The new German Data Protection Act and its compatibility with the European Data Protection Directive

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A B S T R A C T

A substitution of the right to maintain mailing lists for marketing purposes (the so-called "list privilege") by a concept in requirements as proposed by the German Government for the amendment of the German Data Protection Act does not conform with European law. Making the use of relatively innocuous data like name and address for marketing purposes subject to the data subject's declaration of consent infringes upon the requirements of the European Data Protection Directive. The Directive allows for the use of personal data either on the basis of a data subject's declaration of consent or after a balancing of legally protected interests. Reducing this two-track model to a one-track model (based on the data subject's declaration of consent only) does not do justice to the idea of balancing of interests or freedom of communications and services which is a mandatory part of European law. The draft bill interferes drastically with the free movement of goods and services. A tightening of the opt-in requirements would be a severe burden for the German economy because it is impossible for businesses to distribute their goods and services without the help of marketing measures. The economic cycle would be hit at its weakest point, i.e. the link between businesses and consumers which is gaining more and more importance especially with a view to cross-border competition.

1. Introduction

German ministers agreed at the end of 2008 to update federal data protection laws for the digital age in the wake of scandals showing how easily personal details can be bought on the Internet. The government wants to make it illegal for data to be passed between firms without the permission of the person concerned. In future an individual's "express consent" would be needed to pass on any personal data for direct marketing purposes. The following text sets out to analyze whether the recent plans of the German Government to amend German federal data protection law (German Parliament Official Journal - BT-Drs. 16/2011, available at: http://dip21.bundestag.de/dip21/btd/16/161/161011.pdf) are in compliance with the requirements of the European Data Protection Directive (85/67/EC).

In the first part (1) the changes by the draft bill will be described. A presentation of the European Data Protection Directive is following (3). The first main part argues that balancing of legally protected interests is a mandatory requirement of European law. The second main part deals with the question whether the European Data Protection Directive statutes a minimum or maximum harmonization (5). The last part points out the implications of the draft bill (6).

2. The German Government's draft bill

In its draft bill, the German Government proposes to delete the so-called "list privilege" (governed by Section 28 Para. 3 Sentence 1 No. 3 German Federal Data Protection Act - Bundesdatenschutzgesetz, BDG) and to substitute it by a requirement for a declaration of consent. Similar rulings are only adopted in Slovenia, Slovakia and Hungary.1 The list privilege represents a balancing of legally protected interests under constitutional law between the data subject's privacy interests and the industry's interest in pursuing direct marketing with as little constraints as possible. This balancing of legally protected interests is viewed as a lawful extension of the requirements of the constitutional law also by data protection experts. Roßnagel, for example, explains that even though there existed no irrelevant data, the dimensions of the risk of misuse had to be assessed according to the data concerned.4 As long as the risk of misuse could be considered as low, it was justifiable to subordinate it to the general interest in information from a legal perspective.5

Pursuant to the new Section 28 Para. 3 of the draft bill, the processing or use of personal data for the purposes of address sales, marketing or market or opinion research shall only be lawful if the data concerned had declared his/her consent pursuant to Section 28 Para. 3a. In addition, the processing or use of personal data shall also be lawful if the data which are compiled in lists or otherwise combined as well as processed are restricted to marketing purposes regarding the controller's own offers or for the controller's own market or opinion research. In that case, Section 28 Para. 3a: "in future, the controller shall have to approach the data subject and convince him to declare his consent, e.g. by granting him advantages". The lawfulness of the data processing shall be based strictly on the data subject's declaration of consent.

3. The European Data Protection Directive


The reference to commercial advertising found in Recital 30 is of particular importance. Pursuant to this Recital, the Member States are allowed to specify the conditions "under which personal data may be disclosed to a third party for the purposes of marketing whether carried out commercially or by a charitable organisation or by any other association or foundation (...)". In Recital 3o, the Data Protection Directive explicitly restricts the Member States to the extent that they may only act "subject to the provisions allowing a data subject to object to the processing of data regarding him as well as without having to state his reasons". In addition, the Recital only refers to the conditions under which the data may be "disclosed" and not to any other procedure for use or the personal data for marketing purposes as the German Government rules in its draft bill.

