

GERMAN LAW NEWSFLASH – May 2018

Dear Reader,

This Newsflash will highlight the General Data Protection Regulation (GDPR) which has entered into force on 25th of May 2018. In addition to material changes which are fundamentally known to everyone, we will also focus on the broader socio-economic changes of the GDPR.

We hope to meet your interest. As usual any remarks and feedback are always welcome.

Best regards,

Thomas & Team

GDPR – Beginning of a new economic understanding of data?

How it used to be

During the last two decades internet monopolists such as Google, Facebook and Amazon have recognized their position as an intermediary with access to a large amount of information that may eventually be able to recreate the identity of a person. These intermediaries know the effects of their influence and have already altered their algorithms, by decreasing its perfection regarding its results so that consumers are not too frightened by what may be possible. As a consequence most people gave away their data to different services with maybe realizing the character of exchange between service and data, but ignoring the possible consequences. Thus the transparency regarding the use of data has been kept to a minimum level. Somehow a vicious circle.

What is new

The GDPR which has been construed in mid-2016 may change or may already have changed the level of understanding regarding data and its usage. This can be seen especially in Germany where data protection has



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played an important role since 1990, a time where important data protection laws became effective. Now with the GDPR many of these regulations are simply put on a European level. So the changes faced by many in Germany may not be as significant as the Regulation may sound at the moment. What is however significant with the GDPR is the amount of payable damages, which may be up to 4 % of the yearly turnover of a company and equally the burden of proof which is placed on the defendant of a possible data breach claim. Hereby, we see a great risk for companies as to damages resulting from missing data protection. This may be one reason why e.g. trainings on GDPR-compliance are booked out for months although most companies should already have been GDPR-compliant as the German data protection rule of law for years.

Significant under the new Regulation is also the introduction of a prohibition of coupling (*"Kopplungsverbot"*). It is especially directed towards social networks and prohibits to link the consent of end users to actions that have no connection to the very service. As a result companies such as Facebook cannot refer to the consent of the user given during his/her registration to use his/her data for advertisement purposes. Still the precise meaning and range of the prohibition of coupling are part of a greater legal debate.

The idea behind this is to limit the monopoly-like position of such online services and thereby hinder possible misuse. The importance of that has just recently been highlighted by the scandal surrounding Facebook and Cambridge Analytica.

What does it mean for the future

The new GDPR-rules are expected to lead to a greater compliance and awareness regarding data and its usage. Thus national authorities will have the right to demand high damages regarding data breaches. This may be comparable to the U.S. concept of punitive damages.

There may be the risk that specialized law firms dig for failures regarding new data protection compliance systems of relevant companies, just to offer possible claimants (such as employees) the option to sue. This would not be the goal behind the GDPR. Its overall goal is rather to create greater awareness for data protection as a social value and not the

reduction of data protection to a pure formality.

Especially the prohibition of coupling highlights that. It is expected to lead to a greater transparency regarding the actual service offered by an online service provider in exchange for the consent of the user. Additionally, it may offer what has been demanded for years: the option to declare the contract which is the basis for the usage of online services not only to be a one sided contract but one which is based upon exchange of data and service. This may open up for a whole new economic sector of data protection, where the pure exchange of data is limited or even hindered through the greater option to pay for services. As people seem to realize the impacts of giving away endless amounts of data, the interest in protection may grow rapidly. The risk that services are created which are only affordable for people with higher income seems low as e.g. the monthly turnover that facebook generates per user and per month is not more than 5 €.

Still the prohibition of coupling may also be understood on a different level towards the idea, that data is not purely an issue of private identity. From the end the prohibition of coupling limits the range of the individuals consent wherefore the misuse of data monopolies is hindered. Data and its protection may now be more seen as a common good (such as electricity or water supply) which is not for the individual to distribute or for private monopolies to own.

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