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Blockchain and the household exemption

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**Dennis Hillemann, lawyer, specialist lawyer for administrative law,
Partner at KPMG Law**



Dennis Hillemann

Partner

KPMG Law

Rechtsanwalts-gesellschaft mbH,
Hamburg

T +49 40 360994-5045

F +49 1802 11991-1670

M +49 151 50638412

dhillemann@kpmg-law.com

AT KPMG Law SINCE

2016

AREA OF RESPONSIBILITY

- KPMG Law, Public Sector Nord/information access law/legal matters relating to science and education

CERTIFICATIONS

- Lawyer (Admission 2006)
- Specialist lawyer for administrative law (2010)

BRANCH-SPECIFIC EXPERIENCE

- 13 Jahre of relevant professional experience in the public sector (administrative law, constitutional law, EU law)
- As head of KPMG solution „Legal Advice on complex administrative procedures“ main contact person for ministries, public authorities and public-sector companies especially with respect to developing new approaches to cooperations and their funding
- Involvement in the field of blockchain and law; collaboration on designing DIN-SPEC 4997: „privacy by blockchain design“ (Deutsches Institut für Normierung e.V.)
- Speaker at various events regarding blockchain technology (e.g. OECD Global Blockchain Policy Forum, EDV-Gerichtstag).
- Private podcast on blockchain-related issues: „The Blockchain Lawyer“, available on Apple Podcasts, Google Podcasts and Spotify

RECENT WORK

Federal Ministry:

- Continuous judicial representation in legal proceedings regarding administrative and constitutional law (especially UIG/IFG/media law).

Research facilities and universities:

- Continuous legal advice on all legal matters relating to science (especially on governance, IT, university legislation, appointments, technology transfer, cooperation agreement), counsel concerning subsidy law

LANGUAGES

- German (first language)
- Englisch (very good knowledge)
- French (good knowledge)



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Household exemption

Article 2(1),(2) GDPR: Material Scope

1. This Regulation applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system.
2. This Regulation does not apply to the processing of personal data:
 - a) in the course of an activity which falls outside the scope of Union law;
 - b) by the Member States when carrying out activities which fall within the scope of Chapter 2 of Title V of the TEU;
 - c) by a natural person in the course of a purely personal or household activity;**
 - d) by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.

The household exemption (Art. 2(2)(c) GDPR)

Art. 2(2) GDPR states exemptions from the **material scope** of the GDPR.

The GDPR...

...does not apply to the processing of personal data...

- ...by a natural person...
- ...in the course of a purely personal or household activity.



Further explanation:

- processing of data must not be related to any professional or economic activity
- any legal entities may not rely on the household exemption because they are unable by nature to pursue „personal or household“ activities

Activities privileged by the household exemption (examples)

- ✓ Private chats and emails
- ✓ Security cameras covering only the user's property (however, no exception when also covering public or third parties' ground at the same time)
- ✓ Keeping a private bank account from which alimony is wired to another account – even if wage payments are received on the same current account
- ✓ Sporadic sales of one's own second hand items on ebay
- ✓ private correspondence, private social networking (Recital 18 GDPR)

Data processing must serve **no other purposes** than purely personal or household activities. Even if the purpose of personal or household activities is predominating, any data processing serving other purposes prevents the household exemption from being applicable. For example, collecting data of both private and business contacts leads to GDPR rules being applicable, as well as using the list of phone numbers in one's smartphone for both private and professional activities.





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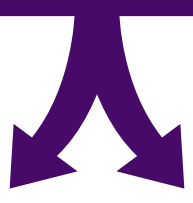
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Household exemption and blockchains

Blockchain and the household exemption

General problem: GDPR is built on the assumption of a centralised processing of data – blockchains process data in a decentralised way. Therefore, the application of the GDPR to blockchain-related situations raises many questions.

