

## The New Federal Data Protection Act – Implementation of the GDPR in Germany



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### I-INTRODUCTION

Germany was the first Member State to pass a law on the implementation of the GDPR (Regulation (EU) 2016/679; in German: Datenschutz-Grundverordnung, DS-GVO or DSGVO)<sup>1</sup> and on the adaption of national data protection law. The new “Bundesdatenschutzgesetz” (BDSG, Federal Data Protection Act) was officially published in July 2017 and has come into force on May 25<sup>th</sup> 2018.

With 85 paragraphs, the new law is significantly longer than its predecessor which consisted of 48 paragraphs and a short annex. The reason for this is that the act does not only implement the GDPR, it also implements Directive (EU) 2016/680 (in German most commonly called Richtlinie für Justiz und Inneres, JI-Richtlinie).<sup>2</sup>

The new Federal Data Protection Act was introduced as Article 1 of the Act to adapt Data Protection Law to Regulation (EU) 2016/679 and to Implement Directive (EU) 2016/680 (Datenschutz-Anpassungs- und -Umsetzungsgesetz EU, DSAnpUG-EU, 30 June 2017).<sup>3</sup> Article 8 DSAnpUG-EU states that the previous Federal Data Protection Act<sup>4</sup> shall expire with the new, identically named act coming into force.

Articles 2 to 6 DSAnpUG-EU contain amendments to the Act Regulating the Cooperation between the Federation and the Federal States in Matters Relating to the Protection of the Constitution and on the Federal Office for the Protection of the Constitution (Bundesverfassungsschutzgesetz, BVerfSchG),<sup>5</sup> the Military Counterintelligence Service Act (Gesetz über den Militärischen Abschirmdienst,

MADG),<sup>6</sup> the Federal Intelligence Service Act (Bundesnachrichtendienstgesetz, BNDG),<sup>7</sup> the Act on Prerequisites and Procedures for Security Clearance Checks Undertaken by the Federal Government (Sicherheitsüberprüfungsgesetz, SÜG)<sup>8</sup> and the Act to restrict the Privacy of Correspondence, Posts and Telecommunications (Artikel 10-Gesetz, G 10)<sup>9</sup>.

Additionally, a number of federal laws were adapted to the GDPR by the Act to Amend the Federal War Victims Relief Act and Other Provisions (Gesetz zur Änderung des Bundesversorgungsgesetzes und anderer Vorschriften, 17 July 2017),<sup>10</sup> most notably provisions of the Social Security Code (Sozialgesetzbuch, SGB).

### II-DATA PROTECTION LAW IN GERMANY

Germany has a long and rich tradition when it comes to data protection law. The Hessian Data Protection Act of 1970<sup>11</sup> is recognized as the oldest formal data protection act worldwide. A Federal Data Protection Act was introduced in 1977.<sup>12</sup> In 1983, the German Federal Constitutional Court in Karlsruhe (Bundesverfassungsgericht, BVerfG) gave its landmark decision on the then planned census (Volkszählungsurteil, Census Decision).<sup>13</sup> The decision established a new unwritten fundamental right in the Federal Republic: the right to informational self-determination.<sup>14</sup> Its importance for the development of German data protection law cannot be overstated.

Karlsruhe ruled that any interference with the right to

1 Official Journal of the European Union L 119/1, 4 May 2016.

2 Official Journal of the European Union L 119/89, 4 May 2016.

3 Federal Law Gazette (BGBl.) 2017 I p. 2097. An English translation can be found here: [https://www.bvdnet.de/wp-content/uploads/2017/08/BMI\\_%C3%9Cbersetzung\\_DSAnpUG-EU\\_mit\\_BDSG-neu.pdf](https://www.bvdnet.de/wp-content/uploads/2017/08/BMI_%C3%9Cbersetzung_DSAnpUG-EU_mit_BDSG-neu.pdf).

