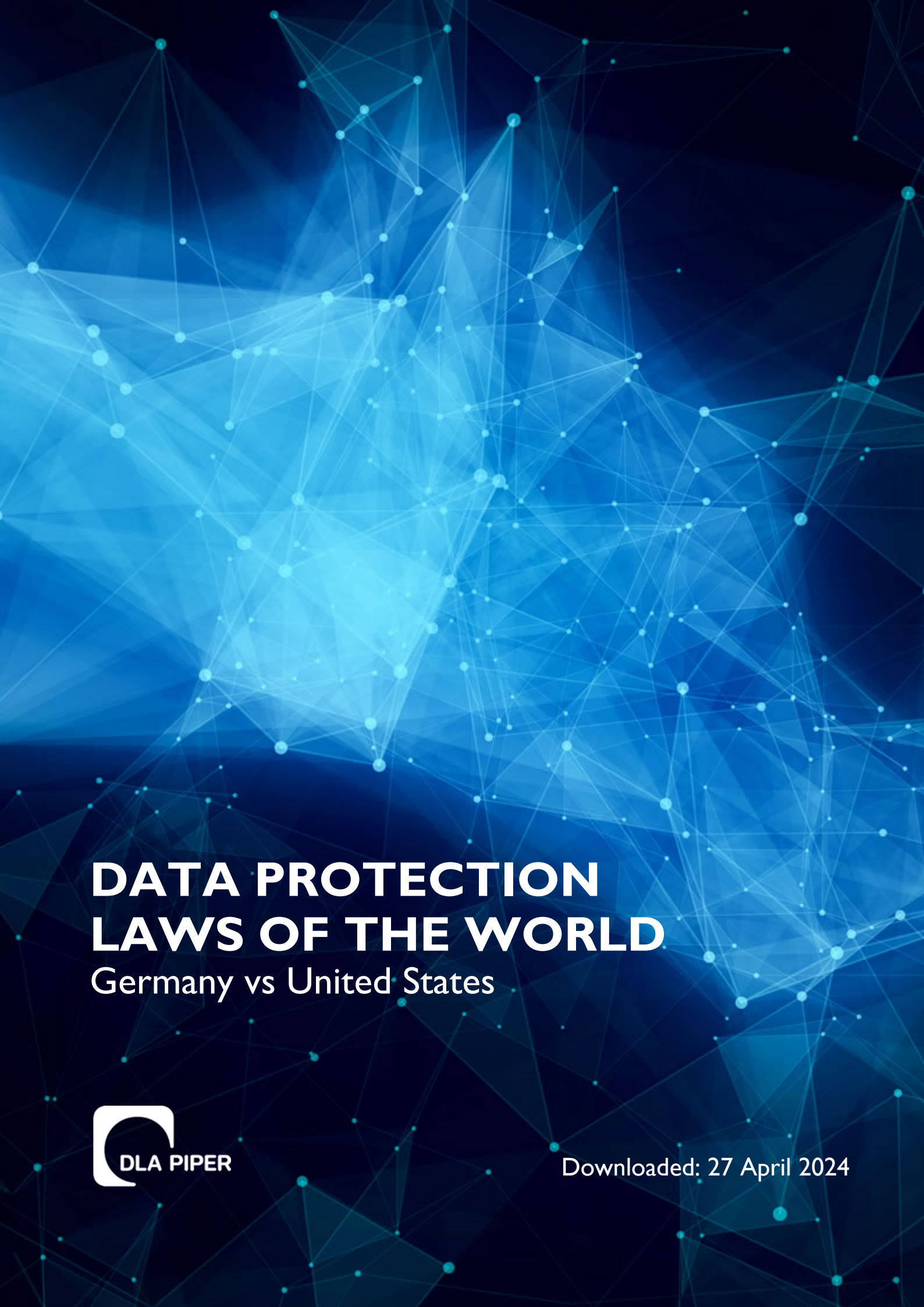

DATA PROTECTION LAWS OF THE WORLD

Germany vs United States

DLA PIPER

GERMANY

Last modified 19 January 2024

LAW

The General Data Protection Regulation (Regulation (EU) 2016/679) (**GDPR**) is a European Union law which entered into force in 2016 and, following a two-year transition period, became directly applicable law in all Member States of the European Union on May 25, 2018, without requiring implementation by the EU Member States through national law.

A 'Regulation' (unlike the Directive which it replaced) is directly applicable and has consistent effect in all Member States. However, there remain more than 50 areas covered by GDPR where Member States are permitted to legislate differently in their own domestic data protection laws, and there continues to be room for different interpretation and enforcement practices among the Member States.

Territorial Scope

Primarily, the application of the GDPR turns on whether an organization is established in the EU. An 'establishment' may take a wide variety of forms, and is not necessarily a legal entity registered in an EU Member State.

However, the GDPR also has extra-territorial effect. An organization that it is not established within the EU will still be subject to the GDPR if it processes personal data of data subjects who are in the Union where the processing activities are related "*to the offering of goods or services*" (Article 3(2)(a)) (no payment is required) to such data subjects in the EU or "*the monitoring of their behaviour* " (Article 3(2)(b)) as far as their behaviour takes place within the EU.

Germany has adjusted the German legal framework to the GDPR by passing the new German Federal Data Protection Act (*Bundesdatenschutzgesetz* – "**BDSG**"). The BDSG came into force together with the GDPR

UNITED STATES

Last modified 29 January 2023

LAW

United States privacy law is a complex patchwork of national, state and local privacy laws and regulations. There is no comprehensive national privacy law in the United States. However, the US does have a number of largely sector-specific privacy and data security laws at the federal level, as well as many more privacy laws at the state (and local) level. In recent years, beginning with California, states have begun to introduce their own comprehensive privacy laws, and other states are expected to follow and enact their own comprehensive state privacy laws. Although a bipartisan draft bill (the ‘American Data Privacy and Protection Act’) was introduced in 2022, several senators were in opposition of the bill, and comprehensive privacy law on the federal level is not expected to pass any time soon.

Federal and State Privacy Laws and Regulations

Federal laws and regulations include those that apply to financial institutions, telecommunications companies, credit reporting agencies and healthcare providers, as well as driving records, children’s privacy, telemarketing, email marketing and communications privacy laws.

There are also a number of state privacy and data security laws that overlap with federal law—some of these state laws are preempted in part by federal laws, but others are not. US states have also passed privacy and data security laws and regulations that apply across sectors and go beyond federal law—such as data security laws, secure destruction, Social Security number privacy, online privacy, biometric information privacy, and data breach notification laws. Generally, each state’s laws apply to personal information about residents of that state or activities that occur within that state. Thus, many businesses operating in the United

on May 25, 2018. The purpose of the BDSG is especially to make use of the numerous opening clauses under the GDPR which enable Member States to specify or even restrict the data processing requirements under the GDPR. Part 3 of the BDSG implements the Law Enforcement Directive (EU) 2016/680.

Find the English version here.

In addition to the BDSG, there exist a number of data protection rules in area-specific laws, for example those regulating financial trade or the energy sector. As of 1 December 2021, the Telecommunications-Telemedia-Data Protection Act (*Telekommunikation-Telemedien-Datenschutzgesetz* – "**TTDSG**") provides data protection regulations for telecommunication and telemedia providers, which are intended to eliminate a long-standing legal uncertainty about the applicability of the data protection regulations of the German Telecommunications Act (*Telekommunikationsgesetz* – "**TKG**") and the German Telemedia Act (*Telemediengesetz* – "**TMG**") in interaction with the GDPR. The TTDSG also transposes the “cookie consent” requirement under Article 5 (3) ePrivacy Directive into German law.

States must comply not only with applicable federal law, but also with numerous state privacy and security laws and regulations.

For example, California alone has more than 25 state privacy and data security laws, including the California Consumer Privacy Act (CCPA) and its regulations as recently amended by the California Privacy Rights Act (CPRA), collectively referred to as the CCPA. The CCPA, as amended, introduced additional definitions and individual rights, and imposed additional requirements and restrictions on the collection, use and disclosure of personal information. The CCPA is also unique among state comprehensive privacy laws in that, as of January 1, 2023, it applies to HR and B2B personal information. Enforcement of the CPRA amendments to the CCPA commenced on July 1, 2023 for violations of the new provisions that occur on or after that date.

Notably, updated CCPA regulations based on the CPRA amendments were finalized on March 29, 2023, with enforcement by the California Attorney General and the newly established California Privacy Protection Agency (‘CPPA’ or ’Agency’) expected to begin on July 1, 2023. However, following a suit filed by the California Chamber of Commerce, the Sacramento district court ruled that the Agency was required to give businesses 12-months between finalizing a CCPA regulation and commencing enforcement, effectively delaying enforcement of the amended regulations to March 29, 2024. This delay does not affect the Agency or the California Attorney General’s ability to enforce the version of the CCPA amended by the CPRA (effective July 1, 2023) or the existing (i.e., pre-2023-amendment) CCPA regulations (effective August 14, 2020).

In late 2022, the California legislature also passed the California Age-Appropriate Design Code, which was slated to take effect July 1, 2024 and would apply to companies that meet the definition of “ business” under the CCPA and that provide online services that are likely to be accessed by individuals under 18 years of age. However, on September 18, 2023, a California District Court issued an injunction blocking the law from coming into effect on First Amendment grounds. Following an appeal to the Ninth Circuit by the California Attorney General's office, the fate of the law is currently uncertain. More information on the California Age-Appropriate Design Code can is available at https://www.dlapiper.com/en-us/insights/publications/2023/05/californias-age-appropriate-design-code-act

Beyond California, Colorado's Attorney General finalized the Colorado Privacy Act (CPA) Rules on March 15, 2023, which add significantly to the CPA’s obligations on businesses. Both the CPA and the CPA Rules went into effect July 1, 2023. Connecticut, Utah, and Virginia’s privacy laws also took effect in 2023.

