

## Introduction

Germany passed its new Federal Data Protection Act (*Datenschutz-Anpassungs- und -Umsetzungsgesetz EU*, the Act) on 30 June 2017. The Act implements the European General Data Protection Regulation (GDPR) and will enter into force on 25 May 2018. It will replace the former German Data Protection Act (BDSG), which has been in force for nearly four decades. Although the Act is only a supplement to the GDPR, it includes various additional provisions that need to be followed: the appointment of Data Protection Officers (DPOs); employee data protection; sensitive personal data; the rights of data subjects; the change of the purpose of processing; video surveillance; fines and sanctions; creditworthiness and scoring.

As an EU regulation, the GDPR will be directly applicable and prevail over the Act. The new Act will be the principal legal act for adapting the strongly differentiated German data protection law to the GDPR. More specific national legal acts will also be passed for areas such as personal data in the context of registration, tax or health. The data protection laws of the German Federal States (*Bundesländer*) will also be adapted.

The Act is long and complicated – it contains 85 sections, compared to the old BDSG, which contained 48. In addition, it will always need to be read in relation to the GDPR.

## Some Notable Provisions

**Data Protection Officer (DPO)** – As far as the appointment of DPOs is concerned, the Act provides for a wider scope than the GDPR. Companies doing business in Germany and engaging at least 10 persons in the field of automated processing will need to appoint a DPO. In cases of automated processing in the course of business for either (1) the purpose of a transfer, (2) for the purpose of an anonymized transfer or (3) for the purpose of market or opinion research, a DPO must be appointed regardless of the number of persons employed for the automated processing of personal data. The same applies when personal data is processed that is subject to a data protection impact assessment. In case of a mandatory appointment of a DPO, an employee who serves as a DPO is protected against dismissal for one year after the appointment ends, except for extraordinary termination reasons.

**Employee data** – The Act will require written employee consent for the processing of employee data, unless special circumstances justify either oral or electronic consent. Consent in the employment context is only required for exceptional cases where the data processing is not justified by executing the employment contract, such as the publishing of a photo of an employee in a marketing brochure. Furthermore, existing works agreements may need to be amended to conform to the new legislation.

**Data subjects rights** – The new rights of data subjects introduced by the GDPR, such as the rights to rectification, erasure or data portability, have largely been replicated by the Act. However, the right to access personal data has been restricted in cases where the personal data is only stored on the basis that statutory retention provisions prohibit its deletion, or the personal data is solely kept for security or control reasons. In both cases, the data may not be used for any other purpose, and the right of access is further restricted where accessing the data would require an unreasonable effort.

**Processing special categories of personal data** – The processing of special categories of personal data is permissible without consent of the data subject – subject to the fulfillment of certain other preconditions – to the extent it is required for reasons relating to social security, healthcare, employment and for certain public interests. Staff that handle special categories of personal data must be subject to confidentiality agreements and be aware of the risks associated with the processing of special categories of personal data.

## Recommendations

Companies need to carefully observe the practice of the German courts and supervisory authorities in this area. However, it still remains to be seen whether the European Court of Justice will deem all the provisions of the BDSG to be compatible with EU law.

## Contact



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