § 14 TMG. As greydate.com is a free internet service, the name and address of a user will not be necessary. All other personal data needs to be marked as provided based on the individual user's own choice.

The provider of greydate.com asks for various sensitive data. Sensitive data within the meaning of "specific data", § 3a sub-para 9 BDSG, is data concerning the race or ethnic origin of a user, political opinions, religious or political beliefs, union membership, health, and sexual interest. The approval by the user who provides specific personal data needs to expressly cover that type of personal data, §§ 28 sub-para 6, 4a sub-para 3 BDSG. Therefore, the provider needs to explain in its Data Protection Declaration or Terms of Use what he is going to do with that data, and the provider must to point out that the purpose for the collection of personal data also relates to "specific data" provided by a user.

A "Find A Friend Service" requires that the SNS provider have obtained the approval by the users to make his data available to other users. Such approval by a user can be part of the Data Protection Declaration by the provider.



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REGISTRATION

Please fill in the registration form to allow us to find the perfect Greydate.com match for you!

Name:

Address:

Email Address:

Confirm Email Address:

Password:

Confirm Password:

Please supply your details:

Sex:

Age:

Ethnic Origin:

Employment details:

Hobbies and interests:

Marital history:

Will you be supplying a photo?

Find a friend service: Are you interested in our 'find a friend' service for mature pen pals?

Click here when you are ready to register

“Terms Of Use” and “Data Protection Declaration” must form part of the contract between the SNS provider and the user. Only in this case the legal terms by the SNS provider in both electronic documents will be binding for the user.

The SNS provider needs to be in a position where it can prove that both documents, the Terms of Use and the Data Protection Declaration, became a part of the contract when both parties concluded the agreement about the free use of greydate.com by the user. To achieve this, the user who registers needs to actively accept both terms individually by a click on a button.

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FIND A FRIEND

Our database also contains many individuals who are just looking for a mature pen friend for companionship.

Click below to see our database of your potential penfriends

SEE OUR DATABASE

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HOME Page

FIND A FRIEND:

All users shall have the possibility to access the database of greydate.com about individuals who might like to have a pen friend. The provider needs to obtain an approval for this from the persons who are included in its data base. The approval needs to be granted based on an informed consent, therefore, the provider needs to inform about that service in its Data Protection Declaration.

The necessary approval can be granted by the individual user as part of the Terms of Use and/or of the Data Protection Declaration. To achieve this, therefore, to become a part of the agreement, it is necessary that the user have access to those documents and thereafter accepts both documents by making a “click”.

MAKE A DATE:

“Fab at 50+, Sexy at 60+, Super at 70+ etc. can be seen as a joke but also as a compliance issue because the “best ager generation” might be indirectly discriminated by these jokes.

The information about the age plus a sexual comment might be considered to be sensitive data, therefore, “specific personal data”. The provider needs to obtain the expressed approval by the user to make that data, including “jokes”, accessible for third parties. That expressed approval needs to qualify as an informed consent in order that her/his data is made accessible to other users under a category like “naughty at 90+”.

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MAKE A DATE

Please enter the details of your perfect Greydate.com partner:

Sex: Male Female

Age:

Ethnic Origin:

Employment details:

Hobbies and interests:

Do you want to see a photograph? yes no

Click here when ready to make a date

Home Page

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TELL US ABOUT YOUR DATE

Share your dating experiences:
Log in to our chat room using your registration
username and password

Chat away

username

Home Page

TELL US ABOUT YOUR DATE:

The operator offers a chat room for its users. Users are to chat about their experiences, thinking etc. related to dates with, e.g., other users of greydate.com. It is obvious that such chats have the potential for all sorts of violations of personal rights or even criminal law. As the operator knows about this risk from the very beginning of the offering of chat channel as a service, the operator must actively supervise the chats and comments and avoid violations and criminal acts in its chat room. The operator might have to do so 24 hours/day, 7 days/week, 365 days/year. It is not sufficient if the provider only starts to act when the operator has been informed about a violation etc. by, e.g., a victim. If the provider does not do so, the operator will incur a high risk of being held liable itself.