While not identical, the Colorado, Connecticut, Utah, and Virginia state privacy laws are substantially similar to each other in most key aspects. Further, unlike the CCPA, all are also generally inapplicable to personal information collected about, and processed in the context of, employee and business relationships. On the other hand, while the CCPA has some practical similarities with these state laws, it adopts more granular definitions, requirements, and restrictions that vary considerably from these laws, and, notably, applies to personal information collected from California residents in employment and B2B contexts.

2023 brought a significant development in the health data space, with Washington passing the My Health My Data Act (MHMD). The law ostensibly applies only to consumer health data, but its exceptionally broad definitions and scope combined with its private right of action may mean its enforcement touches on data many companies may not typically consider “ health” data. More information on the MHMD Act is available at https://www.dlapiper.com/en/insights/publications/2023/04/washington-state-passes-my-health-my-data-act

Finally, the pace of state privacy legislation accelerated in 2023 overall, with the following states passing their own comprehensive privacy laws or variations thereof:

- Florida (effective July 1, 2024)
- Oregon (effective July 1, 2024)
- Texas (effective July 1, 2024)
- Montana (effective Oct. 1, 2024)
- Delaware (effective Jan. 1, 2025)
- Iowa (effective Jan. 1, 2025)
- Tennessee (effective Jan. 1, 2025)
- New Jersey (effective Jan. 15, 2025)
- Indiana (effective Jan. 1, 2026)

More information on the US state privacy laws is available at https://privacymatters.dlapiper.com/state-privacy-laws/

Enforcement of Unfair and Deceptive Trade Practices

In the United States, consumer protection laws, which prohibit unfair and deceptive business practices, provide another avenue for enforcement against businesses for their privacy and security practices.

At the federal level, the US Federal Trade Commission (FTC) uses its authority to protect consumers against unfair or deceptive trade practices, to take enforcement actions against businesses for materially unfair privacy and data security practices. The FTC uses this authority to, among other things, take enforcement actions and investigate companies for:

- Failing to implement reasonable data security measures
- Making materially inaccurate or misleading privacy and security statements, including in privacy policies
- Failing to abide by applicable industry self-regulatory principles
- Transferring or attempting to transfer personal information to an acquiring entity in a bankruptcy or M&A transaction, in a manner not expressly disclosed on the applicable consumer privacy policy
- Violating consumer privacy rights by collecting, using, sharing or failing to adequately protect consumer information, in violation of standards established in their prior enforcement precedents

Many state attorneys general have similar enforcement authority over unfair and deceptive business practices, including failure to implement reasonable security measures and violations of consumer privacy rights that harm consumers in their states. State attorneys general also sometimes work together on enforcement actions against companies for actions that broadly affect the consumers of multiple states (such as data breaches).

Privacy class actions also continue to be a key risk area in the United States, including in the context of biometric privacy (under the Illinois Biometric Privacy Act), text messaging (under the federal Telephone Consumer Privacy Act) and call recording, wiretapping and related claims under the California Invasion of Privacy Act and other state laws. Online monitoring and targeting activities—including via cookies, pixels, chat bots, and so-called “session replay” tools— are an area of particular focus in the United States from a regulator and enforcement perspective and are also a developing litigation risk area.

DEFINITIONS

"**Personal data**" is defined as "*any information relating to an identified or identifiable natural person*" (Article 4). A low bar is set for "identifiable" – if the natural person can be identified using “*all means reasonably likely to be used*” (Recital 26) the information is personal data. A name is not necessary either – any identifier will do, such as an identification number, phone number, location data or other factors which may identify that natural person.

Online identifiers are expressly called out in Recital 30, with IP addresses, cookies and RFID tags all listed as examples.

The GDPR creates more restrictive rules for the processing of "**special categories**" (Article 9) of personal data (including data relating to race, religion, sexual life, data pertaining to health, genetics and biometrics) and personal data relating to **criminal convictions and offences** (Article 10).

The GDPR is concerned with the "**processing**" of personal data. Processing has an extremely wide meaning, and includes any set of operations performed on data, including the mere storage, hosting, consultation or deletion of the data.

Personal data may be processed by either a "**controller**" or a "**processor**". The controller is the decision maker, the person who "*alone or jointly with others, determines the purposes and means of the processing of personal data*" (Article 4). The processor "*processes personal data on behalf of the controller*", acting on the instructions of the controller. In contrast to the previous law, the GDPR imposes direct obligations on both the controller and the processor, although fewer obligations are imposed on the processor.

The "**data subject**" is a living, natural person whose personal data are processed by either a controller or a processor.

The definitions are the same as in Article 4 GDPR. Beyond that, the BDSG contains further definitions for 'public bodies of the Federation', 'public bodies of the Länder' and 'private bodies' in Section 2 BDSG. The TTDSG contains definitions for types of data that are specifically

DEFINITIONS

Definition of personal data

Varies widely by law and regulation. The definition of personal information varies under US law. Some lawsÔsuch as data breach and security lawsÔ apply more narrowly, to sensitive personal information, such as government identifiers, financial account information, password, biometrics, health insurance or medical information, and other information that can lead to identity fraud and theft or financial harm. On the other hand, under a number of state and federal laws, personal information broadly includes any information that identifies or is linked or reasonably linkable to an individual.

California

Under the CCPA, personal information includes information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household. The definition specifically includes name, alias, contact information, government IDs, biometrics, genetic data, location data, account numbers, education history, purchase history, online and device IDs, and search and browsing history and other online activities, if such information is linked or linkable with a particular consumer or household. Excluded from the definition are deidentified information and information lawfully made publicly available through various means, such as through government records or by the consumer.

Under the law, 'consumer' is broadly defined as any resident of California.

Colorado, Connecticut, Delaware, Florida, Indiana, Iowa, Montana, New Jersey, Oregon, Tennessee, Texas, Utah, Virginia

Under the other thirteen comprehensive state privacy laws, personal data includes information that is linked or reasonably linkable to an identified or identifiable individual, who is a resident of the particular state acting an individual or household capacity. Deidentified data, personal data made publicly available, and personal data about individuals acting in an employment or B2B context are generally not in scope.

Definition of sensitive personal data

Varies widely by sector and by type of statute.

related to the provision of telecommunications and telemedia services (so-called inventory data and usage data).

Generally, includes personal health data, financial data, credit worthiness data, student data, biometric data, personal information collected online from children under 13, and information that can be used to carry out identity theft or fraud are considered sensitive, and subject to additional restrictions and regulations.

For example, state breach notification laws and data security laws generally apply to more sensitive categories of information, such as Social security numbers and other government identifiers, credit card and financial account numbers, passwords and user credentials, health or medical information, insurance ID, digital signatures, and /or biometrics.

California

The CCPA defines *sensitive personal information* as personal information that reveals about a consumer one or more of the following types of information, including:

- Social Security, driver’s license, state identification card or passport number
- account log-in, financial account, debit card or credit card number in combination with any required security or access code, password or credentials allowing access to an account
- precise geolocation
- racial or origin, citizenship or immigration status, religious or philosophical beliefs, or union membership
- contents of a consumer’s mail, email, and text messages unless the business is the intended recipient of the communication
- genetic data
- biometric information
- health information
- information about sex life or sexual orientation

Colorado, Connecticut, Delaware, Florida, Indiana, Iowa, Montana, New Jersey, Oregon, Tennessee, Texas, Utah, Virginia

Under the other thirteen comprehensive state privacy laws, the definition of *sensitive data* is a sub-cateogry of peronsal data and largely the same with various states adding or subtracting certain data elements from the above list.

Washington

Washington’s MHMD Act introduced a very broad definition of *consumer health data*, which includes: “personal information that is linked or reasonably

linkable to a consumer and that identifies the consumer's past, present, or future physical or mental health status."

For the purposes of this definition, physical or mental health status includes, but is not limited to:

- Individual health conditions, treatment, diseases, or diagnosis
- Social, psychological, behavioral, and medical interventions
- Health-related surgeries or procedures
- Use or purchase of prescribed medication
- Bodily functions, vital signs, symptoms, or measurements of the information described in subsection (8)(b)
- Diagnoses or diagnostic testing, treatment, or medication
- Gender-affirming care information
- Reproductive or sexual health information
- Biometric data
- Genetic data
- Precise location information that could reasonably indicate a consumer's attempt to acquire or receive health services or supplies
- Data that identifies a consumer seeking health care services
- Any information that a regulated entity or a small business, or their respective processor, processes to associate or identify a consumer with the data described in (b)(i) through (xii) of this subsection that is derived or extrapolated from nonhealth information (such as proxy, derivative, inferred, or emergent data by any means, including algorithms or machine learning)

This definition could arguably include any category of personal data (e.g., the inclusion of inference data makes it difficult to exclude any data whatsoever in the health, wellness, and fitness space). In addition, “health care services” includes any service provided to a person to assess, measure, improve, or learn about a person's health.

NATIONAL DATA PROTECTION AUTHORITY

Enforcement of the GDPR is the prerogative of data protection regulators, known as supervisory authorities (for example, the CNIL in France or the Garante in Italy). The European Data Protection Board (the replacement for the so-called Article 29 Working Party) is comprised

NATIONAL DATA PROTECTION AUTHORITY

There is no single national authority.

With some exceptions (such as for banks, credit unions and insurance companies), the FTC has jurisdiction over most commercial entities and has authority to issue and

of delegates from the supervisory authorities, and monitors the application of the GDPR across the EU, issuing guidelines to encourage consistent interpretation of the Regulation.