4 Federal Law Gazette 2003 I p. 66.

5 Federal Law Gazette 1990 I p. 2954, 2970.

6 Federal Law Gazette 1990 I p. 2954, 2977.

7 Federal Law Gazette 1990 I p. 2954, 2979.

8 Federal Law Gazette 1994 I p. 867.

9 Federal Law Gazette 2001 I p. 1254, 2298; 2007 I p. 154.

10 Federal Law Gazette 2017 I p. 2541.

11 Law and Ordinance Gazette 1970 I p. 625.

12 Federal Law Gazette 1977 I p. 201.

13 BVerfGE (Decisions of the Federal Constitutional Court) 65, 1.

14 For further information on the decision see Hornung, G./ Schnabel, C., Data protection in Germany I: The population census decision and the right to informational self-determination, Computer Law & Security Report, Vol. 25, Iss. 1, 2009, pp. 84-88.

## IMPLEMENTATION OF THE GDPR IN GERMANY by, Dr. jur. Christian L. Geminn

informational self-determination must be based on a law that regulates the interference in an area specific and precise manner and that moreover regulates the lawful purpose as well as protective measures. This sparked the following development: The data protection law landscape in Germany has over time evolved and has become more and more complicated. All German states have their own data protection acts and there are provisions on data protection scattered all over sectoral German law, most notably perhaps in the Broadcast Media Act (Telemediengesetz, TMG)<sup>15</sup> and in the Telecommunications Act (Telekommunikationsgesetz, TKG)<sup>16</sup>. Adapting all of these provisions to the GDPR has proven to be a formidable task.

The federal structure of Germany means that beside the Federal Commissioner for Data Protection and Freedom of Information (Bundesbeauftragte für den Datenschutz und die Informationsfreiheit, BfDI) each German state (Länder) has its own data protection commissioner.

### III-THE NEW FEDERAL DATA PROTECTION ACT

#### A-Structure

The new Federal Data Protection Act is divided into four parts. Part 1 contains common provisions relevant to both the GDPR and Directive (EU) 2016/680 as well as the processing of personal data beyond the scope of the two (Section 1 to Section 21). It is structured in 6 chapters: scope and definitions; legal basis for processing personal data; data protection officers of public bodies; Federal Commissioner for Data Protection and Freedom of Information; representation on the European Data Protection Board, single contact point, cooperation among the federal supervisory authorities and those of the states concerning European Union matters; legal remedies.

Part 2 is concerned with implementing provisions for processing for purposes in accordance with Article 2 GDPR. Like part 1, it is structured in 6 chapters: legal basis for processing personal data; rights of the data subject; obligations of controllers and processors; supervisory authorities for data processing by private bodies; penalties; legal remedies.

Part 3 serves the implementation of Directive (EU) 2016/680. The seven chapter deal with: scope, definitions and general principles for processing

personal data; legal basis for processing personal data; rights of the data subject; obligations of controllers and processors; transfer of data to third countries and to international organizations; cooperation among supervisory authorities; liabilities and penalties.

Part 4 consists of only a single section. Its Section 85 is concerned with the processing of personal data in the context of activities outside the scope of the GDPR and Directive (EU) 2016/680.

#### B. Scope of the Act

The Act applies to the processing of personal data of both private bodies and public bodies of the Federation (Bund).<sup>17</sup> Public authorities of the states (Länder) are only governed by the Act where data protection is not governed by state law. Other federal data protection law generally takes precedence over the Act.

Article 1(5) BDSG clarifies that the provisions of the Act shall not apply where the GDPR directly applies. For now, the burden to perform that evaluation is left to those applying the law. They will have to operate under the assumption that the new act does not violate the GDPR.

The overall scope of the GDPR is widened by Section 1(8) BDSG which states that the GDPR and Parts 1 and 2 BDSG generally apply accordingly to the processing of personal data by public bodies in the context of activities outside the scope of the GDPR and Directive (EU) 2017/680.

