

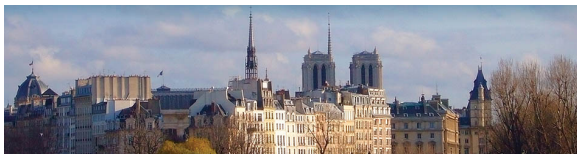
# **DATA PROTECTION LAWS OF THE WORLD**

France vs Germany



Downloaded: 28 April 2024

## FRANCE



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. This is the **'establishment criterion'**. 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 behavior" (Article 3(2)(b)) as far as their behavior takes place within the EU. This is the **'targeting criterion'**.

France updated Law No. 78-17 of January 6, 1978 on information technology, data files and civil liberties (the **'Loi Informatique'**) to GDPR with the enactment of (i) Law No. 2018-

## 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

493 of June 20, 2018 on the protection of personal data, and (ii) Order No. 2018-1125 of December 12, 2018, adopted pursuant to Article 32 of Law No. 2018-493, updates the Law and other French laws relating to personal data protection in order to simplify the implementation and make the necessary formal corrections to ensure consistency with EU data protection law. France domestic data protection legislation was further completed with the adoption of Decree No. 2019-536 of May 29, 2019, adopted for the application of the Law (the Decree). The Decree clarifies procedural rules of the French data protection authority, including its control and sanctions, and further specifies data subject rights.

The Law and the Decree have been updated:

- in 2021, (i) Law No. 2021-988 of July 30, 2021, on the prevention of acts of terrorism and intelligence amended articles 48 and 49 of the Law to create exceptions to the rights of individuals when processing is justified by national security and (ii) Law No. 2021-1017 of August 2, 2021, relating to bioethics which modified article 75 of the Law relating to processing in the health field; and
- in 2022, (i) Law No. 2022-52 of January 24, 2022, on criminal liability and homeland security amends articles 10, 20, 125 of the Law and created article 22-1 to introduce the simplified sanction procedure of the French data protection authority and (ii) Decree No. 2022-517 of April 8, 2022, amends the Decree to define the modalities of this simplified sanction procedure as introduced by Law No. 2022-52 of January 24, 2022. The objective of these new texts is to introduce more flexibility in the use of formal notices or sanctions.

## Territorial Scope

As of today, Article 3 of the Law provides that it applies when (i) the data controller or data processor is established in France (whether the processing takes place in France or not) or (ii) the data subjects reside in France (for the possible legal variations as permitted from time

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.



to time of the GDPR. Contrary to the GDPR, the Law has not included the *targeting criterion*;

## 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 under the Law are the same as under the GDPR. Article 2 of the Law makes an

## 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

express reference to GDPR definitions, thus harmonizing the definitions and concepts of French law with the GDPR.

## 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 ICO in the UK). The European Data Protection Board (the replacement for the so-called Article 29 Working Party) is comprised 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.

The « *Commission Nationale de l'Informatique et des Libertés* » or « CNIL » is the French supervisory authority

### Address

definitions for 'public bodies of the Federation', 'public bodies of the L&#228;nder' and 'private bodies' in Section 2 BDSG. The TTDSG contains definitions for types of data that are specifically related to the provision of telecommunications and telemedia services (so-called inventory data and usage data).

## 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 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 ( L&#228;nder) 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

3 place de Fontenoy  
TSA 80175  
75334 Paris Cedex 07

## Telephone

01 53 73 22 22

## Website

[cnil.fr](http://cnil.fr)

The CNIL has different missions and powers, which mainly include:

- i. informing data subjects and data controllers / processors (whether public or private) about their rights and obligations;
- ii. ensuring compliance of all personal data processing with French and EU data protection rules as well as data protection rules resulting from international commitments of France;
- iii. anticipating new challenges and issues arising from innovation and the use of new technologies, including privacy in general and ethics;
- iv. controlling and sanctioning.

In addition, the Law provides for mutual assistance and joint operations with other EU Supervisory Authorities, as well as cooperation with non-EU supervisory authorities.