Recital 71 specifies that the Data Protection Directive "does not stand in the way of a Member State's regulating marketing activities aimed at consumers residing in territory in so far as such regulation does not concern the protection of individuals with regard to the processing of personal data. Vice versa, it may be concluded that data protection issues related to commercial advertising shall be subject to the Data Protection Directive only and that Member States are not allowed to implement separate rulings on a national level.

The Data Protection Directive itself specifies a clear-cut mechanism for the legislature of data processing. Article 7 bases legitimacy on the declaration of consent just as well as on the realization of legitimate interests.10 Pursuant to this Article, the Member States shall only grant processing of personal data if the data subject has unambiguously given his/her consent (lit. a) or if the processing is necessary for the purposes of legitimate interests (lit. f), except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject.11 This mechanism derived from the BDG which also sees the legitimacy of any data processing activities based on a declaration of consent or


a comprehensive evaluation of the rights and interests of all parties concerned (see Sections 28, 29 BDSG). 7

The dualistic model of a legislation via declaration of consent and balancing of interests was meant to accommo-
date the concerns of the industry. The Federation of European Direct Marketing (FEDIM), in particular, had a strong influence on the relevant wording. 8 The balancing of legally protected interests has found entrance into nearly all data protection laws within the European Union. 9 In Spain, which is the only country using the model in a restricted version, the supervisory authorities apply the idea of a balancing of legally protected interests in their decision-making processes. 10 Only in Austria had the restriction of a balancing of legally protected interests when the Data Protection Directive was first implemented. This restriction was revoked, however, in one of the following amendments. A similar development could be seen in Austria.

Article 14 Sentence 1 stipulates that the Member States shall grant the data subject the right to object at any time on compelling legitimate grounds relating to his/her particular situation to the processing of data relating to him/her. The second option of the right to object explicitly refers to direct

marketing (Article 14 Sentence 1 lit. b) and is instantly remis-
sable of Section 28 Par. 3 BDSG. In both regulations, the use of data for marketing purposes is not linked to an explicit declaration of consent of the data subject but is regarded as principally lawful. 11 With regard to the implementation of the right to object, the Data Protection Directive explicitly grants the freedom of services to any form in which it has been used in various ways. In Denmark, Norway and Sweden, for example, legally mandatory Robinson lists were introduced for marketing purposes.

These requirements of the Data Protection Directive have found their way into further documents of the decision-makers in Brussels. Most notably, the Safe Harbor Privacy Principles provide for a mandatory choice for the data subject with regard to the disclosure of data to third parties and possible changes to the purposes of the data collection (opt-out). In addition, direct marketing is explicitly mentioned and the Principles grant the data subject the right to object to receiving further direct marketing material. 12

4. Balancing of legally protected interests as a mandatory requirement of European law

Pursuant to a decision by the European Court of Justice (ECJ) dated 20 May 2003, 13 the requirements of any European directive must always be seen as a view to the fundamental rights and freedoms which, according to pre-

vailing case law, belong to the set of general legal principles the ECJ, amongst others, has to adhere to. 14 In the following discussion it will be demonstrated that the balancing of a legally protected interests model specified in Article 7 lit. f of the Data Protection Directive is based on a concordance between the free movement of services on the one hand and data privacy, which is mandatory provided for by the Euro-

pean law, on the other. If this is correct, then the Member States cannot claim the right to unilaterally abolish the data protection model based on the balancing of interests in favor of a model based on the declaration of consent.