#### C. Opening clauses and regulatory mandates of the GDPR

The margin for the national lawmakers left by the GDPR is heavily disputed. The GDPR itself talks about “specifications or restrictions of its rules by Member State law”.<sup>18</sup> German lawmakers have instead used the terms “Öffnungsklauseln” (opening clauses) and “Regelungsaufträge” (regulatory mandates) for classification.<sup>19</sup>

The regulatory mandates are ultimately meant to ensure the enforcement of the GDPR while opening

<sup>15</sup> Federal Law Gazette 2007 I p. 179.

<sup>16</sup> Federal Law Gazette 2004 I p. 1190.

<sup>17</sup> Section 1 BDSG.

<sup>18</sup> Recital 8 GDPR.

<sup>19</sup> BT-Drs. (Bundestag printed matter) 18/11325, p. 1. For a more detailed analysis see Roßnagel, A./Bile, T./Friedewald, M./Geminn, C./Grigorjew, O./Karaboga, M./Nebel, M., *National Implementation of the GDPR: Challenges, Approaches, Strategies* Policy Paper, January 2018.

## IMPLEMENTATION OF THE GDPR IN GERMANY by, Dr. jur. Christian L. Geminn

clauses allow for a deviation from the GDPR. An obvious example for a regulatory mandate is Article 51(3) GDPR which requires Member States with more than one supervisory authority like Germany to define the supervisory authority which is meant to represent those authorities in the European Data Protection Board. The corresponding provision in the new Federal Data Protection Act is Section 17 which tasks the Federal Commissioner with that responsibility.

The total number of regulatory mandates and options is at about 70.<sup>20</sup> The GDPR is therefore said to resemble in parts a Directive. The purpose behind this is to enable Member States to maintain their complex, proven and practiced regulatory regimes in certain areas of life and administration as long as the European Single Market is not affected directly (e.g. tax law and social security, press law and labor law).

### D. Areas of particular interest

#### 1) Data processing for employment-related purposes

The provisions in Section 26 BDSG on data processing for employment-related purposes correspond with those of Section 32 of the old Federal Data Protection Act. In a single norm, the German legislator has placed a framework based on the opening clause of Article 88(1) GDPR.<sup>21</sup> It is expected that Section 26 BDSG will be reformed in the years to come to create a more specific framework.<sup>22</sup> It is also possible that a separate act on employment-related data processing will be created. Time restrictions and the high sensitivity of the subject only allowed for a transfer of the existing framework from the old BDSG to the new one. Attempts to reform employment-related data processing have failed several times in the past.

#### 2) Video surveillance

The Act holds relatively detailed provisions on video surveillance of publicly accessible spaces in Section 4 BDSG. The provision is mostly identical with its predecessor in the old Federal Data Protection Act.<sup>23</sup> A major change of the old law was introduced in 2017 via the “Videoüberwachungsverbesserungsgesetz”

(Act on the Improvement of Video Surveillance).<sup>24</sup> The change was meant to facilitate video surveillance for instance in the context of public transportation and at other places where large numbers of people gather like sports stadiums.

It is questionable if Section 4 BDSG is compatible with the GDPR. The GDPR regulates the lawfulness of processing in Article 6 GDPR. Specifications by the Member States are only permissible according to Article 6(2) GDPR if the processing in question is based on Article 6(1)(1)(c) or (e) GDPR.

It has to be noted that Section 4 BDSG is a deviation from the technological neutrality of the GDPR. The German legislator felt it was necessary to address the specific risks of video surveillance rather than rely on the abstract provisions of the GDPR.

#### 3) Supervisory authorities

The provisions on the Federal Commissioner for Data Protection and Freedom of Information are found in Sections 8 to 16 BDSG. The Commissioner who is located in Bonn serves as supervisor for the public bodies of the Federation<sup>25</sup> with the exemption of federal courts acting in their judicial capacity<sup>26</sup> and represents Germany on the European Data Protection Board. Private bodies are supervised by the supervisory authorities of the states (Länder).<sup>27</sup>

