



Employees of the Saxon Data Protection Commissioner accessing the premises of a controller in 2016

Implementation of GDPR and control mechanisms of data protection institutions in Germany

Mr. Bernhard Bannasch

Deputy Saxon Data Protection Commissioner, Head of Division





Implementation of GDPR in Germany



Implementation of GDPR and control mechanisms of DPAs in Germany

- **Federal State**
- **1 Federation**
- **16 States (f. i. Saxony, capital Dresden, 4,14 million inhabitants (LV 1,9 million), population density 227/km² (LV 30/km²))**
- **1 federal data protection commissioner**
- **17 state commissioners (2 in Bavaria)**
- **Always two levels: federal and state, different competencies**





- **GDPR = Regulation: generally and directly applicable in each MS (article 288(2) of TFEU), in force as of today, 00.00 h**
- **Aim: full harmonisation of data protection in the EU**
- MS did not always adhere to Directive 95/46/EC, cf. ECJ C-468/10 (ASNEF); C-469/10 (FECEMD).
- Since 1995 many changes occurred in economic life, in particular with regard to economic activities in the www („eCommerce“)
- Implementation took place in some MS only in an unsatisfactory manner, cf. Ireland, where the DPA was never able to assert himself against facebook Ltd.
- No consistent level of data protection within the EU, furthermore differences which hindered the free flow of data in the single market (cf. Rec. 13 of GDPR), fragmented data protection „landscape“.
- **From today, MS legislation has only complementary function.**
- **MS legislation fills in regulatory choices allowed for MS in respect of those issues where full harmonisation was not intended.**



- GDPR = Regulation: generally and directly applicable in each MS (article 288(2) of TFEU), in force as of today, 00.00 h
- Numerous opening clauses, to be :
 - i. a. Article 6(2,3) **with regard to the public sector** (Art. 6 Abs. 1 lit. c und e): factually national legislation = **gateway to national data processing provisions in the public sector.**
- Furthermore, Chapter IX (Articles 85-91) „Provisions relating to specific processing situations“ = **left to the national legislator.**
 - f. i. press legislation, freedom of information, national identification number, processing in the context of employment, archive legislation, scientific and historical research purposes or statistical purposes, churches and religious associations.



- **GDPR = Regulation: generally and directly applicable in each MS (article 288(2) of TFEU), in force as of to-day, 00.00 h**
- Concept of current data protection legislation stays essentially the same. GDPR builds upon Directive 95/46/EG.
- On the other hand, there are many new provisions which must be respected and taken into account, in particular with regard to the enormous extension of administrative fines (Article 83 of GDPR), concerns companies.
- Overall, the GDPR (and Directive 2016/680) are influenced by German data protection philosophy; main protagonists were German (f. i. members of the data protection division in the Commission, the rapporteur for the GDPR in the European Parliament, Mr. Jan Phillip Albrecht MEP).
- It remains to be seen to what extent the GDPR will factually be able to regulate the www, big data, privacy by default or -design or data transfers into (unsafe) third countries.
- **GDPR is, in my opinion, a remarkable piece of legislation, a huge progress.**



Adaptation to GDPR in Germany

- **Review of the whole legislation**
 - **On the federal level:**
 - „Contact group“ founded in early 2016, Berlin, representatives of each Federal Ministry
 - Lead role with the Federal Ministry of the Interior, which drafted the Federal (omnibus) Act on Adaptation to the GDPR and Implementation of Directive 2016/680
 - **On the state level (Saxony):**
 - „Interministerial working group“ founded in mid-2016, Dresden, representatives of each State Ministry
 - GDPR: Lead role with the Saxon Ministry of the Interior, which drafted the Saxon (omnibus) Act on Adaptation to the GDPR
 - JHA-Directive: Lead role with the Saxon Ministry of Justice which is currently still drafting a “Saxon Law to implement Directive (EU) 2016/680” (police, including police measures to avert dangers; prisons and similar institutions)



Let`s have a closer look on the federal level:

- (Omnibus) „Law on the Adaptation of Data Protection Legislation to Regulation (EU) 2016/679 and on Implementation of Directive 2016/680“ of 30 June 2017, came into force as of today, 00.00 h
- Only general data protection legislation (*Second* Law on Implementation, pertaining to the specific federal data protection legislation, f. i. social welfare legislation, registration legislation etc., is in preparation)

- Article 1: Federal Data Protection Law = general adaptation act
 - ❖ Part 1: Common provisions
 - ❖ Part 2: GDPR implementing provisions
 - ❖ Part 3: Provisions on data processing with regard to JHA-Directive
 - ❖ Part 4: Special provisions for processing outside GDPR and JHA-Directive
 - Article 2: Amendments to the Federal Law on Protection of the Constitution
 - Article 3: Amendments to the Law on Military Counterintelligence Service
 - Article 4: Amendments to the Law on Federal Intelligence Service
 - Article 5: Amendments to the Security Screening Act
 - Article 6: Amendments to the Law on Telecommunication Surveillance
 - Article 7: Amendments to the Federal Data Protection Law

