

# Introduction to the proposed European Privacy Law Reform

- The German Perspective -

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Rechtsanwalt

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# Overview

Part 1: Reform Package

Part 2: Consequences for Germany

# PART 1

# REFORM PACKAGE

# Data Protection is a European issue



- European Data Protection Directive (95/46/EC)
- Article 29 Data Protection Working Party
- Recognition of adequacy of data protection (especially Switzerland, Safe Harbo(u)r in the USA)
- Recognition of Model Clauses
- ePrivacy Directive (2002/58/EC and 2009/136/EC)
- Agreements regarding airline passenger records and finance data
- European Charter of Fundamental Rights (Article 8)
- Treaty on the Functioning of the European Union (“TFEU”) (Article 16, 114)



# Process leading to the reform package

2002	Public consultation for the implementation of the European Data Protection Directive
2007	Communication from the Commission (COM (2007) 87) “on the follow-up of the Work Programme for better implementation of the Data Protection Directive”
2009	Review of the legal framework regarding data protection
2009	Public consultation
2010	Communication from the Commission (COM (2010) 609) “A comprehensive approach on personal data protection in the European Union”
2010	Public consultation
2011	Inter-service consultation regarding the draft reform package <ul style="list-style-type: none"><li>• General Data Protection Regulation</li><li>• Data Protection Directive regarding Police Co-operation and Judicial Co-operation in criminal matters</li></ul>
2012	First European Commission proposal

# Process leading to the Regulation

European Commission proposal  
dated 25 January 2012



First Reading  
Parliament and Council



Second Reading  
Parliament and Council

# Entry into force of the Regulation

- European Regulations are directly applicable
- No implementation into national law
- Provision contained in proposal (Article 91)
  - Entry into force on the twentieth day following that of its publication in the Official Journal of the European Union
  - Applicable two years from publication date

2016?

- Will national law become obsolete?





# The positive aspects of the reform

## European Commission Communication:

- Individuals will be put in control of their data
- Data protection rules adapted to digital internal market
  - Harmonization (EUR 2,3 billion savings through standardizing of divergent data protection rules)
  - Simplification (EUR 130 million savings through elimination of the requirement for general notification to the supervisory authority)
  - More independence for data protection supervisory authorities
  - One-Stop-Shop for data protection within the European Union
  - More efficient co-operation between data protection supervisory authorities
  - More consistent application of data protection law
- Sets global standards for data protection

# Does the patchwork of nations remain?

- National data protection supervisory authorities remain independent but will be governed more strictly by the European Commission concerning the application of data protection law
- Statutory obligations for data processing continue to be determined predominantly pursuant to national law
- Special areas of leeway with regard to implementation provided for in the General Data Protection Regulation
  - Rights of data subjects (Article 21) -> with exceptions
  - Press (Article 80) -> with exceptions
  - Health (Article 81) -> only stricter
  - Protection of employee data (Article 82) -> only stricter
  - Research purposes (Article 83) -> only stricter
  - Obligations of secrecy (Article 84) -> only stricter
  - Churches and religious associations (Article 85) -> only stricter
  - ePrivacy Directive (Article 89): implementation on a national level remains

# Further development of data protection

- European Data Protection Board (Article 64)
  - Composition
    - representatives of supervisory authorities of each Member State
    - representative of the European Data Protection Supervisor
    - European Commission shall have the right to participate in the activities and meetings
    - NO representation of national governments
    - NO representation of the industry
  - Advisory, investigative and reporting function
  - Expression of opinions
- Rights of the European Commission
  - 26 enabling provisions for “delegated acts”
    - > right to object for European Parliament and Council (Article 86)
  - 20 powers for “implementing acts”

**PART 2**  
**CONSEQUENCES FOR**  
**GERMANY**

# Definition of „personal data“

- The European Data Protection Directive 1995 protects data
  - concerning identified natural persons
  - concerning identifiable natural persons
  - also in business situations (B2B)
- Controversial debate regarding “identifiable”
  - IP-Addresses
  - Cookies (also difficult in the ePrivacy Directive)
  - Online Behavio(u)ral Advertising (OBA)
- Draft General Data Protection Regulation (Article 4 and Recitals 23 and 24)
  - Data subject identifiable by controller or third parties “by means reasonably likely to be used”
  - Online identifiers and IP addresses need not necessarily be considered as personal data in all circumstances

# New approaches to regulation

Article	Content
3	Extra-territorial effect
8	Processing of personal data of a child
17	Right to be forgotten and to erasure
18	Right to data portability
20	Restriction on profiling
23	Data protection by design and by default
24	Joint controllers
13, 26, 28, 29, 30, 33, 42, 44, 51, 77	Responsibilities and obligations of the processor
31, 32	Data breach notification
46-72	Supervision and new role of the European Commission
73-79	Remedies, Liability and Sanctions

# Restrictions for the use of personal data

- European Data Protection Directive 1995
  - No obligation to strictly specify purposes
  - Collection and use of data also for third party interests
- Draft General Data Protection Regulation (Article 6 para. 1 (f) and para. 4)
  - Balance of interest clause no longer allows the taking into account of third party interests (so far permitted by Section 29 para. 2 BDSG)
  - Obligation to strictly specify purposes cannot be overcome by balance of interest clause
  - A ban on commercial direct marketing without a declaration of consent has been deleted from earlier drafts. Instead, there is a right to object and obligation to inform
  - Restrictions for individuals under 18 years of age