French data protection authority Commission Nationale de l'Informatique et des Libertés (CNIL) and European Parliamentary Research Service EPRS have come up with different answers to the question: **Can processing personal data by means of a blockchain fall under the household exemption of Art. 2 (2)(c) GDPR?**



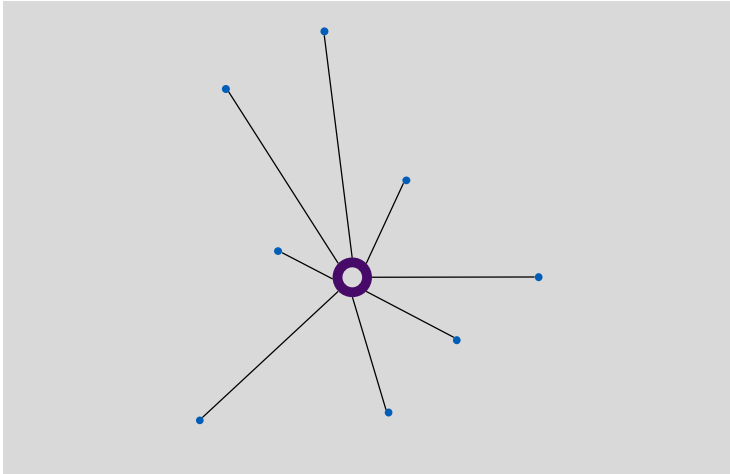
CNIL answers in the affirmative

Natural persons are able to enter personal data on the blockchain in a way not relating to a professional or commercial activity.

EPRS doubts it

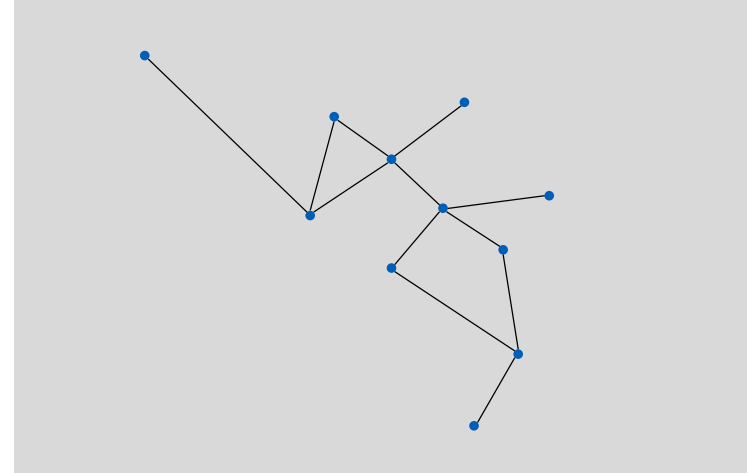
Even natural persons are unable to enter personal data on the blockchain under the household exemption due to those data made accessible to an indefinite number of people on the internet.

The CNIL's approach to relating blockchains to the GDPR legal terms



Based on the traditional idea of **centralised networks**, GDPR rules define legal obligations in relation to a subjects role in the network.

In a centralised network, there has to be someone determining the purposes and means of the processing of personal data – the **controller**, in terms of the GDPR. In a ramified but still centralised network, there might also be entities that process personal data on behalf of the controller without determining the purposes and means – the **processor**.



Following the rise of the blockchain, authorities are confronted with **decentralised networks** connecting many participants.

The CNIL approaches this task by examining if the participants of blockchains can be put in the legal categories of **controllers/processors**.

Blockchain participants and GDPR legal terms according to the CNIL

Participant

Can be a controller:

1. when the said participant is a natural person and the personal data processing operation is related to a professional or commercial activity (i.e. activities not strictly personal, e.g. if a notary records his client's property deed on a blockchain) or
2. when the said participant is a legal person who registers personal data in a blockchain (e.g. if a bank enters its clients' data onto a blockchain)

Miner

- Can't be a controller because they only validate transactions submitted by participants and are not involved in the object of these transactions; therefore, they don't define the purposes and the means of processing
- Could be seen as processors (following the controllers' instructions when checking whether the transaction meets technical criteria), but: the CNIL recognises the practical difficulties coming with this classification and announces an in-depth reflection on the matter

Smart contract developer

- Can be seen as a processor
- Regarding smart contracts, as for any software, the algorithm developer may simply be a solution provider or, when the said algorithm developer participates in the processing, may be qualified as a data processor or data controller depending on its role in determining the purposes of the processing.