The federal structure of Germany requires provisions on the cooperation between the many supervisory authorities of the Bund and the Länder. Such provisions can be found in Sections 18 and 19 BDSG. Clear responsibilities are of particular importance when it comes to handling complaints which play a pivotal role in the enforcement of the GDPR. According to Article 77(1) GDPR complaints can be lodged “with a supervisory authority, in particular in the Member State of his or her habitual residence, place of work or place of the alleged infringement”. Member States like Germany with multiple supervisory authorities are free to regulate which authority should be responsible. Section 19(2) BDSG states that in principle a complaint shall be forwarded by a supervisory authority which is not responsible according to Section 19(1) BDSG

20 BT-Drs. (Bundestag printed matter) 18/11325, p. 73.

21 For further details see Kort, M., Der Beschäftigtendatenschutz gem. § 26 BDSG-neu, ZD (2017) 319; Maier, N./Ossoinig, V., ‘Beschäftigtendatenschutz’ in Roßnagel, A. (ed), *Das neue Datenschutzrecht – Europäische Datenschutz-Grundverordnung und deutsche Datenschutzgesetze* (Nomos 2018) § 8 I.

22 BT-Drs. (Bundestag printed matter) 18/11325, p. 95; see also Coalition Agreement 2018, pp. 1837 et seq., 6108.

23 Section 6b of the old Act.

24 Federal Law Gazette 2017 I p. 968. Full title: Gesetz zur Änderung des Bundesdatenschutzgesetzes - Erhöhung der Sicherheit in öffentlich zugänglichen großflächigen Anlagen und im öffentlichen Personenverkehr durch optisch-elektronische Einrichtungen.

25 Section 9(1) BDSG.

26 Section 9(2) BDSG; Article 77 GDPR.

27 Section 40(1) BDSG.

## IMPLEMENTATION OF THE GPDR IN GERMANY by, Dr. jur. Christian L. Geminn

to the supervisory authority of a Land in which the controller or processor has an establishment.<sup>28</sup> If no such establishment exists, the addressee shall be the authority of the Land where the applicant resides.

A controversial<sup>29</sup> provision can be found in Section 29 BDSG. The investigatory powers of supervisory authorities according to Article 58(1)(e) and (f) GDPR shall not apply with regard to certain persons as far as exercising these powers would violate these persons' obligations to secrecy. A list of relevant persons can be found in Section 203(1), (2a) and (3) of the German Criminal Code and includes physicians, attorneys, psychologists, counsellors, social workers and other professions with special relationships of confidence with their clients.

### 4) Restrictions on the rights of the data subject

A significant part of the Act (Sections 32 to 37 BDSG) is devoted to restrictions on the rights of the data subject; ironically under the title "rights of the data subject".<sup>30</sup> The restrictions concern the information to be provided to the data subject (Sections 32 and 33 BDSG), the right of access (Section 34 BDSG), the right to erasure (Section 35 BDSG), the right to object (Section 36 BDSG) and automated individual decision-making (Section 37 BDSG). Additionally, Section 29 BDSG limits the rights of the data subject where secrecy obligations are involved.

The right to erasure<sup>31</sup> for instance shall not apply according to Section 35 BDSG if "in the case of non-automated data processing erasure would be impossible or would involve a disproportionate effort due to the specific mode of storage and if the data subject's interest in erasure can be regarded as minimal".

Another example is Article 37(1)(1) BDSG. The right "not to be subject to a decision based solely on automated processing"<sup>32</sup> shall not apply if the decision is made in the context of providing services pursuant to an insurance contract and the request of the data subject was fulfilled". This is a limited transfer of Section 6a(2) (1) of the old BDSG.

Some of the restrictions were scaled back and limited to analogue processing after an earlier draft of the Act<sup>33</sup> had come under fire because of the scope of the restrictions.

### 5) Data protection officers

Section 38 BDSG contains a transfer of Section 4f of the preceding act into the new act. This means that the requirements for private bodies to designate a data protection officer will go beyond those of the GDPR in Germany. Controller and processor shall designate a data protection officer if they constantly employ as a rule at least ten persons dealing with the automated processing of personal data. Under certain conditions, a data protection officer has to be designated regardless of the number of persons employed in processing.<sup>34</sup>

Data protection officers of public bodies are regulated in Sections 5 to 7 BDSG.