4.1. General legal principles

The general legal principles common to the legal systems of all Member States constitute legal matter which is on an equal level with the provisions on which has to be taken into account the question of whether a general legal principle is common to the legal systems of all Member States can be argued by anybody (Common law, civil law, their institutions, Common Market citizens), it is only the ECJ which can render a binding decision. The essential criteria are that the existence of the legal issue can be identified in the legal systems of the Member States, that its existence is recognized in the legal systems on a national level and that the primary Community law leaves room for its application.

The ECJ has, in the meantime, recognized various general legal principles, in particular also the principle of propor-
tionality. 15 The principle of proportionality throws into relief the difficult relationship between directive and the objectives of the Community. It must be possible to classify a directive as an adequate and necessary means to fulfill the duty to regulate. As such, a directive will only be acceptable from a European law perspective, if it is guaranteed that the fundamental interests are not seriously affected by differences in national rules applicable to the processing of personal data. Any such separate rules were giving to be eminently by the Data Protection Directive itself. It was true that the Member States had freedom in imple-
menting Directive 95/46. "However, there is nothing to suggest that the regime it provides for lacks predictability or is illiberal, as such, consistent with the general prin-
ciples of Community law and, in particular, to the funda-
mental rights protected by the Community legal order" (Cipress 846/89, and, it was, ‘rather, an aged and

7 For the German background of Article 7 see Simint, Die EU-Datenschutzrechtsordnung – Stilllegung oder Anreiz? Neue Juristische Woche-

9 Künler, European Data Protection Law, Oxford 2007, p. 245 at seq. with diagrams.
10 Künler, European Data Protection Law, Oxford 2007, p. 245, 246. For the introduction, see also Wurz, Handelskammer Datenschutz, Munich 2000, p. 27 at sec. 27.
14 ECJ, Decision 6 March 2001 – Case C-274/99, Compila-
16 Digest of the case 1971, 1161.
Community law, such as inter alia the principle of proportionality (Cypert 87). The Data Protection Directive takes account of this by not relying solely on the data subject’s declaration of consent. Member States may derogate from Article 7(1) of the Directive by allowing the handling of "legitimately protected interests may also lead to instances of use of personal data which are compliant with data protection law. One criterion for the balancing of legally protected interests would be the sensitivity of the data involved as well as the purpose of use. In the case of data of an objectively high sensitive character, balancing of legally protected interests will regularly give precedence to the data subject’s interests. This means that Art. 7(1) of the Directive could be an example for such sensitive data. In the case of data of an objectively low sensitive character, balancing of legally protected interests will lead to a forum for the free movement of services and the interests of the direct marketing businesses. Such data might be the name and the address of a person, if they are not e.g. in a debtor list. With respect to the implementation of a practical concordance between data protection and free movement of services, already the current BDSG has borne witness to the legal deliberations on a European as well as on a constitutional level. Where a government, however, strictly demands a declaration of consent for the processing or use of the most inconsequential data, the principle of balancing of legally protected interests may be lost and of the practical concordance essential infringed upon.29 A one-sided preferential treatment of the data subject’s privacy interests infringes upon the free movement of services and their realization pursuant to Art. 7(1) of the Directive.

In consequence, the combination of the declaration of consent and the balancing of interests models in Article 7 of the Directive is mandatory. It is not an autonomous element of the German law. Member States cannot simply make changes to the different models of legitimation of Article 7; doing this, they may easily be blamed for not accommodating the concordance required by the Directive in the data protection necessary pursuant to European law. This is especially true if they even demand an explicit declaration of consent for the processing of relatively inconsequential data like the data subject’s address.

5. Minimum or maximum harmonization?

Furthermore, it should be investigated as to whether the Data Protection Directive is not designed to be mandatory in itself and thus does not leave room for any individual plans of the German Government. European Directives often provide for a standard minimum harmonization, i.e. the Member States may exceed the requirements of the Directive. If the Data Protection Directive was a market harmonization tool, the Member States would be able to implement much tighter data privacy regulations. This would only be possible, however, as long as the objectives of the Directive were adhered to.