The GDPR creates the concept of "**lead supervisory authority**". Where there is cross-border processing of personal data (i.e. processing taking place in establishments of a controller or processor in multiple Member States, or taking place in a single establishment of a controller or processor but affecting data subjects in multiple Member States), then the starting point for enforcement is that controllers and processors are regulated by and answer to the supervisory authority for their main or single establishment, the so-called "lead supervisory authority" (Article 56(1)).

However, the lead supervisory authority is required to cooperate with all other "concerned" authorities, and a supervisory authority in another Member State may enforce where infringements occur on its territory or substantially affect data subjects only in its territory (Article 56(2)).

The concept of lead supervisory authority is therefore of somewhat limited help to multinationals.

Germany does not have one central supervisory authority for data protection law but authorities in each of the sixteen German federal states (*Länder*) that are competent for the public and the private sector in the respective state. In addition, there are different supervisory authorities for private broadcasters as well as for public broadcasters and several supervisory authorities for religious communities.

The German Federal Commissioner for Data Protection and Freedom of Information (*Bundesbeauftragter für Datenschutz und Informationsfreiheit* – "**BfDI**") is the supervisory authority for all federal public bodies as well as for certain social security institutions; it also supervises telecommunications and postal service providers, insofar as they provide telecommunications or postal services. The BfDI represents Germany in the European Data Protection Board. To ensure that all the supervisory authorities have the same approach, a committee consisting of members of all authorities for the public and the private sector has been established – the 'Data

enforce federal privacy regulations (including telemarketing, email marketing, and children's privacy) and to take enforcement action to protect consumers against unfair or deceptive trade practices, including materially unfair privacy and data security practices.

Many state attorneys general have similar enforcement authority over unfair and deceptive business practices, including failure to implement reasonable security measures and violations of consumer privacy rights that harm consumers in their states.

California

The California Attorney General and the California Privacy Protection Agency (the Agency) share authority to enforce the CCPA.

California consumers also have a private right of action under the CCPA for certain data breaches, and the CCPA provides for statutory damages.

Colorado, Connecticut, Delaware, Florida, Indiana, Iowa, Montana, New Jersey, Oregon, Tennessee, Texas, Utah, Virginia

State Attorneys General in all the other thirteen states have authority to enforce their state comprehensive privacy laws. Additionally, in some states such as Colorado, district attorneys can enforce the law.

None of these states currently provide for a private right of action.

Washington

The Washington Attorney General has the authority to enforce the MHMD Act.

Washington residents also have a private right of action under the Act, but unlike the CCPA the MHMD Act does not provide for statutory damages, meaning plaintiffs must prove actual damages to succeed.

Sector-Specific Enforcement

In addition, a wide range of sector-specific regulators, particularly those in the healthcare, financial services, telecommunications and insurance sectors, have authority to issue and enforce privacy and security regulations, with respect to entities under their jurisdiction.

Protection Conference' (*Datenschutzkonferenz* "**DSK**"). The coordination mechanism between the German supervisory authorities for data protection law mirrors the consistency mechanism under the GDPR.

A list with the contact details and websites of most of the supervisory authorities can be found here.

REGISTRATION

There are no EU-wide systems of registration or notification and Recital 89 of the GDPR seeks to prohibit indiscriminate general notification obligations. However, Member States may impose notification obligations for specific activities (e.g. processing of personal data relating to criminal convictions and offences). The requirement to consult the supervisory authority in certain cases following a data protection impact assessment (Article 36) constitutes a notification requirement. In addition, each controller or processor must communicate the details of its data protection officer (where it is required to appoint one) to its supervisory authority (Article 37(7)).

In many ways, external accountability to supervisory authorities via registration or notification is superseded in the GDPR by rigorous demands for internal accountability. In particular, controllers and processors are required to complete and maintain comprehensive records of their data processing activities (Article 30), which must contain specific details about personal data processing carried out within an organisation and must be provided to supervisory authorities on request. This is a sizeable operational undertaking.

There is no general requirement in Germany for controllers or processors to register their processing activities with the competent supervisory authority for data protection law; however, a register of data protection officers (DPOs) is maintained.

REGISTRATION

There is no requirement to register databases or personal information processing activities. However, four states currently impose certain registration requirements on data brokers:

California

The CCPA (as amended in 2019) requires (subject to some exceptions) that data brokers register with the California Attorney General (however, following amendments to the data broker registration law in late 2023, the data broker registration process and list is being transferred to the Agency). Under the law, a "data broker" is defined as a business that knowingly collects and sells to third parties the personal information of a consumer with whom the business does not have a direct relationship. The terms "sell" and "personal information" are defined as set forth in the CCPA.

Oregon

In 2023, Oregon passed a law requiring data brokers register on an annual basis with the Department of Consumer and Business Services before collecting personal data in Oregon. Companies must register if they maintain data that is “categorized or organized for sale or licensing to another person.” The law took effect on January 1, 2024.

Texas

In 2023, Texas passed a law requiring data brokers register with the Secretary of State. The law has a narrower scope than most of the other state data broker registration laws in that it only applies to businesses that (1) in a 12-month period, derive more than 50% of their revenue from the processing or transfer of personal data that the business did not collect directly from individuals, or (2) derive revenue from the processing or transfer of personal data of more than 50,000 individuals whose data

DATA PROTECTION OFFICERS

Each controller or processor is required to appoint a data protection officer (DPO) if it satisfies one or more of the following tests:

- it is a public authority;
- its core activities consist of processing operations which, by virtue of their nature, scope or purposes, require regular and systemic monitoring of data subjects on a large scale; or
- its core activities consist of processing sensitive personal data on a large scale.

Groups of undertakings are permitted to appoint a single DPO with responsibility for multiple legal entities (Article 37(2)), provided that the DPO is easily accessible from each establishment (meaning that larger corporate groups may find it difficult in practice to operate with a single DPO).

DPOs must have "expert knowledge" (Article 37(5)) of data protection law and practices, though it is possible to outsource the DPO role to a service provider (Article 37 (6)).

Controllers and processors are required to ensure that the DPO is involved "*properly and in a timely manner in all issues which relate to the protection of personal data*" (Article 38(1)), and the DPO must directly report to the highest management level, must not be told what to do in the exercise of his or her tasks and must not be dismissed or penalised for performing those tasks (Article 38(3)).

the business did not directly collect. The law took effect on September 1, 2023, with first registrations due March 1, 2024.

Vermont

In 2018, Vermont passed a law requiring data brokers to register with the Secretary of State and adhere to minimum data security standards. Under the law a “data broker” is defined as a company that collects computerized, personal information of Vermont residents with whom the company has no direct relationship, and either sell or licenses that information.

In addition, several state laws require entities that engage in certain types of telemarketing activities to register with the state attorney general or other consumer protection agency.

DATA PROTECTION OFFICERS

With the exception of entities regulated by HIPAA, there is no general requirement to appoint a formal data security officer or data privacy officer.

Massachusetts and some other state laws and federal regulations, including the recently updated FTC Safeguards Rule (applicable to non-banking financial institutions), require organizations to appoint one or more employees to maintain their information security program.

The specific tasks of the DPO, set out in GDPR, include (Article 39):

- to inform and advise on compliance with GDPR and other Union and Member State data protection laws;
- to monitor compliance with the law and with the internal policies of the organization including assigning responsibilities, awareness raising and training staff;
- to advise and monitor data protection impact assessments where requested; and
- to cooperate and act as point of contact with the supervisory authority.

This is a good example of an area of the GDPR where Member State gold plating laws are likely. For example, German domestic law has set the bar for the appointment of DPOs considerably lower than that set out in the GDPR.

The threshold to designate a DPO is much lower in the BDSG. The controller and processor has to designate a DPO if they constantly employ as a rule at least 20 persons dealing with the processing of personal data by automated means, Section 38 (1) sentence 1 BDSG. The meaning of ‘automated processing’ is interpreted broadly by the German Authorities. It basically covers every employee who works with a computer.

If the threshold of 20 persons is not reached, Section 38 (1) sentence 2 BDSG regulates, that a DPO has to be designated in case the controller or processor undertakes processing subject to a data protection impact assessment pursuant to Article 35 GDPR, or if they commercially process personal data for the purpose of transfer, of anonymized transfer or for purposes of market or opinion research.

A dismissal protection for the DPO is provided in Section 38 (2) in conjunction with Section 6 (4) BDSG. Where the controller or processor is obliged to appoint a DPO, the dismissal of a DPO, who is an employee, is only permitted in case there are facts which give the employing entity just cause to terminate without notice. After the activity as DPO has ended, a mandatory DPO who is an employee may not be terminated

for a year following the end of appointment, unless the employing entity has just cause to terminate without notice.

Additionally, Section 38 (2) in conjunction with Section 6 (5) and (6) BDSG stipulates that the DPO shall be bound by secrecy concerning the identity of data subjects and concerning circumstances enabling data subjects to be identified, unless he / she is released from this obligation by the data subject. Also, the DPO has the right to refuse to give evidence under certain conditions.

Moreover, the German supervisory authorities expect that the DPO speaks the language of the competent authority and the data subjects, i.e. German, or at least that instant translation is ensured.

The supervisory authorities maintain a register of DPOs. No fee is charged for registering or updating the details of a DPO.