### 6) Representation of data subjects

According to Article 80 GDPR, data subjects shall have the right to mandate a not-for-profit body, organization or association to lodge a complaint on their behalf and to exercise the rights referred to in Articles 77 to 79 GDPR. Member States are free to decide whether or not to give such bodies the right to act independently of a data subject's mandate.<sup>35</sup>

The corresponding provision is not located in the BDSG, but in Section 2(2)(1)(11) UKlaG (Unterlassungsklagengesetz, Injunction Act). This provision was created as early as February 2016 and is limited to data processing in the context of advertising, market and opinion research, credit bureaus, the creation of personality and usage profiles, address trading, other forms of data trading and similar commercial purposes. Section 2(2)(1)(11) UKlaG thus falls short of the possible scope of Article 80(2) GDPR.

28 For details on the right to lodge a complaint see Geminn, C., 'Rechtsschutz für Betroffene' in Jandt, S./ Steidle, R. (eds), *Datenschutz im Internet* (Nomos 2018).

29 See for instance Schuler, K./Weichert, T., 'Beschränkung der Datenschutzkontrolle bei Berufsgeheimnisträgern nach § 29 Abs. 3 BDSG-neu ist grundrechtswidrig', 22.5.2017 <[https://www.netzwerk-datenschutzexpertise.de/sites/default/files/gut\\_2017\\_dskontrolleinschr\\_bds-g-neu\\_03.pdf](https://www.netzwerk-datenschutzexpertise.de/sites/default/files/gut_2017_dskontrolleinschr_bds-g-neu_03.pdf)>.

30 Title of Part 2, Chapter 2 BDSG.

31 Article 17 GDPR.

32 Article 22 GDPR.

33 For more information on the draft see Geminn, C., *Risikoadäquate Regelungen für das Internet der Dienste und Dinge? Die Neuerungen des Entwurfs für ein neues Bundesdatenschutzgesetz im Überblick*, DuD (2017) 295-299 (296-299).

34 Section 38(1)(2) BDSG: "If the controller or processor undertake processing subject to a data protection impact assessment pursuant to Article 35 of Regulation (EU) 2016/679, or if they commercially process personal data for the purpose of transfer, of anonymized transfer or for purposes of market or opinion research, they shall designate a data protection officer regardless of the number of persons employed in processing."

35 Article 80(2) GDPR.



## IMPLEMENTATION OF THE GDPR IN GERMANY by, *Dr. jur. Christian L. Geminn*

### 7) Processing of special categories of personal data

Section 22(1)(1) BDSG allows for the processing of special categories of personal data by both public and private bodies. The permissible processing relates to social security, medicine and public health. Section 22(2) BDSG states that “appropriate and specific measures shall be taken to safeguard the interests of the data subject” and lists a number of such measures.

### 8) Scoring

Section 31(1) BDSG on scoring is a continuation of Section 28b of the old BDSG; Section 31(2) BDSG on credit reports continues Section 28a of the old act. Section 31(1) BDSG only regulates scoring in the context of a contractual relationship with a natural person. Scoring is defined by the Act as “the use of a probability value for certain future action”.

### 9) Penal provisions and fines

Section 42 BDSG contains penal provisions which amend the GDPR in accordance with Recital 152 GDPR. Transferring “personal data of a large number of people which are not publicly accessible” to a third party or otherwise making them accessible for commercial purposes is punishable with imprisonment of up to three years or a fine.<sup>36</sup> Processing without authorization of fraudulently acquiring personal data in return for payment or with the intention of enriching oneself or someone else or harming someone is punishable with imprisonment of up to two years or a fine.<sup>37</sup> Both offences are only prosecuted if a complaint is filed by the data subject, the controller or a supervisory authority.

Section 43 BDSG sets up administrative offences with fines of up to 50.000 € for violations of Section 30 BDSG on consumer loans. Section 43(3) BDSG states that authorities and other public bodies shall not be subject to any administrative fines.