LINKS TO SITES OF INTEREST:

The provider needs to be aware about making use from foreign trade marks.

To set a link only does not create a liability except if the provider makes the content of the linked site as a part of its own content due to specific circumstances. This is subject to case law.



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LINKS TO SITES OF INTEREST

ABOUT US	Lingerie *	
REGISTRATION	Younger Brides	find-a-sugardaddy.com
FIND A FRIEND	Flowers *	
MAKE A DATE	Magazines	silverfox.co.uk
TELL US ABOUT YOUR DATE	Wine and Champagne *	
LINKS	Pre-prepared food *	
PRESS RELEASES / INVESTORS	Games	games-channel.co.uk
HOME	News *	sky.com/news
	Insurance & Finance	lifeandfinance.co.uk
	Health Products	healthprods.co.uk

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Home Page

PRIVACY POLICY:

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PRIVACY POLICY

Your privacy is of paramount importance to us and you can rest assured that we will take every step to make sure that your privacy is respected and that any personal information you pass to us will not be revealed to anyone else. At any time, you can ask us to let you know what information we hold about you

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The law requires that the user be informed about the collection, processing and use, as well as the transmission of personal data at the beginning of a visit of a user on a website, § 13 sub-para 1 TMG. It is not sufficient if a privacy policy is only accessible when the user already clicks through the sites.

The “privacy policy” does not have any description of the purpose, type and scope of use of the personal data, § 13 sub-para 1 TMG.

The provider does not provide any information with respect to sensitive, and therefore, specific personal data which it wishes to collect, §§ 28 sub-para 6, 4a sub-para 3 BDSG.

Also, the provider does not inform about the legal entities to which it wishes to transmit personal data of the user as announced by the provider in its “Legal Stuff”.

Also, no information is provided that personal data might also be transferred to companies and countries outside the European Union.

The user does not receive the information that the user has a right to withdraw her/his approval at any time.

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Your privacy is of paramount importance to us and you can rest assured that we will take every step to make sure that your privacy is respected and that any personal information you pass to us will not be revealed to anyone else. At any time, you can ask us to let you know what information we hold about you

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Also, no information is provided from whom the user can receive details as to what personal data of the user is stored.

Information is also missing about the use of cookies.

Information is missing about the use of cookies. Probably, greydate.com will have a user profiling for advertisement purposes. No such information is provided.

Finally, most providers use analysing tools such as Google Analytics. No such information is provided.

LEGAL STUFF:

Please, see the related pages in “Basic Principles about collecting.....Personal Data”, “About Us”, and “Registration”.

It is a high risk that the Terms of Use and the Privacy Policy of the provider will not form part of the contract between the provider and the user because the SNS provider cannot prove that the user has accepted the T&C.

A contract may not be modified without the approval by the other party; therefore, the provider needs to obtain a confirmation by the user if the provider wishes to charge fees for its services.

An exclusion of liability is invalid if a liability for a guarantee, for intent, gross negligence, and for substantial contractual obligations is to be excluded in T&C, §§ 307, 309 BGB (German Civil Code).

The SNS provider may be liable if it allows, for example, that stolen content is published or personal rights are violated in a chat room and the provider did not install an effective system to avoid this.

Any modified form of T&C needs to be approved by the user; therefore, the user must be expressly informed and must have the possibility not to accept the modified T&C. If, as a consequence, the registration might be terminated by the provider, the provider must have a



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LEGAL STUFF

GREYDATE.COM TERMS AND CONDITIONS

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Greydate.com is offered on "as is/as available" basis and we exclude all liability for your use of Greydate.com.

Our dating services are published by us for your benefit, but we accept no responsibility for your use of them.

We reserve the right to change, amend, termination, suspend or delete our services or access of Greydate.com to you and can alter our Terms at any time. Therefore, you should regularly visit this section of the Site.