COLLECTION & PROCESSING

Data Protection Principles

Controllers are responsible for compliance with a set of core principles which apply to all processing of personal data. Under these principles, personal data must be (Article 5):

- processed lawfully, fairly and in a transparent manner (the "lawfulness, fairness and transparency principle");
- collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes (the "purpose limitation principle");
- adequate, relevant and limited to what is necessary in relation to the purpose(s) (the "data minimization principle");
- accurate and where necessary kept up-to-date (the "accuracy principle");
- kept in a form which permits identification of data subjects for no longer than is necessary for the purpose(s) for which the data are processed (the "storage limitation principle"); and
- processed in a manner that ensures appropriate security of the personal data, using appropriate

COLLECTION & PROCESSING

US privacy laws and self-regulatory principles vary widely, but generally require that a notice be provided or made available pre-collection *(eg,* in a privacy policy) that discloses a company's collection, use and disclosure practices, the related choices individuals have regarding their personal information, and the company's contact information.

Opt-in consent is required under certain circumstance to collect, use and disclose certain sensitive data, such as health information, credit reports, financial information, children’s personal information, biometric data, video viewing choices, geolocation data and telecommunication usage information.

All states with comprehensive privacy laws, other than California, Florida, Iowa, and Utah require a business obtain consent from consumers to collect their sensitive data. California requires businesses to provide individuals a right to limit use of their sensitive data, and Iowa and Utah require individuals be provided a notice and right to opt-out of the collection of sensitive data.

The (federal) Children’s Online Privacy Protection Act (COPPA) requires verifiable parental consent prior to the collection of any personal

technical and organizational measures (the "integrity and confidentiality principle").

The controller is responsible for and must be able to demonstrate compliance with the above principles (the "accountability principle"). Accountability is a core theme of the GDPR. Organizations must not only comply with the GDPR but also be able to *demonstrate* compliance perhaps years after a particular decision relating to processing personal data was taken. Record-keeping, audit and appropriate governance will all form a key role in achieving accountability.

Legal Basis under Article 6

In addition, in order to satisfy the lawfulness principle, each use of personal data must be justified by reference to an appropriate basis for processing. The legal bases (also known as lawful bases or lawful grounds) under which personal data may be processed are (Article 6(1)):

- with the consent of the data subject (where consent must be "*freely given, specific, informed and unambiguous*", and must be capable of being withdrawn at any time);
- where necessary for the performance of a contract to which the data subject is party, or to take steps at the request of the data subject prior to entering into a contract;
- where necessary to comply with a legal obligation (of the EU) to which the controller is subject;
- where necessary to protect the vital interests of the data subject or another person (generally recognized as being limited to 'life or death' scenarios, such as medical emergencies);
- where necessary for the performance of a task carried out in the public interest, or in the exercise of official authority vested in the controller; or
- where necessary for the purposes of the legitimate interests of the controller or a third party (which is subject to a balancing test, in which the interests of the controller must not override the interests or fundamental rights and freedoms of the data subject. Note also that this basis cannot be relied upon by a public authority in the performance of its tasks).

Special Category Data

Processing of special category data is prohibited (Article 9), except where one of the following exemptions applies

information from children under 13. In addition, the CCPA requires that a business obtain explicit consent prior to the sale of any personal information about a consumer that the business has "actual knowledge" is less than 16 years old, and where the consumer is less than 13 years old, express parental authorization is required. (As discussed further below, the definition of "sale" under the CCPA is very broad and may include online advertising and retargeting activities, for example.). Amendments to the CCPA expanded this concept to include “ sharing” of a minor’s personal information (meaning the disclosing of personal information for purposes of cross-contextual behavioral advertising).

Further, companies generally need to obtain opt-in consent prior to using, disclosing or otherwise processing personal information in a manner that is materially different than what was disclosed in the privacy policy applicable when the personal information was initially collected. The FTC deems such changes ‘ retroactive material changes’ and considers it unfair and deceptive to implement a retroactive material change without obtaining prior, affirmative consent. Under the CCPA, which applies to individual and household data about California residents, businesses must, among other things:

- At or before collection, provide a notice to consumers disclosing the categories of personal information to be collected. the purposes for collecting such information, whether such information will be sold or shared, and how long such information will be retained or the criteria to determine such period.
- Post a privacy policy that discloses
    - the categories of personal information collected, categories of personal information disclosed for a business purpose, and categories of personal information "sold" and "shared" by the business in the prior 12 months
    - the purposes for which the business collects, uses, sells, and shares personal information
    - the categories of sources from which the business collects personal information
    - the categories of third parties to whom the business discloses personal information and
    - the rights consumers have regarding their personal information and how to exercise those rights

(which, in effect, operate as secondary bases which must be established for the lawful processing of special category data, in addition to an Article 6 basis):

- with the explicit consent of the data subject;
- where necessary for the purposes of carrying out obligations and exercising rights under employment, social security and social protection law or a collective agreement;
- where necessary to protect the vital interests of the data subject or another natural person who is physically or legally incapable of giving consent;
- in limited circumstances by certain not-for-profit bodies;
- where processing relates to the personal data which are manifestly made public by the data subject;
- where processing is necessary for the establishment, exercise or defence of legal claims or where courts are acting in their legal capacity;
- where necessary for reasons of substantial public interest on the basis of Union or Member State law, proportionate to the aim pursued and with appropriate safeguards;
- where necessary for preventative or occupational medicine, for assessing the working capacity of the employee, medical diagnosis, provision of health or social care or treatment of the management of health or social care systems and services;
- where necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of health care and of medical products and devices; or
- where necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with restrictions set out in Article 89(1).

Member States are permitted to introduce domestic laws including further conditions and limitations for processing with regard to processing genetic data, biometric data and health data.

Criminal Convictions and Offences data

Processing of personal data relating to criminal convictions and offences is prohibited unless carried out under the control of an official public authority, or specifically authorized by Member State domestic law (Article 10).

- Include a “do-not-sell-or-share my information” link on the business's website and page where consumers can opt-out of the sale and sharing of their personal information (if applicable)
- Generally, provide at least two methods for consumers to submit CCPA requests to the business, including an online method (e.g., submission of an online form) and a toll-free number

Other California privacy laws (*eg*, the California “Shine the Light Law” and the California Online Privacy Protection Act) currently in force impose additional notice obligations, including:

- Where any personal information is disclosed to a third party for their own marketing use, a specific notice about such disclosure (*eg*, in a company’s privacy policy) must be provided and accessible through a special link on their homepage. Further, the law gives California residents to request a list of the personal information and third parties to whom such information was disclosed for marketing purposes in the prior 12 months
- Whether the company honors any do-not-track mechanisms

Under the comprehensive US state privacy laws , individuals have various qualified rights to request access to, correction, and deletion of their personal information and to “opt out” of sales, sharing, and the use of their personal information for targeted advertising purposes. Further, these laws require businesses to conduct data protection or risk assessments before engaging in certain higher-risk processing activities, such as processing that relates to:

- Certain unfair or intrusive profiling or targeted advertising purposes
- Selling of personal data
- Processing sensitive data

All states other than California and Utah require businesses to establish an internal process whereby consumers may appeal a controller’s refusal to take action on a privacy request and, where the appeal is denied, a method by which the consumer can submit a complaint to the state’s Attorney General.

Other states impose a wide range of specific requirements, particularly in the student and employee privacy areas. For example, a significant number of states

Processing for a Secondary Purpose

Increasingly, organisations wish to 're-purpose' personal data - *ie,* use data collected for one purpose for a new purpose which was not disclosed to the data subject at the time the data were first collected. This is potentially in conflict with the core principle of purpose limitation; to ensure that the rights of data subjects are protected. The GDPR sets out a series of factors that the controller must consider to ascertain whether the new process is compatible with the purposes for which the personal data were initially collected (Article 6(4)). These include:

- any link between the original purpose and the new purpose
- the context in which the data have been collected
- the nature of the personal data, in particular whether special categories of data or data relating to criminal convictions are processed (with the inference being that if they are it will be much harder to form the view that a new purpose is compatible)
- the possible consequences of the new processing for the data subjects
- the existence of appropriate safeguards, which may include encryption or pseudonymization.

If the controller concludes that the new purpose is incompatible with the original purpose, then the only bases to justify the new purpose are consent or a legal obligation (more specifically an EU or Member State law which constitutes a necessary and proportionate measure in a democratic society).

Transparency (Privacy Notices)

The GDPR places considerable emphasis on transparency, *ie,* the right for a data subject to understand how and why his or her data are used, and what other rights are available to data subjects to control processing. The presentation of granular, yet easily accessible, privacy notices should, therefore, be seen as a cornerstone of GDPR compliance.

Various information must be provided by controllers to data subjects in a concise, transparent and easily accessible form, using clear and plain language (Article 12 (1)).

The following information must be provided (Article 13) at the time the data are obtained:

- the identity and contact details of the controller;

have enacted employee social media privacy laws, and, in 2014 and 2015, a disparate array of education privacy laws. In addition, there are several sector-specific privacy laws that impose notice obligations, significantly limit permitted disclosures of personal information, and grant individuals the right to access or review records about the individual that are held by the regulated entity.

The US also regulates marketing communications extensively, including telemarketing, text message marketing, fax marketing and email marketing (which is discussed below).

- the data protection officer's contact details (if there is one);
- both the purpose for which data will be processed and the legal basis for processing, including, if relevant, the legitimate interests for processing;
- the recipients or categories of recipients of the personal data;
- details of international transfers;
- the period for which personal data will be stored or, if that is not possible, the criteria used to determine this;
- the existence of rights of the data subject including the right to access, rectify, require erasure, restrict processing, object to processing and data portability;
- where applicable, the right to withdraw consent, and the right to complain to supervisory authorities;
- the consequences of failing to provide data necessary to enter into a contract;
- the existence of any automated decision making and profiling and the consequences for the data subject; and
- in addition, where a controller wishes to process existing data for a new purpose, they must inform data subjects of that further processing, providing the above information.

Somewhat different requirements apply (Article 14) where information has not been obtained from the data subject.