- Article 8: Coming into force



Let`s have a closer look on the federal level:

- Article 1 (Federal Data Protection Law):
 - ❖ Part 1: Common provisions
 - Scope, Definitions
 - Processing by public institutions, Video surveillance
 - Appointment, Status, Tasks of DP Officials
 - The Federal Data Protection and Freedom of Information Commissioner
 - Representation in the European Data Protection Board, Cooperation of Federation and states with regard to the EU
 - Judicial remedies
 - ❖ Part 2: GDPR implementing provisions 2016/679
 - Processing of specific categories of personal data and processing for other purposes
 - Processing relating to specific processing situations
 - Rights of the data subject
 - Duties of the controller and processor
 - Supervisory authorities for non-public institutions
 - Sanctions
 - Judicial remedies



Let`s have a closer look on the federal level:

- ❖ Part 3: Provisions on data processing with regard to Directive 2016/680
 - Scope, definitions and general principles for the processing of personal data
 - Legal bases for processing personal data
 - Rights of the data subject
 - Duties of the controller and processor
 - Data transfer to third countries and international organisations
 - Cooperation of supervisory authorities
 - Liability and sanctions

- ❖ Part 4: Special provisions for processing outside GDPR and Directive 2016/680
 - Processing personal data in the framework of activities outside GDPR and Directive 2016/680



- Result, concerning private companies and much of the public sector:





- Result, concerning police, prosecution offices` and prison legislation:

JHA Directive

Federal Data
Protection Act,
Chapter 1 and

3

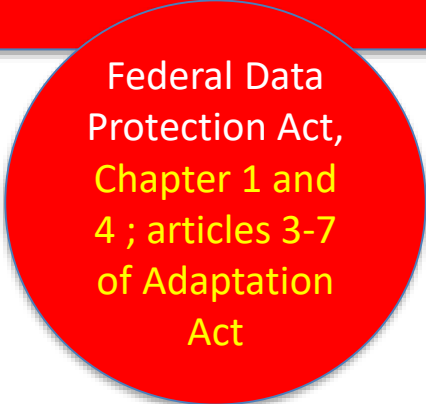
= General
provisions, as far
as not regulated
in specific acts



- Result, concerning the area outside GDPR and JHA-Directive (f. i. intelligence services):



GDPR



Federal Data
Protection Act,
Chapter 1 and
4 ; articles 3-7
of Adaptation
Act



Let`s have a closer look on the state level (Saxony):

- (Omnibus) Law on Adaptation of State Legislation to the GDPR of 26 April 2018, came into force as of today, 00.00 h
- Both general as well as specific data protection legislation (all in one)
- Article 1: Saxon Data Protection Implementation Act
 - Purpose, scope
 - Principles of data processing
 - Rights of the data subject
 - Specific data processing situations
 - The Saxon Data Protection Commissioner
 - Final provisions (administrative offences, transitional arrangements)
- Article 2: Amendments to the Law on Subsidiaries` Data Bases
- Article 3: Amendments to the Law on the Saxon Reconstruction Bank
- Article 4: Amendments to the Saxon Law on Private Media
- Article 5: Amendments to the Saxon Press Act
- Article 6: Amendments to the Saxon Law on Foundations
- Article 7: Amendments to the Saxon Stasi Commissioner Act
- Article 8: Amendments to the Saxon Law on Referendums
- Article 9: Amendments to the Saxon e-Government Act



Let`s have a closer look on the state level (Saxony):

- Article 10: Amendments to the Saxon e-Government Implementing Regulation
- Article 11: Amendments to the Saxon Civil Servants Act
- Article 12: Amendments to Saxon Disciplinary Law Article 13: Amendments to the Saxon Remuneration Act
- Article 14: Amendments to the Law on Public Health Service in the Free State of Saxony
- Article 15: Amendments to the Professional Code for Nursing Staff
- Article 16: Amendments to the Saxon Burial Law
- Article 17: Amendments to the Saxon Law on Cancer Screening
- Article 18: Amendments to the Saxon Hospital Act
- Article 19: Amendments to the Saxon Healing Professions Chamber Act
- Article 20: Amendments to the Saxon Midwife Act
- Article 21: Amendments to the Regulation on Healing Professions and Pharmacy
- Article 22: Amendments to the Saxon Regulation on the Hardship Commission
- Article 23: Amendments to the Saxon Refugee Admission Act
- Article 24: Amendments to the Law on Ethnic German re-Immigrants
- Article 25: Amendments to the Saxon Law on Archives
- Article 26: Amendments to the Saxon Law on Statistics
- Article 27: Amendments to the Saxon Law on Restaurants
- Article 28: Amendments to the Saxon Law on Architects



Let`s have a closer look on the state level (Saxony):

