

# *New Data Protection Laws Adopted in Germany*

Reports by Dr. Ulrich Wuermeling LL.M. and Daniel Widstrand

**O**n 11th May 2001, the Upper House of the German Parliament (Bundesrat) finally adopted amendments to the Federal Data Protection Act and a number of sector specific data protection provisions. This legislation implements the European Union Data Protection Directive which was adopted in October 1998.

The new German laws may come into effect by July 2001. As a consequence of the long delay, the European Commission had initiated proceedings at the European Court of Justice.

The amendments to the data protection laws impose new prohibitions, duties and organisational measures on companies. The protection of personal data will be strengthened through numerous specific technology-related provisions, not covered by the EU Data Protection Directive. Companies are now required to inform data subjects about chip cards, surveillance and direct marketing.

## **CHIP CARDS, SURVEILLANCE AND DIRECT MARKETING**

The Parliamentary Internal Affairs Committee introduced these amendments. During the preparation of the bill, a similar recommendation by the Minister of Interior was dismissed, due to pressure from lobbyists in the banking sector, but in the Lower House of the German Parliament this opposition was unsuccessful.

The amendments require companies to take steps to inform data subjects about the function of chip cards and must be given the opportunity to access, free of charge, equipment that gives information on data processed or stored on a chip card. The communication of personal data between equipment and chip cards has to be

clearly recognisable by the consumer.

Surveillance cameras in public areas will be permitted only when individuals have a right to not have their images captured in this way. The data subject has to be informed about video surveillance. There are additional responsibilities when storing video surveillance images related to identified or identifiable individuals. These rules also apply to other machines, such as Automatic Teller Machines storing the data together with cardholders' bank account numbers.

In the case of direct marketing and the use of personal data, there are additional duties for companies. Consumers have to be informed about their right to object to such use. As a result, the direct marketing industry expects increased expenditure for their marketing campaigns.

## **STRICTER SANCTIONS**

An extension of sanctions will ensure stricter enforcement of the Federal Data Protection Act. Companies will be liable for violations when they cannot prove that they have acted with due care. New sanctions enable supervisory authorities to impose fines on companies violating these restrictions of up to DM 500,000 (£150,000). Until these new regulations, the supervisory authority only had an advisory role in fundamental legal matters.

## **NEW DEMANDS ON DATA PROTECTION OFFICERS**

The amendments will extend the responsibilities of compulsory internal company data protection officers. Processing operations likely to present specific risks to the rights and freedoms of data subjects will be examined in advance of the processing taking place. This will therefore place increased demands on data protection officers.

## **TRANSBORDER DATA FLOWS FACILITATED BETWEEN EU COUNTRIES**

One of the changes based on the EU Data Protection Directive is the prohibition of transfer of data to third countries. The US poses particular difficulties, where in most areas of the economy, no adequate level of data protection exists. Despite the "Safe Harbour Privacy Principles", US companies appear to be sceptical, and the new US Government has urged the European Commission to come up with a more practical approach regarding standard contractual clauses.

The amendments favour cross-border flows of personal data between Member Countries of the European Union. The transfer of data from Munich to Athens should not be more restricted than a transfer of data from Munich to Hamburg. It should now be less complicated for

companies to outsource or set up computer centres within the EU.

#### **NEW LAW EXCEEDS MINIMUM EU STANDARD**

The new German data protection law goes beyond the minimum standards set by the EU Data Protection Directive. This means that companies within Germany have to comply with a number of restrictions not imposed anywhere else in the European Union. Due to the abolition of borders within the European Union, many companies in Germany process data in neighbouring countries. One reason for this approach may be the tough German data protection regulations for telecommunication and Internet providers. Even the draft EU

Data Protection Directive on Electronic Communications will not match the German approach, and will in any event take some time to come into effect. The final decision on a common position of the European Council is expected in June 2001, and the second reading in the Parliament may be delayed further.

Before the final vote on the amended federal data protection laws, the German government has already announced the proposal of a general redraft of the German data protection laws. A consolidation of the existing data protection laws will make the law more transparent for the public. However, the time frame for such a redraft is uncertain.



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## Commissioner advocates new employee legislation

The German Federal Data Protection Commissioner, Dr Joachim Jacob, has called for the adoption of employee data protection laws. He hopes that data protection legislation will take into account both technological developments and the changing legal environment.

The recommendations were contained in Dr. Jacob's latest report to Federal Parliament, on April 5th 2001.

Although Germany is known to be at the forefront of data protection, the Commissioner is displeased by widespread carelessness and deficiencies. He is particularly distressed by industry's lack of interest in informing consumers about data protection affairs. In his view the telecommunications sector has proven that a product of the same quality and price has a competitive advantage and is more lucrative if industry handles its customer relations correctly from a data protective perspective.

The Commissioner considers that self-regulation, ie. sectoral codes of conduct will play an important role in the future. The law allows regulations that would be binding on the respective companies worldwide. The legislators hope that through the codes of conduct, international companies would help to export democratic ideas in areas where international political agreements are hard to reach.

#### **Regulating e-Commerce**

The Commissioner is concerned about companies using customers' e-commerce purchases in ways other than customers have been promised. From a legal perspective the transferring of purchase related information about the data subject such as name, address and the product

description is legal, because the data falls under the less strict general Federal Data Protection Act (Bundesdatenschutzgesetz) and not under the stricter Teleservices Data Protection Act (Teledienststedatenschutzgesetz) for Internet services. The Commissioner proposes a data protection audit which would help to increase certainty and secure trust in e-commerce. He further believes that the law should set out harsh sanctions and clearly establish that "anyone who processes personal data in a different manner than he has promised, is acting illegally."

The Commissioner urged the Federal Parliament to implement the EU Data Protection Directive and to pass new legislation in areas such as labour law where the only existing guidelines are to be found in court rulings (which do not provide sufficient certainty.) The Commissioner is seeking an Employment Data Protection Act, to meet the need for rules on handling employee data.

Another essential demand is for a legal requirement restricting the publication of pictures taken in secret if the publication is not authorised by the individual, and constitutes an invasion of an individual's privacy. The Commissioner also requests a ban on unauthorised genetic testing.

*The Commissioner's Report 99/00 is now available.  
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