Rights of the Data Subject

Data subjects enjoy a range of rights to control the processing of their personal data, some of which are very broadly applicable, whilst others only apply in quite limited circumstances. Controllers must provide information on action taken in response to requests within one calendar month as a default, with a limited right for the controller to extend this period thereby a further two months where the request is onerous.

Right of access (Article 15)

A data subject is entitled to request access to and obtain a copy of his or her personal data, together with prescribed information about the how the data have been used by the controller.

Right to rectify (Article 16)

Data subjects may require inaccurate or incomplete personal data to be corrected or completed without undue delay.

Right to erasure ('right to be forgotten') (Article 17)

Data subjects may request erasure of their personal data. The forerunner of this right made headlines in 2014 when the European Union’s highest court ruled against Google (Judgment of the CJEU in Case C-131/12), in effect requiring Google to remove search results relating to historic proceedings against a Spanish national for an unpaid debt on the basis that Google as a data controller of the search results had no legal basis to process that information.

The right is not absolute; it only arises in quite a narrow set of circumstances, notably where the controller no longer needs the data for the purposes for which they were collected or otherwise lawfully processed, or as a corollary of the successful exercise of the objection right, or of the withdrawal of consent.

Right to restriction of processing (Article 18)

Data subjects enjoy a right to restrict processing of their personal data in defined circumstances. These include where the accuracy of the data is contested; where the processing is unlawful; where the data are no longer needed save for legal claims of the data subject, or where the legitimate grounds for processing by the controller are contested.

Right to data portability (Article 20)

Where the processing of personal data is justified either on the basis that the data subject has given his or her consent to processing or where processing is necessary for the performance of a contract, then the data subject has the right to receive or have transmitted to another controller all personal data concerning him or her in a structured, commonly used and machine-readable format (e.g. commonly used file formats recognized by mainstream software applications, such as .xsl).

Right to object (Article 21)

Data subjects have the right to object to processing on the legal basis of the legitimate interests of the data controller or where processing is in the public interest. Controllers will then have to suspend processing of the

data until such time as they demonstrate “ compelling legitimate grounds” for processing which override the rights of the data subject.

In addition, data subjects enjoy an unconditional right to object to the processing of personal data for direct marketing purposes at any time.

The right not to be subject to automated decision making, including profiling (Article 22)

Automated decision making (including profiling) "*which produces legal effects concerning [the data subject] … or similarly significantly affects him or her*" is only permitted where:

a. necessary for entering into or performing a contract;
b. authorized by EU or Member State law; or
c. the data subject has given their explicit (i.e. opt-in) consent.

Further, where significant automated decisions are taken on the basis of grounds (a) or (c), the data subject has the right to obtain human intervention, to contest the decision, and to express his or her point of view.

The BDSG has additional rules regarding processing of special categories of personal data. Contrary to Article 9 (1) GDPR, processing of such data is permitted by public and private bodies in some cases which are based on the exceptions in Article 9 (2) GDPR, see Section 22 (1), 26 (3) BDSG. Also, Section 24 BDSG determines cases in which controllers are permitted to process data for a purpose other than the one for which the data were collected.

Section 4 BDSG provides a special rule for video surveillance of publicly accessible areas. According to the German data protection supervisory authorities as well as the German Federal Administrative Court (*Bundesverwaltungsgericht* – "**BVerwG**") and the near unanimous opinion in German legal literature, the provision is not compliant with the GDPR insofar as it regulates surveillance by private bodies (Section 4 (1) Nos. 2, 3 BDSG). This is based on the argument that the GDPR does not contain any opening clause on which these deviations from Article 6 (1) GDPR could be based.

Furthermore, the BDSG provides special rules regarding processing for employment-related purposes in Section 26 BDSG. The German legislator has made very broad use of the opening clause in Article 88 (1) GDPR and has basically established a specific employee data protection regime, that mostly only repeats the general legal bases of performance of contract respectively “*carrying out the obligations and exercising specific rights… in the field of employment and social security and social protection law*” (Art. 9(2)(b) GDPR). Due to this, the European Court of Justice ruled that a provision in German state data protection law (which applies to the public sector) that corresponds with the “ performance of the employment contract” legal basis in Section 26 BDSG is invalid (Judgment of the CJEU in Case C-34/21). This is because the law failed to establish specific provisions, although this is a requirement pursuant Article 88(1) GDPR for national legal bases. Due to this decision, it is widely assumed (including by the German supervisory authorities that (some) of the respective German legal bases for the processing of employee personal data in the BDSG are invalid.

Employers should therefore rely (alternatively or additionally) on the GDPR legal bases for the processing of employee and candidate personal data for the establishment or the performance of the employment contract (Article 6(1)(b) GDPR) respectively on Article 9(2)(b) GDPR. In particular when determining what is “ necessary” for the performance of the employment contract, employers also need to comply with the case law of the German Federal Labour Court (*Bundesarbeitsgericht* – "**BAG**").

In addition, there is a legal basis specifically for the investigation of criminal offences against employees which likely is still valid.

Furthermore, processing of employee personal data for purposes that are not specifically related to employment as such can still be based on Article 6 (1) GDPR. In particular, controllers that are part of a group of companies may be able to base transfers of data within the group for internal administrative purposes on their legitimate interests in accordance with to Article 6 (1) f) (as stated by Recital 48 of the GDPR).

The processing of personal data in the context of the provision of telecommunication services is subject to Section 9 et seqq. TTDSG. Furthermore, both the content of telecommunications and its detailed circumstances, in particular the fact whether someone is or was involved in a telecommunications process, is subject to the secrecy of telecommunications, Section 3 TTDSG. Violations of the secrecy of telecommunications constitutes a criminal offence under the German Criminal Code (*Strafgesetzbuch* – "**StGB**").

The processing of personal data in the context of the provision of telemedia (like for example a website or a social network) is subject to specific limitations contained in Section 19 et seqq. TTDSG. There are, inter alia, specific requirements regarding the provision of inventory data, passwords or usage data to public authorities in Section 22 et seqq. TTDSG.

The following German specific rules for the processing of personal data in the employment context likely are still valid:

- Employees’ personal data may be processed to detect criminal offenses only if there is a documented reason to believe the data subject has committed such an offense while employed, the processing of such data is necessary to investigate the offense and is not outweighed by the data subject’s legitimate interest in not processing the data, and in particular the type and extent are not disproportionate to the reason (Section 26 (1) sentence 2 BDSG) (this blocks investigation based on legitimate interests pursuant Article 6(1) f GDPR);
- The processing is based on a works council agreement which complies with the requirements set out Article 88 (2) GDPR (Section 26 (4) BDSG);
- The processing is based on the employee’s consent in written or electronic form. A derogation from this form can apply if a different form is appropriate because of special circumstances (but this derogation will rarely apply in practice). Moreover, the

utilization of consent as basis for the processing is particularly problematic in Germany as Section 26 (2) BDSG stipulates requirements in addition to Article 7 GDPR. If personal data of employees are processed on the basis of consent, then the employee’s level of dependence in the employment relationship and the circumstances under which consent was given shall be taken into account in assessing whether such consent was freely given. Consent may be freely given in particular if it is associated with a legal or economic advantage for the employee, or if the employer and employee are pursuing the same interests. The German data protection supervisory authorities interpret this provision in a way that employee consent cannot be used for processing of personal data which directly relates to the employment relationship, but only to supplementary services offered by the employer (e.g. private use of company cars or IT equipment, occupational health management or birthday lists).

TRANSFER

Transfers of personal data by a controller or a processor to third countries outside of the EU (and Norway, Liechtenstein and Iceland) are only permitted where the conditions laid down in the GDPR are met (Article 44).

The European Commission has the power to make an adequacy decision in respect of a third country, determining that it provides for an adequate level of data protection, and therefore personal data may be freely transferred to that country (Article 45(1)). Currently, the following countries or territories enjoy adequacy decisions: Andorra, Argentina, Canada (with some exceptions), Switzerland, Faroe Islands, Guernsey, Israel, Isle of Man, Jersey, Eastern Republic of Uruguay and New Zealand.

Transfers to third countries are also permitted where appropriate safeguards have been provided by the controller or processor and on the condition that enforceable data subject rights and effective legal remedies for the data subject are available. The list of

TRANSFER

There are generally no geographic transfer restrictions that apply in the US, except regarding the storing of some governmental records and information. However, the HIPAA Privacy Rule requires that covered entities not disclose protected health information outside the US without appropriate safeguards.

appropriate safeguards includes amongst others binding corporate rules, standard contractual clauses, and the EU-US Privacy Shield Framework. The GDPR has removed the need which existed in some Member States under the previous law to notify and in some cases seek prior approval of standard contractual clauses from supervisory authorities.

The GDPR also includes a list of context specific derogations, permitting transfers to third countries where:

a. explicit informed consent has been obtained;
b. the transfer is necessary for the performance of a contract or the implementation of pre-contractual measures;
c. the transfer is necessary for the conclusion or performance of a contract concluded in the interests of the data subject between the controller and another natural or legal person;
d. the transfer is necessary for important reasons of public interest;
e. the transfer is necessary for the establishment, exercise or defence of legal claims;
f. the transfer is necessary in order to protect the vital interests of the data subject where consent cannot be obtained; or
g. the transfer is made from a register which according to EU or Member State law is intended to provide information to the public, subject to certain conditions.

There is also a very limited derogation to transfer where no other mechanism is available and the transfer is necessary for the purposes of compelling legitimate interests of the controller which are not overridden by the interests and rights of the data subject; notification to the supervisory authority and the data subject is required if relying on this derogation.

Transfers demanded by courts, tribunals or administrative authorities of countries outside the EU (Article 48) are only recognized or enforceable (within the EU) where they are based on an international agreement such as a mutual legal assistance treaty in force between the requesting third country and the EU or Member State; a transfer in response to such requests where there is no other legal basis for transfer will infringe the GDPR.