The distinctive feature here is that the Data Protection Directive pursuasively goes beyond the vague and often ill-defined notion of privacy to individuals and, pursuant to Para. 2, regulates that the Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons of legitimate interest. If one wants to say anything specific about the two objectives of the Data Protection Directive, thus, have contrary aims. More protection of privacy reasons at the same time a restriction of the free flow of personal data. As soon as this conflict collides with legislation procedures on the national level, the Member States have to accommodate and comply with the balancing of conflicting interests as dealt with in the Directive. Since European law adhered to Para. 1, the two objectives of the Directive are thus not in conflict. Since the Member States must not introduce any regulations deviating from the freedom provided by the Directive.

In the following, the freedom the Data Protection Directive provides for the Member States will be discussed. Pursuant to Article 7(1) of the Data Protection Directive, the Member States shall guarantee that any processing of data necessary for the realization of the legitimate interests is lawful as far as the data subject’s interests do not override them. In these cases, the Data Protection Directive has obviously decided against using the declarative consent as the sole criterion. Any such instance of data processing based on good faith (Recital 28) can be justified with just a personal interest. If one wants to regulate the processing requirement by relying solely on a declaration of consent, the restrictions for personal data will be further enhanced but the free flow of data pursuant to Article 1 Para. 2 will be restricted.

In the “Lindquist” decision, the ECJ has restricted the Member States’ scope for action. While it was true that Directive 95/46 allowed the Member States freedom in certain areas:

However, such possibilities must be made use of in the manner provided for by Directive 95/46 and in accordance with its objective of maintaining a balance between the free movement of personal data and the protection of private life. (Cypert 59).

The Member States are free, however, to deviate from the regulations of the Data Protection Directive within a certain scope. Here, in particular, Recital 9 of the Data Protection Directive comes into play:

(… whereas Member States will be left a margin for manoeuvre, which may, in the context of Implementation of the Directive, also be exercised by the business and social partners; whereas Member States will therefore be able to specify in their national law the general conditions governing the lawfulness of data processing. …)

This freedom was not granted unconditionally.30 There is clear reference to the regulations which can be found in the Data Protection Directive itself.31 The requirement in Articles 10, 11 Para. 1, 14 Sentence 1 lit. b, 17 Para. 3 or 19 Para. 1 of the Directive must be observed, unless it is not possible to “in particular”, that Data Protection Directive can only be understood as a minimum harmonization. There are similar references to be found in Article 14 Sentence 1 lit. b and Article 18 Para. 1 which explicitly exclude the possibility to use alternative methods of regulation.

Another important point is contained in Recital 30 pointing out that the conditions under which personal data may be disclosed to a third party for the purposes of marketing (…). This clause is read so that one understands that the Member States may use the freedom to find individual solutions for the issues related to address sales. The limits to any such regulations decreed on the national level, pursuant to Recital 30, are defined by the imperative to respect those provisions of the Data Protection Directive “allowing a data subject to object to the processing of data regarding him, at no cost and without having to state his reasons”. Any such provision only has reason if one also takes into account Article 7 lit. b pursuant to which data may also be disclosed after the balancing of legally protected interests. The reference to the data subject’s interest to object to the processing is crucial for cases where data may be disclosed on the basis of a balancing of legally protected interests and without prior declaration of consent.

For the rest, Recital 30 does not contain any legislation for a tightening of marketing law on the national level. Much rather, the English version of the Data Protection Directive makes it clear that the Member States ’may” specify the conditions under which personal data may be disclosed to a third party for the purposes of marketing” (italized by author). Member States are left with the "matter of a concrete and respective decision-refining, but not the creation of an "allied”. The Data Protection Directive itself defines the framework for a data flow for marketing purposes; within this mandatory framework, the Member States are free to detail and specify. Similarly the French version says "ils peuvent préciser les conditions".