The CNIL has a range of tools to complete its missions including e.g., publication of reference frameworks created after consultations with the stakeholders or sectors at hand, among which standard regulations (which are mandatory in respect of processing of biometric, genetic, health or criminal convictions and offences data), reference methodologies in the sector of health, guidelines, recommendations and standards, approval of codes of conduct and certifications, broad range of on-site and off-site investigation powers and sanctions. The Law provides further precisions on the functioning of the CNIL and its specific tasks and powers, notably the extent of on-site investigations and procedural requirements, in connection with the missions described above.

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 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.

Prior formalities with the CNIL are no longer required and are replaced by the obligation to hold a record of processing which include the same categories of information as those initially requested in the filing forms.

However, formalities are maintained for the processing of data in the health sector which is subject either to a declaration of conformity to specific requirements defined by the CNIL or an authorization by the CNIL. In this respect, the CNIL has issued eight (8) methodologies of reference ("*Methodologies de Reference*" or "MR") for various types of research in the health sector. A formal commitment to comply with these methodologies exempts the data controller &#8211; generally the sponsor of the research &#8211; from having to apply for a formal authorization with the CNIL.

Certain specific processing of personal data must be authorized by decree of the State Council (

## 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.

Conseil d'Etat) or ministerial order, taken after a motivated and public opinion of the CNIL. These processing are as follows:

- Processing of the social security number (with a few exceptions);
- Processing carried out by or on behalf of the State, acting in the exercise of its public authority prerogatives, of genetic or biometric data necessary to the authentication or identity control of individuals;
- Processing carried out on behalf of the State (i) which concern State security, defense, national security, or (ii) which purpose is the prevention, investigation, detection or prosecution of criminal offences, or enforcement of criminal convictions or security measures.

## DATA PROTECTION OFFICERS

Each controller or processor is required to appoint a data protection officer 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 data protection officer with responsibility for multiple legal entities (Article 37(2)), provided that the data protection officer is easily accessible from each establishment (meaning that larger corporate groups may find it difficult in practice to operate with a single data protection officer).

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

## 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



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 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 Law provides that controllers processing personal data under the scope of the EU Data Protection Directive on Police and Criminal Justice Cooperation must appoint a DPO, with the exception of jurisdictions acting within the scope of their judicial activity.

The Decree specifies the mandatory information to be communicated to the CNIL by data controller(s) or processor(s) in the DPO notification form.

On 20 September 2018, the CNIL issued two standards regarding the certification of DPO skills: one regarding the skills and know-how expected to be certified as DPO (CNIL Deliberation No. 2018-318), and the other one regarding the criteria applicable to certifying DPO organizations (CNIL Deliberation No. 2018-317). These Deliberations were recently updated notably to adapt the procedure of accreditation of the organizations authorized to certify the DPOs; skills and to enable candidates to take the certification test remotely (CNIL Deliberation No. 2022-128 and CNIL Deliberation No. 2023-062).

exercise of his or her tasks and must not be dismissed or penalised for performing those tasks (Article 38(3)).

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.

On March 2022, the CNIL also published a [Guide for DPOs](#) that combines useful knowledge and best practices to help organizations in appointing and supporting DPOs.

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

## 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 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

- processed in a manner that ensures appropriate security of the personal data, using appropriate 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

(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 legal 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 defense 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).

(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).



## Processing for a secondary purpose

Increasingly, organizations wish to 're-purpose' personal data - i.e. 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 pseudonymisation.

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, i.e. 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;

## 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;

- 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)

- 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 Europe'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 .xml).

## **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 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 .xml).

## **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  $\S 220$ ; compelling legitimate grounds  $\S 221$ ; 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]  $\S 230$ ; 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.

## Special category data

The Law contains specific provisions regarding the processing of health data (e.g. see above regarding authorization requirements), as well as additional provisions regarding processing of special categories of personal data.