The transfer of personal data to a third country or to supranational or intergovernmental bodies or international organisations in the context of

activities not falling within the scope of the GDPR or the Law Enforcement Directive (EU) 2016/680 are also permitted if they are necessary for the performance of own tasks for imperative reasons of defence or for the performance of supranational or intergovernmental obligations of a federal public body in the field of crisis management or conflict prevention or for humanitarian measures.

For more information, please visit our Transfer - global data transfer methodology website.

SECURITY

Security

The GDPR is not prescriptive about specific technical standards or measures. Rather, the GDPR adopts a proportionate, context-specific approach to security. Article 32 states that controllers and processors shall implement appropriate technical and organizational measures to ensure a level of security appropriate to the risk of the processing. In so doing, they must take account of the state of the art, the costs of implementation, and the nature, scope, context and purposes of processing. A 'one size fits all' approach is therefore the antithesis of this requirement.

However, the GDPR does require controllers and processors to consider the following when assessing what might constitute adequate security:

a. the pseudonymization and encryption of personal data;
b. the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services;
c. the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident; and
d. a process for regularly testing, assessing and evaluating the effectiveness of technical and organizational measures for ensuring the security of the processing.

The BDSG has additional rules regarding the processing of special categories of personal data in Sec. 22 (2) BDSG. In case of processing of such

SECURITY

Most US businesses are required to take reasonable technical, physical and organizational measures to protect the security of sensitive personal information (*eg,* health or financial information, telecommunications usage information, biometric data, or information that would require security breach notification). A few states have enacted laws imposing more specific security requirements for such data.

For example, Massachusetts has enacted regulations that apply to any company that collects or maintains sensitive personal information (*eg,* name in combination with Social Security number, driver's license, passport number, or credit card or financial account number) on Massachusetts residents. Among other things, the Massachusetts regulations require regulated entities to have a comprehensive, written information security program and set forth the minimum components of such program, including binding all service providers who touch this sensitive personal information to protect it in accordance with the regulations. Massachusetts law includes encryption requirements on the transmission of sensitive personal information across wireless networks or beyond the logical or physical controls of an organization, as well as on sensitive personal data stored on laptops and portable storage devices.

Some states impose further security requirements on payment card data and other sensitive personal information. In 2019, New York passed a new law (the New York “SHIELD Act”) setting forth minimum security obligations for safeguarding private information. The SHIELD Act does not mandate specific safeguards but rather provides that a business will "be deemed to be in compliance" with the law if it implements

data, appropriate and specific measures have to be taken to safeguard the interests of the data subject.

Taking into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing, these measures may include in particular the following:

- technical and organizational measures to ensure that processing complies with the GDPR;
- measures to ensure that it is subsequently possible to verify and establish whether and by whom personal data were input, altered or removed;
- measures to increase awareness of staff involved in processing operations;
- designation of a data protection officer;
- restrictions on access to personal data within the controller and by processors;
- the pseudonymization of personal data;
- the encryption of personal data;
- measures to ensure the ability, confidentiality, integrity, availability and resilience of processing systems and services related to the processing of personal data, including the ability to rapidly restore availability and access in the event of a physical or technical incident;
- a process for regularly testing, assessing and evaluating the effectiveness of technical and organizational measures for ensuring the security of the processing;
- specific rules of procedure to ensure compliance with this Act and with the GDPR in the event of transfer or processing for other purposes.

a security program that includes elements set forth in the SHIELD Act.

The CCPA and Washington’s MHMD Act provide a private right of action to individuals for certain breaches of unencrypted personal information or consumer health data, respectively, which increases class action risks posed by data breaches.

There are also several other sectoral data security laws and regulations that impose specific security requirements on regulated entities – such as in the financial, insurance and health sectors. Federal financial regulators impose extensive security requirements on the financial services sector, including requirements for security audits of all service providers who receive data from financial institutions. For example, the New York Department of Financial Services (NYDFS) regulations impose extensive cybersecurity and data security requirements on licensees of the NYDFS, which includes financial services and insurance companies. The federal Gramm-Leach-Bliley Act and implementing rules and regulations require financial institutions to implement reasonable security measures.

HIPAA regulated entities are subject to much more extensive data security requirements. HIPAA security regulations apply to so-called ‘covered entities’ such as doctors, hospitals, insurers, pharmacies and other healthcare providers, as well as their ‘business associates’ which include service providers who have access to, process, store or maintain any protected health information on behalf of a covered entity. ‘Protected health information’ under HIPAA generally includes any personally identifiable information collected by or on behalf of the covered entity during the course of providing its services to individuals.

Internet of Things

California enacted the first US Internet of Things (IoT) legislation, effective January 1, 2020. Under SB 327, manufacturers of most IoT and Bluetooth connected devices will be required to implement reasonable security features ‘appropriate to the nature and the function of the device and the information the device may collect, contain or transmit’ and ‘designed to protect the device and any information contained therein from unauthorized access, destruction, use, modification, or disclosure.’ To the extent a device is equipped with a means for authentication outside a local area network, it shall be deemed a reasonable security feature if (i) the preprogrammed is

BREACH NOTIFICATION

The GDPR contains a general requirement for a personal data breach to be notified by the controller to its supervisory authority, and for more serious breaches to also be notified to affected data subjects. A "personal data breach" is a wide concept, defined as any "*breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed*" (Article 4).

The controller must notify a breach to the supervisory authority without undue delay, and where feasible, not later than 72 hours after having become aware of it, unless the controller determines that the breach is unlikely to result in a risk to the rights and freedoms of natural persons. When the personal data breach is likely to result in a *high* risk to natural persons, the controller is also required to notify the affected data subjects without undue delay (Article 34).

Where the breach occurs at the level of the processor, it is required to notify the controller without undue delay upon becoming aware of the breach (Article 33(2)).

The notification to the supervisory authority must include where possible the categories and approximate numbers of individuals and records concerned, the name of the organization’s data protection officer or other contact, the likely consequences of the breach and the measures taken to mitigate harm (Article 33(3)).

Controllers are also required to keep a record of all data breaches (Article 33(5)) (whether or not notified to the supervisory authority) and permit audits of the record by the supervisory authority.

Personal data breaches should be notified to the competent supervisory authority. The German supervisory authorities generally make available specific web forms for notifications and some of them have published risk rating requirements for personal data breach notifications.

The German BDSG only contains slight changes and additions to the regulations in Article 33, 34 GDPR.

Section 29 (1) BDSG stipulates in addition to the exception in Article 34 (3) GDPR, the obligation

unique to each device manufactured, or (ii) the device forces the user to set a unique password upon first use.

BREACH NOTIFICATION

All 50 US states, Washington, DC, and most US territories (including, Puerto Rico, Guam and the Virgin Islands) have passed breach notification laws that require notifying state residents of a security breach involving more sensitive categories of information, such as Social Security numbers and other government identifiers, credit card and financial account numbers, health or medical information, insurance ID, tax ID, birthdate, as well as online account credentials, digital signatures and/or biometrics.

Under many state laws, where more than 500 individuals are impacted, notice must also be provided to credit bureaus. Nearly half of states also require notice to state Attorneys General and / or other state officials of certain data breaches. Further, certain states require impacted individuals to be provided with credit monitoring services for specified lengths of time if the breach involved Social Security numbers. Finally, some state data breach laws impose certain (varying) notice content and timing requirements with respect to notice to individuals and to state Attorneys General and/or other state officials.

Federal laws require notification in the case of breaches of healthcare information, breaches of information from financial institutions, breaches of telecom usage information held by telecommunication providers, and breaches of government agency information.

to inform the data subject of a personal data breach according to Article 34 GDPR shall not apply as far as meeting this obligation would disclose information which by law or by its nature must be kept secret, in particular because of overriding legitimate interests of a third party. By derogation from this, the data subject pursuant to Article 34 GDPR shall be informed if the interests of the data subject outweigh the interest in secrecy, in particular taking into account the threat of damage.

According to Section 43 (4) BDSG, a notification pursuant to Article 33 GDPR or a communication pursuant to Article 34 (1) GDPR may be used in proceedings pursuant to the Act on Regulatory Offences (*Gesetz über Ordnungswidrigkeiten* – "**OWiG**") against the person required to provide a notification or a communication only with the consent of the person obligated to provide a notification or a communication.

ENFORCEMENT

Fines

The GDPR empowers supervisory authorities to impose fines of up to 4% of annual worldwide turnover, or EUR 20 million (whichever is higher).

It is the intention of the European Commission that fines should, where appropriate, be imposed by reference to the revenue of an economic undertaking rather than the revenues of the relevant controller or processor. Recital 150 of the GDPR states that 'undertaking' should be understood in accordance with Articles 101 and 102 of the Treaty on the Functioning of the European Union, which prohibit anti-competitive agreements between undertakings and abuse of a dominant position. Unhelpfully, the Treaty does not define ‘ undertaking’ and the extensive case-law is not entirely straightforward, with decisions often turning on the specific facts of each case. However, in many competition cases, group companies have been regarded as part of the same undertaking. The assessment will turn on the facts of each case, and the first test cases under the GDPR will need to be scrutinised carefully to understand the interpretation of ‘ undertaking’. Under EU competition law case-law, there is also precedent for regulators to impose joint and

ENFORCEMENT

Various entities enforce US national and state privacy laws. Violations of privacy laws and rules are generally enforced by the FTC, state Attorneys General, or the regulator for the industry sector in question. Civil penalties can be significant, particularly for uncooperative or repeat offenders.

In addition, individuals may bring private rights of action (and class actions) for certain privacy or security violations.