- Article 29: Amendments to the Saxon Law on Engineers
- Article 30: Amendments to the Saxon Law on Right to Access Environmental Information
- Article 31: Amendments to the Saxon Law on Waste Management and Soil Protection
- Article 32: Amendments to the Saxon Law on Schools
- Article 33: Amendments to the Saxon Regulation on Professional High Schools
- Article 34: Amendments to the Saxon Regulation on Professional Schools
- Article 35: Amendments to the Saxon Regulation on Basic Schools
- Article 36: Amendments to the Saxon Regulation on Technical Colleges
- Article 37: Amendments to the Saxon Regulation on Schools for Children with Learning Difficulties
- Article 38: Amendments to the Saxon Regulation on Specialized Secondary Schools
- Article 39: Amendments to the Saxon Regulation on Vocational Colleges
- Article 40: Amendments to the Saxon Regulation on Middle Schools
- Article 41: Amendments to the Saxon Regulation on Secondary School Baccalaureate
- Article 42: Amendments to the Saxon Law on Determination of Professional Qualification
- Article 43: Amendments to the Saxon Law on Care and Quality of Housing
- Article 44: Amendments to the Saxon Law on Freedom of Universities
- Article 45: Amendments to the Saxon Law on Blind Person`s Pensions
- Article 46: Amendments to the Saxon Data Protection Act
- Article 47: Coming into force, end of binding force



- Result on the state level:





- Result on the state level:

JHA Directive

Saxon Law on Implementation of JHA-Directive (still in preparation)

Art. 46: Saxon Data Protection Act, continued validity until 6/2019, with regard to JHA-Directive and national security sector

f. i. Saxon Law on Police

f. i. Saxon Law on Security Vetting

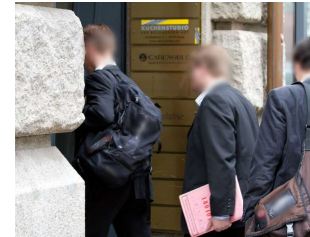


Control mechanisms of data protection institutions in Germany



Previous tasks of the Saxon Data Protection Commissioner (competent for all public and non-public institutions in Saxony; **from today onwards: not for the tax administration**)

1. **Random or prompted supervising of data processing,**



2. **Handling petitions (> 300 in the public, > 1,000 in the non-public sector/a)**

3. **Participation in legislation**



4. **Counselling of public and non-public institutions**

5. **Activity reports**





New powers, much more detailed, Article 58:

Investigative powers:

- (a) to order the controller and the processor ... to provide any information ...;
- (b) to carry out ... data protection audits;
- (c) to carry out a review on certifications issued pursuant to Article 42(7);
- (d) to notify the controller or the processor of an alleged infringement ...;
- (e) to obtain ... access to all personal data and to all information necessary ..;
- (f) to obtain access to any premises ..., including to any data processing equipment and means, in accordance with Union or Member State procedural law.



New powers, much more detailed, Article 58:

Corrective powers:

- (a) to issue warnings to a controller or processor ... ;
- (b) to issue reprimands to a controller or a processor ... ;
- (c) to order ... to comply with the data subject's requests to exercise his or her rights ...;
- (d) to order ... to bring processing operations into compliance with ... this Regulation, where appropriate, in a specified manner and within a specified period;
- (e) to order the controller to communicate a personal data breach to the data subject;
- (f) to impose a temporary or definitive limitation including a ban on processing;
- (g) to order the rectification or erasure ... or restriction of processing ... and the notification of such actions to recipients ... ;
- (h) to withdraw a certification ... ;
- (i) to impose an administrative fine pursuant to Article 83, in addition to, or instead of measures referred to in this paragraph, depending on the circumstances of each individual case;
- (j) to order the suspension of data flows to a recipient in a third country or to an international organisation.



New powers, much more detailed, Article 58:

Authorisation and advisory powers:

- (a) to advise the controller in accordance with the prior consultation procedure ... ;
- (b) to issue ... opinions to the national parliament, the Member State government or ... to other institutions and bodies as well as to the public ... ;
- (c) to authorise processing referred to in Article 36(5), ... ;
- (d) to issue an opinion and approve draft codes of conduct pursuant to Article 40(5);
- (e) to accredit certification bodies pursuant to Article 43;
- (f) to issue certifications and approve criteria of certification in accordance with Article 42(5);
- (g) to adopt standard data protection clauses ... ;
- (h) to authorise contractual clauses referred to in point (a) of Article 46(3);
- (i) to authorise administrative arrangements referred to in point (b) of Article 46(3);
- (j) to approve binding corporate rules pursuant to Article 47.



New conditions for imposing fines, much more detailed, Article 83:

(1) “effective, proportionate and dissuasive”

(2) “due regard shall be given to the nature, gravity and duration, the intention, any action taken by the controller, the degree of responsibility, any previous infringements, the degree of cooperation, the categories of personal data, the manner in which the infringement became known, the compliance with previous measures, adherence to approved codes of conduct, any other aggravating or mitigating factors”.

(3)(4) Fines up to 10 millions € or 2% resp. up to 20 millions or 4% of the total annual turnover.

(8) Exercise of these powers shall be subject to appropriate procedural safeguards.

German Federal Data Protection Law and **Saxon Data Protection Implementation Law**:
No fines against public bodies (but against single public servants).



**Thank you
for your
attention!**

Paldies!

Mr. Bernhard Bannasch
bernhard.bannasch@slt.sachsen.de