## Criminal convictions and offences data

The following categories of persons can process such personal data:

- Courts, public authorities and legal persons entrusted with a public service, acting within the scope of their legal functions, as well as entities collaborating with judicial entities as listed in the Decree;
- Auxiliaries of justice, for the strict exercise of their functions;
- Individuals and private entities to prepare, bring or defend a claim in court as a victim or defendant, and to execute

data until such time as they demonstrate  $\S 220$ ; compelling legitimate grounds  $\S 221$ ; 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]  $\S 230$ ; 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*  $\S 21$ ; "**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.



the court decision, for the duration strictly necessary for these purposes. It is possible to share such information with third parties under the same conditions and for the same purposes;

- Collective IP rights management organizations for the purpose of defending those rights; and
- Persons reusing public information appearing in published rulings, provided that the processing has neither the purpose or effect of allowing the re-identification of the concerned persons.

In addition, the following categories of persons are authorized by the Decree to process personal data relating to criminal convictions, offenses or related security measures:

- Victims support associations contracted by the Ministry of Justice;
- Associations of assistance to the reintegration of persons placed under the authority of justice, in the respect of their social object;
- The establishments mentioned in 2 ° of I of Article L. 312-I of the Code of Social Action and Families as part of their mission of medico-social support;
- The establishments and services mentioned in 4 ° and 14 ° of I of Article L. 312-I of the Code of Social Action and Families;
- The drop-in and reception centers mentioned in III of Article L. 312-I of the Code of Social Action and Families; The medical or medico-educational establishments authorized mentioned in articles 15 and 16 of the order No. 45-174 of 2 February 1945 relating to delinquent childhood;
- The public or private educational or vocational training institutions, authorized and appropriate boarding schools for juvenile school-aged offenders mentioned in Articles 15 and 16 of the aforementioned order of 2 February 1945;

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 *carrying out the obligations and exercising specific rights*; *in the field of employment and social security and social protection law* 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 *carrying out the obligations and exercising specific rights*; *in the field of employment and social security and social protection law* for the performance of the employment contract, employers also need to comply with the case law of the German Federal Labour Court (*Bundesarbeitsgericht* *§ 82 I 1*; "**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).

- Private legal entities exercising a public service mission or the authorized associations mentioned in Article 16 of the aforementioned order of 2 February 1945;
- The legal representatives for the protection of the adults mentioned in Article L. 471-I of the Code of Social Action and Families.

The CNIL may issue standard regulations, prescribe additional measures to be implemented, including of a technical and organizational nature, and / or complementary warranties for processing of special categories of data, including notably criminal convictions and offences data, by public and private entities (except for processing carried out in connection with the exercise of public authority by or on behalf of the State).

In addition, processing of criminal convictions and offences data which purpose is the prevention, investigation, detection or prosecution of criminal offences, or enforcement of criminal convictions or security measures by or on behalf of the State is subject to an order of the competent Ministry.

## Transparency (privacy notices)

The Law mandates data controllers to provide data subjects with information relating to their right to define directives relating to the processing of their personal data after their death (digital legacy).

In addition, where the data is collected from a data subject under 15, the data controller must provide the mandatory information provided for by Art. 13 GDPR in a clear and easily accessible language.

The French data subjects should be also provided with the information relating to the processing of their personal data in French (notably in accordance with Act no. 94-665 dated 4 August 1994 related to the use of the French language).

## Rights of the data subjects

The Decree describes the conditions in which the data subjects can exercise their rights (and more precisely, the conditions to check the identity of the data subject making the right request).

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* &#8211; "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&#8217; 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&#8217;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&#8217;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

Data subjects' rights can be restricted notably to avoid obstructing administrative investigations, inquiries or procedures, to safeguard the prevention, investigation, detection and prosecution of criminal offences, as well as of administrative enquiries, or to protect the rights and freedoms of others.

## Digital legacy

Data subjects have the right to give instructions regarding the storage, deletion and communication of their personal data after their death (Articles 48 and 85 of the Law). Such instructions can be either:

- General, in which case they apply to all their personal data, irrespective of who the controller is. Such instructions can be given to a trusted third party certified by the CNIL; however, the implementing decree in this respect has never been adopted since the adoption of this provision in 2016; or
- Specific to one or several services, in which case the data subject can also give his / her instructions to the relevant data controller. It is required to obtain the specific consent of the data subject, and such consent cannot derive from his/her consent to general terms and conditions.