Some privacy laws (for example, credit reporting, marketing and electronic communications, video viewing history, call recording and cable communications privacy laws) may be enforced through private rights of action, which give rise to class action lawsuits for significant statutory damages and attorney’s fees, and individuals may bring actions for actual damages from data breaches.

The CCPA provides individuals with a private right of action and statutory damages, in the event of certain breaches of unencrypted personal information, where a business has failed to implement reasonable data security procedures (this applies to most categories of personal information under California’s breach notification

several liability on parent companies for fines imposed on those subsidiaries in some circumstances (broadly where there is participation or control), so-called "look through" liability. Again, it remains to be seen whether there will be a direct read-across of this principle into GDPR enforcement.

Fines are split into two broad categories.
The highest fines (Article 83(5)) of up to EUR 20 million or, in the case of an undertaking, up to 4% of total worldwide turnover of the preceding year, whichever is higher, apply to infringement of:

- the basic principles for processing including conditions for consent;
- data subjects’ rights;
- international transfer restrictions;
- any obligations imposed by Member State law for special cases such as processing employee data; and
- certain orders of a supervisory authority.

The lower category of fines (Article 83(4)) of up to EUR 10 million or, in the case of an undertaking, up to 2% of total worldwide turnover of the preceding year, whichever is the higher, apply to infringement of:

- obligations of controllers and processors, including security and data breach notification obligations;
- obligations of certification bodies; and
- obligations of a monitoring body.

Supervisory authorities are not required to impose fines but must ensure in each case that the sanctions imposed are effective, proportionate and dissuasive (Article 83(1)).

Fines can be imposed in combination with other sanctions.

Investigative and corrective powers

Supervisory authorities also enjoy wide investigative and corrective powers (Article 58) including the power to undertake on-site data protection audits and the power to issue public warnings, reprimands and orders to carry out specific remediation activities.

Right to claim compensation

The GDPR makes specific provision for individuals to bring private claims against controllers and processors:

- any person who has suffered "material or non-material damage" as a result of a breach of the GDPR has the right to receive compensation

law) – this raises significant class action risks. Currently, no other comprehensive state privacy laws contain a private right of action.

In June 2018, Ohio became the first US state to pass cybersecurity safe harbor legislation. Under SB 220, a company that has suffered a data breach of personal information has an affirmative defense if it has ‘ created, maintained, and complied with a written cybersecurity program that contains administrative, technical, and physical safeguards to protect personal information that reasonably conforms to an industry recognized cybersecurity framework’ (e.g., PCI-DSS standards, NIST Framework, NIST special publications 800-171, 800-53, and 800-53a, FedRAMP security assessment framework, HIPAA, GLBA).

(Article 82(1)) from the controller or processor. The inclusion of “non-material” damage means that individuals will be able to claim compensation for distress even where they are not able to prove financial loss.
- data subjects have the right to mandate a consumer protection body to exercise rights and bring claims on their behalf (Article 80).

Individuals also enjoy the right to lodge a complaint with a supervisory authority (Article 77).

All natural and legal persons, including individuals, controllers and processors, have the right to an effective judicial remedy against a decision of a supervisory authority concerning them or for failing to make a decision (Article 78).

Data subjects enjoy the right to an effective legal remedy against a controller or processor (Article 79).

In October 2019 the German data protection authorities published guidelines for calculating administrative fines against ‘business undertakings’ under Article 83 GDPR. However, since the final version of the Guidelines 04/2022 on the calculation of administrative fines under the GDPR of the EDPB was adopted in May 2023, the German guidelines are no longer relevant.

Enforcement powers

There are no German specific enforcement powers except for the German Federal Commissioner for Data Protection and Freedom of Information (*Bundesbeauftragter für Datenschutz und Informationsfreiheit* – "**BfDI** ") competent for federal authorities and certain sectors (see Authority for details).

Administrative powers

German law provides for administrative fines of up to 50,000 EUR for the violation of German specific requirements for the processing of personal data in the context of consumer loans (Sections 30 and 43 BDSG).

Criminal offences

The BDSG provides for several offences which can result in prosecution of, imprisonment, and

criminal penalties being imposed of / on individuals. The offences under the BDSG include:

- transferring personal data to a third party or otherwise making them accessible if done deliberately and without authorization for commercial purposes and with regard to the personal data of a large number of people which are not publicly accessible;
- processing without authorization, or fraudulently acquiring, personal data which are not publicly accessible if doing so in return for payment or with the intention of enriching oneself or someone else or harming someone.

Additionally other special laws provide for criminal offences (e.g. violations of the secrecy of telecommunications constitutes a criminal offence under the German Criminal Code (*Strafgesetzbuch* – StGB)).

ELECTRONIC MARKETING

The GDPR will apply to most electronic marketing activities, as these will involve some use of personal data (*eg,* an email address which includes the recipient's name). The most plausible legal bases for electronic marketing will be consent, or the legitimate interests of the controller (which is expressly referenced as an appropriate basis by Recital 47). Where consent is relied upon, the strict standards for consent under the GDPR are to be noted, and marketing consent forms will invariably need to incorporate clearly worded opt-in mechanisms (such as the ticking of an unticked consent box, or the signing of a statement, and *not* merely the acceptance of terms and conditions, or consent implied from conduct, such as visiting a website).

Data subjects have an unconditional right to object to (and therefore prevent) any form of direct marketing (including electronic marketing) at any time (Article 21(3)).

Specific rules on electronic marketing (including circumstances in which consent must be obtained) are to be found in Directive 2002/58/EC (ePrivacy Directive), as transposed into the local laws of each Member State. The ePrivacy Directive is likely to be replaced by a regulation (the so called ePrivacy Regulation), but it is currently uncertain when this is going to happen, as the European

ELECTRONIC MARKETING

The US regulates marketing communications extensively, including email and text message marketing, as well as telemarketing and fax marketing.

Email

The CAN-SPAM Act is a federal law that applies labeling and opt-out requirements to all commercial email messages. CAN-SPAM generally allows a company to send commercial emails to any recipient, provided the recipient has not opted out of receiving such emails from the sender, the email identifies the sender and the sender’s contact information, and the email contains instructions on how the recipient can easily and without cost opt out of future commercial emails from the sender. The FTC and state Attorneys General, as well as ISPs and corporate email systems can sue violators. Knowingly falsifying the origin or routing of a commercial email message is a federal crime.

Text Messages

Federal and state regulations apply to the sending of marketing text messages to individuals. Express consent is required to send text messages to individuals, and, for marketing text messages, express written consent is

Commission has discarded its draft of the ePrivacy Regulation after disagreements by the Member States in the Council of the European Union. In the meantime, GDPR Article 94 makes it clear that references to the repealed Directive 95/46/EC will be replaced with references to the GDPR. As such, references to the Directive 95/46/EC standard for consent in the ePrivacy Directive will be replaced with the GDPR standard for consent.

In general, unsolicited electronic marketing requires prior opt-in consent. The opt-in requirement is waived under the ‘same service / product’ exemption. The exemption concerns marketing emails related to the same products/services as previously purchased from the sender by the user provided that:

- the user has been informed of the right to opt-out prior to the first marketing email
- the user did not opt-out, and
- the user is informed of the right to opt-out of any marketing email received. The exemption applies to electronic communication such as electronic text messages and email but does not apply with respect to communications sent by fax.

Direct marketing emails must not disguise or conceal the identity of the sender.

Like the GDPR, the German BDSG also does not provide for any specific provisions regarding marketing. The use of electronic communication for the purpose of direct marketing as currently regulated in ePrivacy Directive has been transposed into German law and is implemented in Section 7 of the German Act Against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb* – "**UWG**") As emphasized by the German Authorities (in their guidelines on direct marketing), processing of personal data for the purpose of marketing communication which is in breach of Section 7 UWG also constitutes a breach of the GDPR as it does not follow a legitimate purpose.

When using electronic communication for direct marketing, prior consent is generally required, cf. Section 7 (2) no. 1, 2 UWG, the standard for this being the so-called double opt-in process. According to Article 6 (1) a) GDPR as well as required (electronic written consent is sufficient, but verbal consent is not). The applicable regulations also specify the form of consent. This is a significant class action risk area, and any text messaging (marketing or informational) program needs to be carefully reviewed for strict compliance with legal requirements.

Calls to Wireless Phone Numbers

Similar to text messages, federal and state regulations apply to marketing calls to wireless phone numbers. Prior express consent is required to place phone calls to wireless numbers using any autodialing equipment, and, for marketing calls, express written consent is required (electronic written consent is sufficient, but verbal consent is not). The applicable regulations also specify the form of consent. This is a significant class action risk area, and any campaign or program that involves calls (marketing or informational) to phone numbers that may be wireless phone numbers needs to be carefully reviewed for strict compliance with legal requirements. The definition of autodialing equipment is generally considered to, broadly, include any telephone system that is capable of (whether or not used or configured storing or producing telephone numbers to be called, using a random or sequential number generator.

Telemarketing

Beyond the rules applicable to text messaging and calling to wireless phone numbers, there are federal and state telemarketing laws as well. Federal telemarketing laws apply to most telemarketing calls and programs, and state telemarketing law will apply to telemarketing calls placed to or from within that particular state. As a result, most telemarketing calls are governed by federal law, as well as the law of one or more states. Telemarketing rules vary by state, and address many different aspects of telemarketing, such as calling time restrictions, do-not-call registries, opt-out requests, mandatory disclosures, requirements for completing a sale, executing a contract or collecting payment during the call, further restrictions on the use of auto-dialers and pre-recorded messages, and record-keeping requirements. Many states also require telemarketers to register or obtain a license to place telemarketing calls.