This is equally true for the relevant clauses in Article 5 and Recital 22. Pursuant to Article 5 of the Data Protection Directive, it is up to the Member States to determine more precisely, “within the limits of the provisions of this Chapter”, the conditions under which the processing of personal data is lawful. Recital 22 states that the “Member States shall more precisely define in the laws they enact or when bringing into force the measures taken under this Directive the general circumstances in which there is compliance with the second sentence of the Recital explicitly contains the possibility to provide for special processing conditions for specific sectors and for the general public. The conditions under which the data subject’s interests take precedence.32 According to Simitus/Dammann, this provision only grants the possibility for the Member States “to specify the conditions under which personal data may be disclosed to a third party for the purposes of marketing”. (…). This point is also understood by the Directive. Since Article 18 Para. 1 with regard to the exact definition of the requirements for lawfulness” Thus, these regulations only exist “in accordance with the requirements of the Directive” (italized by author).32 The crucial point – as also underlined by Simitus/Dammann33 – is the principle laid down in Article 7 Para. 1 Sentence 1 that any processing must only occur in compliance with the require-ments of the Directive.

The freedom granted to the Member States, thus, can only be assumed to refer to the modalities and the arrangements within the system.34 A fundamental change of systems is of course not covered, however. The explicit opening clauses in Recitals 9 and 30 aside, the regulatory density of the Data Protection Directive is to be interpreted as maximum harmonization.35 This also follows from Recital 10 pursuant to which the approximation of the national laws must not result in any lessening of the protection they afford. Thus, the Data Protection Directive is to be considered as a harmonization “which is generally complete” as also the ECJ underlines in its “Lindquist” decision.36 In its “ORF” decision, the ECJ had also pointed out that member states may, without prejudice to the objective of approximating the national laws, regulations and administrative provisions in order to eliminate obstacles to the functioning of the internal market deriving precisely from disparities between national legislation that the Member States cannot deviate from the common framework any longer once harmonization has been reached.37

The Directive, thus, leaves Member States wide leeway, but the directives times require interpretation but still prohibit individual solutions on the national level. Ehmann/Hellrich, thus, rightly point out that the Directive only grants "margins for manoeuvre within strict limits” to the Member States.38 Article 7 lit. f of the Data Protection Directive contains the legal


32 Thus, it is also called a Framework Agreement; cf. Kopp, Tendenzen der Harmonisierung des Datenschutzrechts in Europa, Datenschutz und Datenspeicherung, 1995, p. 250 [v. 250].
35 EJC, Decision 6-12-2001 - Matter C-465/99, C-138/01 and C-139/01, Composition 2003-1-489 - ORF.

28 Cypert, Die Prinzipien des Datenschutzrechts und ihre Relevanz im geltenden Recht, Heidelberg 1994, p. 180 et seq
29 On this note, however, Kopp/Fitzenrath/Gerstek, Modernisierung des Datenschutzrechts, Gutachten im Auftrag des Bundeskanzleramtes, Berlin 2001, p. 77 et seq, the authors see a limit only in those cases where data processing in other Member States is affected.
30 Cf. also Breininger, Handelsblatt, München, Munich 2000, p. 170 et seq.
32 Cf. also Breininger, Handelsblatt, München, Munich 2000, p. 170 et seq.
33 Breininger, Abschreibung des Lohnsteuerprinzips - neue Erwerbstätigen und nicht Erwerbstätigen eines Gegeneffekts aus Änderung des Bundesdatenschutzgesetzes (BDG), Recht der Datenverarbeitung, 2008, p. 223 [v. 250].
basis for the general balancing of interests clause. It does not quote a specific margin for manoeuvre, though.\textsuperscript{50} Also important is the imperative laid down in Article 2 Para. 2 of the Data Protection Directive pursuant to which Member States shall neither restrict nor prohibit the free flow of personal data between Member States. Thus, individual solutions on the national level with cross-border impact are prohibited in any case.\textsuperscript{41} On the whole, the Member States' margin for manoeuvre is limited by the fundamental freedoms contained in the EC Treaty.\textsuperscript{52} Thus, there is no room for any lawful single-handed attempt by the German Government to regulate direct marketing.

