

Flexibility for national legislation in the draft Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)

Germany refers to the proposal of the Danish Delegation on Flexibility for national legislation from July 7th 2014. As Denmark annotated the Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data provides that Member States shall determine more precisely the conditions under which the processing of personal data is lawful (Article 5). Furthermore the recitals provide that a margin of manoeuvre for Member States will be left, enabling Member States to specify in their national law the general conditions governing the lawfulness of data processing (recital 9). Moreover recital 22 clearly states that Member States - independently of general rules - can provide for special processing conditions for specific sectors and for the processing of special categories of data.

Like Denmark Germany has utilized the margin of manoeuvre which the Directive provides for Member States. Therefore there are a number of areas of German national law as well that in some way prescribe rules on some aspects of processing of personal data.

In conjunction with the general and horizontal law on data protection implementing the 95-Directive¹, Germany - like Denmark - has several sector specific laws in areas that need a more detailed/precise/specific regulation, in Germany e.g. processing of personal data by public authorities, in the health care sector, in the taxation and in the employment context. for purposes of social security or for scientific purposes. These national laws ensure a high level of protection of the fundamental rights and freedoms, notably the right to privacy. It is important for Germany as well that these sector specific laws can be upheld and that the possibility to introduce new sector specific laws is also upheld. It is therefore important also for Germany that the draft Regulation more clearly states that there remains a margin of manoeuvre for Member States - and that there is flexibility for the national legislator to uphold or to adopt national legislation on processing of personal data in these specific sectors and for special categories of data.

The processing of personal data, for example in the area of taxation, education, social security, in the employment context, archives, the health-care sector or scientific research, as well as for police prevention of threats to public security and order (which do not constitute crimes and are therefore not covered by the draft Directive), is not comparable to data processing by Facebook, Google or other companies in general. The Regulation therefore contains provisions leaving the further regulation of data processing up to the Member States (e.g. Art. 6 (3), Art. 21 (1)) as well as specific provisions for certain processing sectors (e.g. archives, the health-care sector, social security, scientific research, statistics, the employment context). Chapter IX also already contains provisions delegating to the Member States the further regulation of the processing of personal data in such specific processing situations and the processing of special categories of data.

With regard to the research sector, the Regulation in general should pay sufficient attention to the special conditions within the framework of research. The special provision in Chapter IX already makes this clear. In addition, Articles 83 to 83c and the provisions referring to them must work together consistently. Further revisions to other research-related provisions are necessary for them to do so.

If no further provisions for the specific processing sectors can be made at EU level, or at least not within the General Data Protection Regulation, the Member States must have a sufficient margin of manoeuvre in terms of quantity and quality to continue to ensure an appropriate level of protection in accordance with the special nature of these specific sectors.

¹ Federal Data Protection Act (BDSG) of 22 May 2001 (incl. subsequent changes) and corresponding acts of the Länder in Germany.

Like Denmark Germany recognizes that some margin of manoeuvre is already provided for in the draft Regulation. Germany as well especially recognizes Article 6 (3), Article 9 (2) (a) and (g), Chapter DC and recital 36 which are crucial to this end and a good basis for further work. There is indeed the need for further clarification.

To improve this approach for more flexibility for national legislation governing the lawfulness of data processing by public authorities and in the employment and health and social care context, Germany supports the proposals of the DNK-Delegation and puts forward the following²:

(The proposals are based on the Presidency text in 17831/13. New text is marked in **bold**. Text to be deleted is ~~crossed-out~~.)

8a) However in conjunction with the general and horizontal law on data protection implementing the Directive 95/46/EC, Member States have specified in their national law the general conditions governing the lawfulness of data processing applicable in particular to the processing of personal data necessary for the performance of a task carried out in the public interest or in the exercise of a public authority. These national laws provide for a more specific or stricter regulation of the processing of personal data. This Regulation shall therefore not prevent the Member States from upholding or from introducing specific national law in regard to data processing by public authorities, in the taxation, employment and health and social care context.

8b) Where Art. 2 (2a) does not prevent the Member States from upholding or adopting specific provisions addressing the special circumstances in the public sector, in the taxation, employment and health and social care context of the Member States, it shall be assumed that research conducted by universities or other institutions fully or partly sponsored by the government is not covered by this provision. Art. 2 para 2a shall not affect the specific provisions for scientific and other purposes laid down in Chapter IX.

35a) This Regulation provides for general rules on data protection. Therefore Member States are also provided with a margin of manoeuvre to lay down specific national laws on data protection applicable to the processing necessary for the performance carried out in the public interest or in the exercise of official authority vested in the controller. Thus, the Regulation does not exclude Member State law that defines the circumstances of specific processing situations, including determining more precisely the conditions under which processing of personal data is lawful. National law may also provide for special processing conditions for these specific sectors and for the processing of special categories of data.

36) Where processing is carried out in compliance with a legal obligation to which the controller is subject or where processing is necessary for the performance of a task carried out in the public interest or in the exercise of an official authority, the processing should have a (...) basis in Union law or in the national law of a Member State. (...). It should be also for Union or national law to determine at least the purpose of the processing. Furthermore, this (...) basis could, ~~within the limits of this Regulation,~~ **specify the general conditions governing the lawfulness of data processing**, determine specifications for determining the controller, the type of data which are subject to the processing, the data subjects concerned, the entities to which the data may be disclosed, the purpose limitations, the storage period and other measures to ensure lawful and fair processing. It should also be for Union or national law to determine whether the controller performing a task carried out in the public interest or in the exercise of official authority should be a public authority or another natural or legal person governed by public law, or by private law such as a professional association, where grounds of public interest so justify including for health purposes, such as public health and social protection and the management of health care services.

² Only the relevant recitals and paragraphs are referenced.

Article 2

2a. This Regulation shall not prevent the Member States from providing for a higher level of protection or more specific regulations in their national law applicable to the processing of personal data by public authorities exercising their powers in the public interest and to data processing in the taxation, employment and health and social care context.

Article 6

3. The basis for the processing referred to in points (c) and (e) of paragraph 1 must be provided for in:

(a) Union law, or

(b) national law of the Member State to which the controller is subject.

The **conditions for lawful** processing shall be determined in this legal basis or as regards the processing referred to in point (e) of paragraph 1, be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. ~~Within the limits of this Regulation, This legal basis may specify inter alia the general conditions governing the lawfulness of data processing, the controller, the processor, processing operations and processing procedures, including measures to ensure lawful and fair processing, may be specified in this legal basis.~~

Chapter IX-XI

The proposals above are without prejudice to Chapter IX, where specific rules and margins for manoeuvre for Member States and Union law are provided. With regard to specific data processing situations such as archiving purposes, for health-related purposes, for purposes of social protection, in the employment context, processing of genetic data and in the area of education and jurisdiction etc., additional amendments in Chapter IX are needed. Germany refers to its comments on Chapter IX from January 15th 2014 pointing out that the proposals therein as well need to be complemented. Furthermore, increased flexibility for national legislation by this proposal has to be reflected in the final provisions.