# Requirements for a valid declaration of consent

- European Data Protection Directive 1995
  - Informed consent
  - No coercion
- Additional requirements in Germany
  - Must be in writing (= signature)
  - Highlighted
  - Limitations of general terms and conditions
- Draft General Data Protection Regulation (Article 7 and Recitals 25, 32)
  - Burden of proof is provided for
  - Explicit (“by ticking a box”)
  - Imbalance of power is not allowed
  - Withdrawal of consent is always possible



# Extended obligation of transparency

- European Data Protection Directive 1995
  - Identity of controller and obligation to specify purposes
  - If “necessary” also
    - categories of recipients
    - obligation to reply and consequences of refusal
    - existing rights of access and rectification
- Draft General Data Protection Regulation (Article 14 and 15 and Recitals 46, 48 and 51)
  - Retention period
  - Right of access, rectification or erasure
  - Right to lodge a complaint with a supervisory authority and their contact data
  - Intended data transfers to third countries
  - Obligation to make available data and consequences of refusal
  - Source from which the data originate

# Right to be forgotten

- European Data Protection Directive 1995
  - Deletion of data unlawfully retained
  - Right to object in case of overriding interest
  - Right to object against direct marketing
- Draft General Data Protection Regulation (Article 17 and Recital 53)
  - Deletion if
    - objection has been lodged and if there are no convincing and overriding reasons to the contrary (change in the burden of proof)
    - withdrawal of consent
  - Deletion from publicly accessible sources
  - Exceptions (especially statutory storage requirements)

# Right to data portability

- General right of access and erasure in the European Data Protection Directive 1995
- Similar in the German Data Protection Act (*Bundesdatenschutzgesetz*)
- Draft General Data Protection Regulation (Article 18 and Recital 55)
  - right to obtain a copy of the data in an electronic and structured format which is commonly used
  - right of the data subject to disclose personal data to third parties
  - the European Commission may specify the electronic formats

# Measures based on profiling

- Provision regarding “automated individual decisions” in the European Data Protection Directive 1995
  - Legal or material adverse effects
  - Based solely on automated processing of data
- Data Protection Amendments 2009 introduced additional special scheme regarding scoring
- No application to scoring for advertising purposes
- Draft General Data Protection Regulation (Article 20)
  - Solely automated processing
  - Produces legal effects for or significantly affects the individual
  - Evaluation, analysis or prediction
  - Limited number of exceptions only, therefore a declaration of consent will be necessary in many cases

# The role and responsibility of service providers

- European Data Protection Directive (Article 2 f and 17 para. 3)
  - Processor is not third party
  - Only on instruction from the controller
  - Technical and organizational measures
- Extension through Data Protection Amendments 2009
  - 10-point catalogue for the drawing up of contracts
  - Security audits must be recorded
- General Data Protection Regulation (Articles 13, 26, 28, 29, 30, 33, 42, 44, 51 and 77 and Recitals 62, 65 and 66)
  - Requirements for contractual regulations
  - More responsibilities for processor

# Limitations for third country data transfers

- European Data Protection Directive 1995
  - Only export to countries with “adequate protection” – white list
  - Approved methods of adequacy:
    - Safe Harbo(u)r
    - Model Clauses
    - Binding Corporate Rules
- General Data Protection Regulation (Chapter V)
  - Clear implementation of mechanism approved today
  - Safe Harbo(u)r is not listed – will it still be an option?
  - But: higher level of data protection inherent in the Regulation leads to higher requirements
  - Extra-territorial effect of the Regulation

# Additional bureaucratic duties

- Annulment of the policy of compulsory registration is not relevant for Germany
- Internal data protection officers are already required in Germany (pursuant to the Regulation, it is only compulsory for companies to appoint a DPO if they employ more than 250 persons)
- Additional requirements contained in the General Data Protection Regulation:
  - strategies and measures (Article 22)
  - detailed documentation (Article 28)
  - notification and communication of personal data breaches (Article 31 and 32)
  - further obligations regarding data protection impact assessment (Article 33)
  - prior authorization and prior consultation (Article 34)
  - extended rights of the data protection supervisory authorities (Article 45 through 54)

# Stricter Sanctions

Maximum penalty in % of global turnover	Offences include where a controller intentionally or negligently (Article 79):
0,5%	<ul style="list-style-type: none"><li>• does not respond promptly or not in the required format to data subjects</li><li>• charges a fee for the information</li></ul>
1%	<ul style="list-style-type: none"><li>• does not provide the information in a sufficiently transparent manner or does not comply with the right to erasure</li><li>• does not react to objections filed by data subjects</li><li>• does not or not sufficiently maintain the documentation</li></ul>
2%	<ul style="list-style-type: none"><li>• processes data without a legal basis</li><li>• does not comply with the rules for international data transfers</li><li>• does not adopt appropriate internal guidelines</li><li>• does not designate an EU representative</li></ul>