Greydate.com is published in the UK and English law is the law of this web site.

You are responsible for any material that you submit to us but we will remove any material that you post to the site and/or to terminate your membership with us and use of Greydate.com at any time.

We retain copyright of your profile and we can amend, change or delete your profile to comply with our responsibilities as a publisher.

Any personal data that you submit to us is subject to our privacy policy and by submitting your data, you allow us to process it on your behalf and to transfer it to other companies within our group and to third parties whose products and services will be of interest to you and who would wish to contact you direct.

If at any time you have any complaints in relation to the services which we offer, we will do our utmost to respond to your complaint, but we are the final arbiter.

Remember that Greydate.com is offered as a free service.

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Therefore, it is necessary to have a termination right for the provider in its T&C if a user does not accept modifications of the T&C in future.

There is a big legal question mark if a provider of an SNS may remove material of a user at any time. This will be a case-by-case decision.

There is a big legal question mark if a provider of an SNS may remove material of a user any time. This will be a case-by-case decision.

A right of the provider to terminate a contract in T&Cs without any reason, without any notice period, and without a chance to remedy any contractual breaches by the user, will be invalid as a "surprising" term but also because it contradicts basic principles of German contract law, §§ 305c, 307 sub-para 2 BGB.

Also, there is a legal question mark here, if a right to use a copyright of a user can be automatically transferred due to terms in T&Cs. This will be a case-by-case decision based on the characteristics of each case.



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A provider may not amend, change or delete personal data of the user in her/his profile. Due to the fact that these exists personal data, the approval by the individual user must be requested.

It is a matter of close legal research if Art. 6 Rom I Act might result in the legal consequence that certain legal protections of a consumer in her/his country of domicile cannot be excluded by a choice of jurisdiction. A potential user of greydate.com will be a consumer.

The data protection clause is without any legal value for the provider as explained above. Consequence: **THE OPERATOR HAS NO RIGHT TO COLLECT, PROCESS, USE, AND TRANSFER, PERSONAL DATA OF ITS USERS TO ANY THIRD PARTY, AND TO AMEND, CHANGE, DELETE ANY PERSONAL DATA AS FAR AS THE DATA DOES NOT ONLY COVER THE E-MAIL ADDRESS OF THE USER.**

“The right of making the last decision“ in T&Cs is invalid because it contradicts basic principles by the legislator regarding contracts.

A “free service“ does not decrease the level of various contractual obligations specifically related to data protection issues and liability.



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LEGAL STUFF

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These results of a legal due diligence of "greydate.com" for providing this SNS from Germany might be a "no-go" for any investor because it is nearly impossible to receive the necessary approvals by the users in a form requested by law ex post. A solution might be that the entrepreneur of that social network starts again with a new legal entity due to the missing legal compliance in the past and starts with a new user registration including valid T&Cs and lawful approvals by its users.

What seems to be difficult, therefore, to meet legal requirements, is possible with good planning, qualified information and – I'm honest – some patience.

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Dr. Oliver M. Habel

Oliver Habel specializes in corporate law and German and international commercial law, especially for the IT/e-commerce, mechanical engineering and plant construction, logistics and medical technology industries. An important part of his professional work consists of drafting and negotiating contracts for international trade, for example purchasing and licensing agreements, project and OEM contracts and R&D partnership agreements, especially for international contractual situations. The corporate law component of his work is growing, connected with company start-ups, setting up new branches and M&A. In court, Oliver Habel handles cases involving disputed IT projects, sales contracts and product liability law. His clients include national and international companies, as well as start-ups and private clients in the field of commerce. He spends almost half his time advising on international legal cases.

Oliver Habel passed both of the national law examinations in Munich, in 1983 and 1985. In 1987 he took a doctorate in the field of copyright and software protection. In 1980, 1984 and 1989 he worked for prolonged periods in the USA and Australia.

Areas of law: corporate law and German and international commercial law, IT, Internet and e-commerce law, product liability.

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