Processing operations carried out by a group of entities for a common purpose

Option I: Identifying beforehand the data controller

CNIL recommends for the participants to take a joint decision on the data controller's responsibilities, thereby either

- Creating a legal person in the form of an association or economic interest group or
- Designating the participant who makes decisions for the group as the data controller

Option II: Not identifying a data controller

- As a result, all participants are likely to be considered joint controllers! Therefore, they would have to determine their respective responsibilities to ensure compliance with GDPR rules.

CNIL: Participation in a blockchain can also fall under the household exemption

CNIL: Are all actors involved in a blockchain data controllers?

While the CNIL guidance focuses on the legal obligations of controllers and processors, it unambiguously states that natural persons do not have to fear that every processing of data carried out on a blockchain by private means falls under the GDPR's material scope.

“Furthermore, natural persons who enter personal data on the blockchain that do not relate to a professional or commercial activity, are not data controllers (pursuant to the “purely personal or household activity” exclusion set out in Article 2 of the GDPR). **For example, a natural person who buys or sells Bitcoin, on his or her own behalf, is not a data controller.**”

But: The CNIL guidance does **neither further explain nor question** this statement, presumably taking the applicability of the household exemption for granted.

EPRS: Blockchain-related processing of data hardly falls under household exemption

EPRS generally stresses out that **“the notion of household activity has to be interpreted strictly”** according to the applicable ECJ (European Court of Justice) rulings.

The ECJ in “Bodil Lindquist” and subsequent rulings stated that in internet-related situations a household activity can’t be affirmed “with the processing of personal data consisting in publication on the internet so that those data are made accessible to an indefinite number of people.”



In the opinion of the EPRS this lead to a “second test relating to the scope of dissemination of personal data” being added to the household exemption beyond the legislative text.



As a result,

- private and/or permissioned blockchains are likely to occur in a commercial or professional context, thus falling short of the test set out in Art. 2(2)(c) GDPR regarding the nature of the activity
- public and permissionless blockchains may be used in the course of a purely personal or household activity, but they would nevertheless involve a scope of dissemination that can’t be controlled by the data subject
- Only a blockchain **both** private/permissioned and non-professional might be in accordance with the household exemption

Conclusions

1

The CNIL commendably is the first authority of an EU member country to propose solutions to the problems regarding blockchain technology and GDPR legislation.

2

Developers of smart contracts can't be considered as falling under the household exemption since they function as processors. Miners could also be regarded as processors (Art. 4 (8) GDPR) – on which there's no consensus yet.

3

It remains doubtful at least that the household exemption is applicable at all to the processing of data with means to a blockchain since the ECJ demands a restrictive interpretation of Art. 2(2)(c) GDPR: (1) both the nature of the activity and (2) the scope of dissemination of personal data have to be examined.

4

Therefore, it seems that the proposal of the CNIL offers an overly broad interpretation of the household exemption

5

If even data processing on blockchains in the course of personal activities implicates legal obligations pursuant to the GDPR – as the EPRS suggests –, the question must be raised of how (and, more importantly: if) these obligations can be legally enforced. This will cause practical questions nearly impossible to solve which might imply that the EPRS opinion is too strict. Solution: mutually agreed standards on national and international level, such as DIN-SPEC 4997 ("privacy by blockchain design").



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Thank you very much for your attention!

Dennis Hillemann

Partner, Public Sector

T +49 (0)40 360994-5045

dhillemann@kpmg-law.com

KPMG Law Rechtsanwaltsgesellschaft mbH

Ludwig-Erhard-Str. 11-17

20459 Hamburg