

# Client Alert

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## Germany Introduces Stricter Privacy Laws

On 10 July 2009, the second chamber (*Deutscher Bundesrat*) passed Amendment II (Data Trading) of the German Data Protection Act. A number of data protection scandals which occurred in Germany over the past year prompted and fueled the legislative process. In December last year, the original proposal by the German government caused widespread opposition by German industry leaders. At the same time, however, the German data protection authorities and consumer protection organizations lobbied extensively for an even stricter approach.

Amendment II will come into force on 1 September 2009. Earlier this year, the German parliament passed another amendment to the German Data Protection Act (Amendment I (Scoring)). It will come into force on 1 April 2010.

The following is a short description of the main changes implemented by both laws (Amendments 2009):

### Consent Requirement for Marketing Use

Amendment II introduces a general rule that the processing and use of personal data for marketing purposes requires consent. Under the old law, most cases of processing or use for marketing purposes have been justified under a balance of interest test. Data subjects only had the right to object at any time.

A number of exceptions mitigate the new consent requirement. The

processing or use of personal data for marketing purposes will still be allowed vis-à-vis (i) existing customers, (ii) consumers listed with their address in public directories, (iii) in the B2B area and (iv) for charitable purposes. Two further exemptions from the consent requirement cover situations in which the marketing communication discloses the source of the address. In case of data "transfer" for marketing purposes, the original source of the data has to be named. In case of "use" of the data for third party marketing, the controller of the data needs to be named.

Until 31 August 2012, the old balance of interest concept providing the right to use data for marketing purposes without consent will continue to apply to data already collected prior to 1 September 2009. It will, however, be necessary to implement the law from the outset, because new data is collected every day. In most cases it will not be feasible to distinguish between old and new data.

The changes require the review of data use for marketing purposes, the introduction of notifications in marketing communication and modifications to customer relationship management databases in order to ensure compliance.

### Data Protection Officers

The position of internal data protection officer will be strengthened. Under the current law, all medium or large size companies must already appoint a

"The revised privacy law forces companies in Germany to review their privacy compliance in many areas."

data protection officer in Germany, and the right of the company to withdraw such an appointment is limited. In addition to being protected against withdrawal, data protection officers in Germany will, in the future, enjoy comprehensive dismissal protection until one year after their appointment terminates. Furthermore, data protection officers will be legally entitled to take part in education programs to be paid for by the employer. Given the extended protection and rights, companies will have to very carefully consider their appointment of data protection officers.

## **Processing Principles**

The principles of data avoidance and data minimization (e.g. collecting only such data as are necessary to accomplish a task or retaining that data for no longer than the task requires) which are already part of the current law will, in the future, not only apply to the structuring of data processing systems but to any kind of processing or use of data. Furthermore, any feasible anonymization and pseudonymization must be applied, unless such measures lead to disproportional efforts. Compared to the current law, the burden of proof changes in this regard. Companies will have to verify compliance with such extended and strengthened principles.

## **Data Breach Notification**

Inspired by existing US legislation and ongoing discussions on a European level, the German legislation introduces an obligation to inform the data protection authorities as well as the data subjects about data breaches. This obligation will only be effective for certain categories of data (e.g. bank account data) and only in cases where the data subjects are subjected to a risk of "considerable impairment". In cases where the requirements for breach notification apply, companies may be faced with considerable costs. In order to prepare for such situations, companies will need to implement robust internal reporting systems for data breaches and extend them to all service providers

engaged in the processing of data. Due to the expected introduction of data breach notification obligations in many countries around the world, international corporations will have to develop global response plans in order to ensure compliance in a timely and organized manner when an incident occurs.

## **Market Research**

The processing or use of personal data for market and opinion research purposes will continue to be governed by the balance of interest test.

The parliament did not follow the government's original proposal to introduce a consent requirement for this area. Instead, the new law states that the data may only be used for the original research purpose for which the data were collected. In all other instances, processing or use of the data requires anonymization unless the data have been collected from a publicly accessible source or can be published in a legitimate way. The future conduct of market and opinion research and the use of data resulting from such activities will have to follow these rules. Market and opinion research with a view to using the collected personal data for marketing purposes will be limited in the future.

## **Employee Data**

Due to a number of recent employee data privacy scandals in Germany, Amendment II includes additional regulations concerning the protection of employee data. The new provision states the general principle that the processing or use of employee data for the purpose of entering, conducting or terminating an employment relationship is legitimate. In addition, the provision restricts the ability of companies from conducting criminal investigations against employees unless there exists a concrete suspicion with regard to the affected employee. Current law already limits an employer to conduct such investigations, but Amendment II introduces very strict additional requirements. This will hinder the types of investigations or audits customary in international corporations today and

increase the risk of fraud and other criminal offenses in the workplace. It may also lead to conflicting obligations, for example in cross-border government investigations or discovery procedures.

## Commissioned Processing

Agreements about the processing of data by service providers must, in the future, contain more detailed requirements designed to protect personal data. Amendment II sets out 10 minimum provisions to be included in outsourcing and other service agreements relating to the processing of personal data. The list includes the obligation to follow the instructions of the principal, the right to verify compliance with security requirements and a duty to inform about data breaches. Most of the requirements are customary in these types of agreements, but the detailed legal obligations will prompt companies to review existing agreements for compliance.

## Data Protection Authorities

The power of the data protection authorities to issue orders will be extended. In view of the legal uncertainties caused by the Amendments 2009, the new powers might have a considerable impact. In the future, the data protection authorities will be able to influence the interpretation of the law simply by issuing orders against companies concerning any compliance issue. Under the current legal framework, they can only issue orders to avert deficiencies with regard to technical and organizational measures.

## Credit Information Agencies and Scoring

Amendment I leads to a number of new regulations for credit information agencies. The new law sets out the circumstances under which companies can notify agencies about credit defaults. It also restricts internal or external credit scoring. This affects, in particular, the so-called geo-scoring which is conducted on the basis of micro-geographic data. Companies using credit scoring or working with credit information agencies must bring their procedures into compliance with the new requirements. Scoring for marketing purposes, however, is not governed by the new regulations as long as the marketing communication does not contain any direct and binding contractual offers.

In addition to Amendment II, the law implementing the Consumer Credit Directive (2008/48/EC) sets out new obligations to inform consumers, if credit agency information leads to the rejection of a credit.

## Sanctions

In the future, formal infringements of the German Data Protection Act may trigger monetary fines of up to €50.000 (formerly €25.000) and material infringement fines of up to €300.000 (formerly €250.000). In case the infringements lead to higher monetary gains for the infringing party, the fines can be increased accordingly.

### Timeline

<b>1 September 2009</b>	Amendment II comes into force
<b>1 April 2010</b>	Amendment I comes into force
<b>1 April 2010</b>	Amendment II provisions on extended sanctions and data retention for data transfers come into force
<b>10 June 2010</b>	Implementation of data protection provisions from Consumer Credit Directive come into force
<b>31 August 2010</b>	Amendment II provision on market research comes into force
<b>31 August 2012</b>	Amendment II provision on marketing use comes into force for data collected prior to 1 September 2009

If you have any questions about this *Client Alert*, please contact the author listed below or the Latham attorney with whom you normally consult:

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