6. Implications of the German Government’s draft bill

This regulatory approach of the German Government’s draft bill is, however, contrary to the requirements of the European Data Protection Directive. Article 7 lit. f of the Data Protection Directive provides for a balancing of legally protected interests model as an alternative to the declaration of consent model. A general “opt-in” regulation as proposed by the German Government is not contained in the Data Protection Directive in such form. A separate German solution would have fatal repercussions on the internal market which usually is structured trans-nationally. For the rest, the balancing of legally protected interests model is a mandatory regulation under European law. It is based on the idea that the fundamental law of informational self-determination needs to be brought into concordance with the needs of the industry pursuant to European law, respecting especially the protection of the free movement of services and the principle of proportionality. This concordance demands that the requirement for a declaration of consent shall be waived if the data subject’s legitimate interests are only marginally impaired and that the use of data shall be allowed after a balancing of legally protected interests pursuant to Article 7 lit. f. This result which is mandatory pursuant to European law, is correctly reflected in the Data Protection Directive; any solo attempt to regulate direct marketing on the national level as proposed by the current German draft bill would be contrary to the principle of concordance and proportionality and, thus, unlawful under European law.

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\textsuperscript{40} Wuerenzel, Handelshemmnisse Datenschutz, Munich 2000, p. 170, marginal note 657.
\textsuperscript{41} Cf. also Roßnagel/Pfennig/Gazdzik, Modernisierung des Datenschutzrechts. Gutachten im Auftrag des Bundesministeriums der Justiz, Berlin 2001, p. 78.

Data retention in the UK: Pragmatic and proportionate, or a step too far?

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A B S T R A C T

On 6 April 2009 new legislation came into force, for the first time putting Internet service providers’ duty to retain significant amounts of data (relating to customers’ email and internet usage) on a compulsory, as opposed to a voluntary footing. It is a topic which has provoked intense protest from the privacy lobby and fuelled months of “Big Brother” headlines in the press. For the industry it raises operational challenges – how to facilitate storage and retrieval of colossal amounts of data. In this article we consider the policy background to the regime, the detail of the UK implementation and the practical implications for communications service providers. We weigh up the privacy and human rights concerns against the business case put forward by the Government. We also examine the Government’s proposals – announced at the end of April – to significantly extend and “future proof” this regime in the form of its Interception Modernisation Programme.

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1. Policy background

1.1. The rationale for data retention: “the difference between life and death”\textsuperscript{2}

The Government’s case for systematic retention of communications data, reiterated in various policy documents over the past few years, is that such information is a vital tool in counter terrorism and serious crime investigations, because it allows investigators to identify suspects, examine their contacts, establish relationships between conspirators, and place them in a specific location at a certain time” and to “draw up a detailed profile of the suspect(s) either to inform prevention/detriment operations or for use as corroborative evidence in a prosecution”.\textsuperscript{3} In its latest policy document, the Government has gone even further, stating that such information “can mean the difference between life and death”.\textsuperscript{2}

Communications data is the “who”, “when” and “where” of a phone call or Internet communication, as distinct from the message content, which is governed by separate legislation.\textsuperscript{4} As communications technologies have advanced and diversified, the pool of evidence potentially available to investigators has grown – and so has the Government’s desire to access it. Developments in UK policy during 2008 fuelled much press speculation about the advent of an Orwellian surveillance state.

1.2. Data retention in the UK – a brief history

Of course, the use of communications data for intelligence and counter terrorism purposes is not new. By late 2000, a regime for the lawful acquisition and disclosure of such data was already on the statute book, in the form of the Regulation of Investigatory Powers Act 2000 ("RIPA"). At this point, it is worth highlighting the distinction between data retention –