Fax Marketing

Federal law and regulations generally prohibit the sending of unsolicited advertising by fax without prior, express consent. Violations of the law are subject to civil actions and have been the subject of numerous class action

according to established German case law, data subjects must always give consent for a specific processing purpose. This means that the person to be contacted needs to know (1) from whom (meaning which specific entity or entities), (2) for which specific products and services he / she will receive marketing offers and (3) by which means (e.g. email or telephone).

The German lawmaker has also transposed the ‘same service / product’ exemption into Section 7 UWG. Based on Section 7 (3) UWG, direct marketing can be based on the exemption if the following prerequisites are met:

- the recipients electronic mail address was obtained from the sender in connection with the sale of goods or services;
- the sender uses the address for direct advertising of his own similar goods or services (no cross-selling permitted);
- the recipient has not objected to this use; and
- the recipient is clearly and unequivocally advised, upon the collection of the address as well as each time it is used, that he or she can object to such use at any time, without costs arising by virtue thereof, other than transmission costs pursuant to the basic rates.

lawsuits. The law exempts faxes to recipients that have an established business relationship with the company on whose behalf the fax is sent, as long as the recipient has not opted out of receiving fax advertisements and has provided their fax number ‘voluntarily,’ a concept which the law specifically defines.

The law also requires that each fax advertisement contain specific information, including:

- A ‘clear and conspicuous’ opt-out method on the first page of the fax
- A statement that the recipient may make a request to the sender not to send any future faxes and that failure to comply with the request within 30 days is unlawful, and
- A telephone number, fax number, and cost-free mechanism to opt-out of faxes, which permit consumers to make opt-out requests 24 hours a day, seven days a week
- Violations are subject to a private right of action and statutory damages, and thus pose a risk of class action lawsuits

ONLINE PRIVACY

The General Data Protection Regulation (GDPR) supersedes national data protection law unless there is an opening clause constituted under GDPR. Due to Article 95 GDPR this is the case for national data protection law that was created to implement the Directive on privacy and electronic communication (Directive 2002/58/EC; "ePrivacy Directive").

The German legislator created national data protection regulations for providers of telecommunication services and for providers of certain electronic information and communication services (e.g. website operators) within the TTDSG, which was adopted on 1 December 2021. The TTDSG aims to eliminate the legal uncertainties caused by the fact that special data protection provisions were previously regulated in two different laws, the TKG and the TMG, which were both not adapted to the

ONLINE PRIVACY

There is no specific federal law that *per se* regulates the use of cookies, web beacons and other similar tracking mechanisms. However, the state online privacy laws require notice of online tracking and of how to opt out of it.

Under California law, any company that tracks any personally identifiable information about consumers over time and across multiple websites must disclose in its privacy policy whether the company honors any ‘ Do-Not-Track’ method or provides users a way to opt out of such tracking. The same law also requires website operators to disclose in their privacy policy whether any third parties may collect any personally identifiable information about consumers on their website and across other third party websites, and prohibits the advertising of certain products, services and materials

GDPR. As a result, in the past German data protection authorities and courts sometimes disagreed on which of these provisions, if any, were applicable.

The TTDSG eliminates some provisions that were deemed unapplicable and shifts the data protection regulations regarding telecommunication and telemedia into a single law, which stands alongside the GDPR and the BDSG. The TKG and the TMG have been amended and remain effective, but no longer contain data protection regulations. Whether this new legislation will actually put an end to the previous discussions remains to be seen.

Cookie compliance

The legal requirements with regard to the use of cookies were long unclear in Germany. It was disputed whether there was any consent requirement for cookies at all, as the respective provisions of the ePrivacy Directive had never been transposed into German law (which was also the opinion of the German data protection authorities at that time). Cookie consent was then required as of 28 May 2020, when the German Federal Court of Justice (*Bundesgerichtshof* – "**BGH**") ruled that Section 15 (3) TMG (which technically only provides for an opt-out requirement regarding the use of cookies) was to be construed as a requirement for cookie consent in the meaning of the ePrivacy Directive.

With Section 25 TTDSG, Germany finally transposed Article 5 (3) of the ePrivacy Directice into national law in December 2021, making cookie consent a legal obligation while explicitly including the definition of consent in terms of the GDPR.

In accordance with the ePrivacy Directive, under German law consent is not required where the sole purpose of cookies (or to be more precise, of the storage of information or access to information already stored in the users terminal equipment) is carrying out the transmission of a communication over a public telecommunications network or providing a telemedia service explicitly requested by a user (Section 25 (2) TTDSG).

In addition to that, the German data protection authorities have long been of the opinion that the processing of personal data enabled by the cookies used for analysis and tracking tools regularly requires consent, in particular if the tools allow third parties to collect data from website users as (joint) controllers. It remains to be seen whether this position will be upheld by the BGH or another superior German court.

(including alcohol, tobacco, firearms, certain dietary supplements, ultraviolet tanning, tattoos, obscene matters, etc.). Further, under most of the comprehensive state laws, information collected via cookies, online, mobile and targeted ads, and other online tracking are subject to the requirements of the law.

Further, given the broad definition of personal information under the comprehensive state privacy laws, information collected via cookies and similar technologies is generally subject to the requirements of the law (e.g., notice and consumer rights). For example, under the CCPA a 'sale' includes selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating a consumer’s personal information by one business to another business or a third party for monetary or other valuable consideration. ‘Sharing’ under the CCPA is defined as sharing, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means, a consumer’s personal information by the business to a third party for cross-context behavioral advertising, whether or not for monetary or other valuable consideration, including transactions between a business and a third party for cross-context behavioral advertising for the benefit of a business in which no money is exchanged. These broad definitions sweep in certain online advertising activities -- for example, where a business permits the collection and use of information through certain third party cookies and tags on their website, in order to better target the business' ad campaigns on third party websites or in exchange for compensation from a third party ad network.

Universal Opt-Out Signals / Global Privacy Control (GPC)

Amendments to the CCPA, and recent enforcement actions by the California Attorney General, have highlighted the requirement that businesses that process personal information for targeted advertising purposes allow consumers to opt-out of sales and sharing, using an opt-out preferences signal sent by the consumer’s browser or a browser plugin, aso referred to as Global Privacy Control (GPC). Colorado’s comprehensive privacy law introduces the same requirement, with an effective date of July 1, 2024.

Minors

The Children’s Online Privacy Protection Act and regulations (COPPA) applies to information collected

Traffic data

Lawful processing of traffic data is governed by Section 9 et. seqq. TTDSG and may only take place to the extent it is necessary for the purposes constituted therein or if other legal provisions require a processing. Those who provide or participate in the provision of telecommunication services have to take the technical precautions and actions necessary to protect personal data in accordance with Section 165 TKG; in this context the state of the art must be observed. In addition, the service providers are required to protect the secrecy of telecommunications, which extends to both the content of telecommunications and its detailed circumstances, in particular the fact whether someone is or was involved in a telecommunications process.

Providers of telecommunication services in terms of Section 3 (2) sentence 1 TTDSG may process traffic data for the establishment and maintaining of a telecommunications connection, remuneration inquiry and billing, fraud prevention as well as detection and remedy of disruptions regarding telecommunications systems and tracing of malicious or nuisance calls. Processing of traffic data for marketing purposes, need-based design of telecommunication services and provision of value-added services requires consent in accordance with GDPR.

Generally, traffic data shall be deleted by the service provider without undue delay after termination of each telecommunications connection or as soon as the data are no longer necessary in relation to the purpose for which they are otherwise being processed. However, data may and must be stored in case statutory retention periods under the TTDSG, TKG or other law apply.

If there is a particular and significant risk of a security incident, providers of publicly available telecommunication services shall notify the users about any possible protective or remedial measures that can be taken by users and, where appropriate, about the threat itself (Section 168 (6) TKG), in addition to their general notification obligations with respect to security incidents towards the German Federal Network Agency (*Bundesnetzagentur* – "**BNetzA**") and the Federal Office for Information Security (*Bundesamt für Sicherheit in der Informationstechnik* – "**BSI**").

Location data

Publicly available telecommunication services may only process location data for the purpose of providing value-

automatically (*eg*, via cookies) from child-directed websites and online services and other websites, online services and third party ad networks or plug-ins that knowingly collect personal information online from children under 13. COPPA also regulates behavioral advertising to children under 13 as well as the collection of geolocation information, requiring prior verifiable parental consent to engage in such advertising or collection.

California law requires that operators of websites or online services that are directed to minors or that knowingly collect personally identifiable information from minors permit minors that are registered users of their sites to remove any content the minor has posted from the site or online service. The law does not give minors the right to remove information posted by third parties. Minors must be given clear notice on how to exercise their right to removal. Certain state privacy laws (such as the CCPA, CPA or VCDPA) also require that a business obtain explicit consent prior to selling any personal information about an individual the business has actual knowledge is under 16 years old.

Location Data

Generally, specific notice and consent in needed to collect precise *(e.g.,* mobile device) location information. The CCPA defines precise geolocation information as “any data derived from a device and that is used or intended to be used to locate a consumer within a geographic area that is equal to or less than the area of a circle with a radius of one thousand, eight hundred and fifty (1,850) feet.” Connecticut and Utah law carry similar definitions, albeit with a radius of 1,750 feet.

added services in case the data are rendered anonymous or processing is based on consent in terms of the GDPR (Section 13 (1) TTDSG).

Consent can be withdrawn at any time and where consent was given to the processing of location data, it must be possible, by simple means and free of charge, to temporarily prohibit the processing of such data for each connection to the network or for each transmission of a message.

The processing of location data in other contexts than telecommunication services (like for example GPS tracking) is subject to the GDPR.

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DATA PRIVACY TOOL

You may also be interested in our Data Privacy Scorebox to assess your organization's level of data protection maturity.

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