Other noteworthy provisions are Section 42(4) and 43(4) BDSG which state that a notification pursuant to Article 33 GDPR or a communication pursuant to Article 34(1) GDPR may only be used in criminal proceedings as well as in proceedings pursuant to the Administrative Offences Act against the person required to provide a notification or a communication if that person has given consent.

### IV-CONCLUSION

The new Act transposes many provisions from its predecessor. This softens the requirements for controllers when it comes to adapting to the new data protection regime at least somewhat.<sup>38</sup>

Whether or not certain provisions in Germany’s new law will hold out before the European Court of Justice will have to be seen. Some of the German supervisory authorities and data protection consultants are thus advising controllers not to utilize those national provisions that provide more leeway for processing of personal data.<sup>39</sup> For better or worse, Germany has deviated from the provisions of the GDPR by adjusting them. This runs contrarily to the goal of the GDPR to harmonize data protection law within the European Union and even beyond.

All in all, Germany has used the opening clauses contained in the GDPR in a rather one-sided manner.<sup>40</sup> The goal was to lift some of the burden that the GDPR has placed on the controller. This is particularly evident in the use of the opening clause of Article 23 GDPR to restrict the rights of the data subject.

The European Commission has already threatened to start an infringement procedure.<sup>41</sup> The Commission seems irritated by the German approach and its representatives have sought to clarify that the GDPR merely allows for “specifications” thus limiting the margin for Member States.

### V-OUTLOOK

Federal lawmakers are preparing an “omnibus law” to adjust more than 140 national laws containing data protection provisions to the GDPR. The majority of these adjustments will likely be of a formal nature to adapt the laws to the language used in the GDPR.

On the state level, similar adjustments are made to state laws. The complexity of German data protection law is thus likely to remain – none of the existing national law will be dispensed with completely. For the administrations of the German states, local data protection acts exist, for instance the Hessian Data Protection Act (Hessisches Datenschutzgesetz, HDSG<sup>42</sup>). These have also been reworked to become

<sup>36</sup> Section 42(1) BDSG.

<sup>37</sup> Section 42(2) BDSG.

<sup>38</sup> The legislator acknowledges this. See for instance BR-Drs. (Bundesrat printed matter) 110/17, p. 70.

<sup>39</sup> E.g. the supervisory authority of the state Baden-Württemberg.

<sup>40</sup> For further details see Roßnagel, A., Gesetzgebung im Rahmen der Datenschutz-Grundverordnung, DuD (2017) 277-281.

<sup>41</sup> <https://heise.de/-3689759>.

<sup>42</sup> For the draft of the adjusted act see LT-Drs. 19/5728.

## IMPLEMENTATION OF THE GPDR IN GERMANY by, *Dr. jur. Christian L. Geminn*

compatible with the GDPR. However, not all states were able to complete the legislative process before May 25<sup>th</sup>.

### ABBREVIATIONS

**BDSG**, Bundesdatenschutzgesetz

**BGBI.**, Bundesgesetzblatt

**BfDI**, Bundesbeauftragte für den Datenschutz und die Informationsfreiheit

**BNDG**, Bundesnachrichtendienstgesetz

**BR**, Bundesrat

**BT**, Bundestag

**BVerfG**, Bundesverfassungsgericht

**BVerfGE**, Entscheidungen des Bundesverfassungsgerichts

**BVerfSchG**, Bundesverfassungsschutzgesetz

**Drs.**, Drucksache

**DSAnpUG-EU**, Datenschutz-Anpassungs- und -Umsetzungsgesetz EU

**DuD**, Datenschutz und Datensicherheit

**G 10**, Artikel 10-Gesetz

**HDSG**, Hessisches Datenschutzgesetz

**LT**, Landtag

**MADG**, Gesetz über den Militärischen Abschirmdienst

**SÜG**, Sicherheitsüberprüfungsgesetz

**TKG**, Telekommunikationsgesetz

**TMG**, Telemediengesetz

**UKlaG**, Unterlassungsklagengesetz

**ZD**, Zeitschrift für Datenschutz