If the data subject has not given any instructions in his / her lifetime, then his / her heirs can exercise certain rights, in particular:

- The right of access, if it is necessary for the settlement of the succession; and
- The right to close the deceased's accounts and to cease the processing of his / her personal data or, request the update of the personal data of the deceased.

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

## 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, New Zealand, Japan, the United Kingdom, the Republic of Korea and the United States (for companies certified under the EU-US Data Privacy Framework).

Transfers to third countries are also permitted where appropriate safeguards have been provided by the controller or processor and on condition that enforceable data subject rights and effective legal remedies for the data subject are available. The list of appropriate safeguards includes among others binding corporate rules and standard contractual clauses. Controllers should also take additional requirements provided by the [EDPB Recommendations 01/2020](#), following-up to the CJUE Schrems II Decision, i.e., Transfer Impact Assessment and where necessary, supplementary measures. 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 defense of legal claims;

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 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.



- 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.

In the event processing of personal data involves a transfer of data outside the European Union territory, data subjects must be provided with mandatory information on, inter alia, the data transferred, the purpose of the transfer, the recipients of the data and the transfer mechanism used in accordance with the GDPR.

With respect to transfers made on the basis of Article 49(1)§2 of GDPR ("compelling legitimate interest"), the Decree provides that the CNIL will define templates (including annexes) to be used by data controllers to inform the CNIL about such transfers.

With respect to transfers made on the basis of code of conduct or other certification mechanism approved by the CNIL in accordance with the Law and the Decree, the Decree provides that data controller / data processor that rely on such transfer mechanisms shall provide the CNIL with a binding and enforceable commitment to apply appropriate safeguards to data subjects' rights and freedoms in the concerned third-country.

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](#).

For more information, please visit our [Transfer &#8211; 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.

Although there is no specific requirements other than those set forth in the GDPR, the CNIL and the French Cyber Security Agency (&#8220;ANSSI&#8221;) have issued security guidance and recommendations containing state-of-the-art security practices, in particular: the 2023 version of the [Personal Data Security Guide](#) and the 2022 version of the [recommendations on password and other shared secrets](#).

## 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 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.

## 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

## 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.

Article 85 of Decree restricts the obligation of notification under Article 34 of the GDPR for the following processing:

- Processing including personal data allowing to identify, directly or indirectly, individuals whose identity is protected under Article 39 *sexies* of the French law on the freedom of the press; and
- Administrative, financial and operational data, as well as health data processing for which the notification of an unauthorized disclosure or access is likely to result in a risk for the national security, defense or public, due to the volume of data affected by the breach and the private information it contains (such as the family address or composition).

The Law provides that a Decree by the State Council, adopted after seeking the CNIL's opinion (yet to be adopted) will specify a list of categories of processing and processing operations that derogate to the data breach notification requirement. Such derogation will only apply to processing that are necessary pursuant to a legal obligation bearing on the data controller or a public interest mission vested in the data controller, where such data breach notification would likely result in a risk to homeland security, defense or public safety.

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 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 scrutinized carefully to understand the interpretation of 'undertaking'. Under EU competition law case-law, there is also precedent for regulators to impose joint and 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.

## 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 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.

For instance, in France, criminal penalties which can go up to 5 years of prison and EUR 300,000 fine for natural persons and EUR 1,500,000 for legal persons.

In May 2023, the EDPB issued Guidelines 04/2022 on the calculation of administrative fines under the GDPR.

## 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.

Since 24 January 2022, the CNIL can investigate and use corrective powers following the simplified sanction procedure (Article 22-I of the Law). This accelerated procedure can be used when a case does not present a specific issue (e.g. there is an established case law on the issue, the factual and legal issues are considered as simple). In such case, the CNIL can pronounce one or more of the following measures: warning, injunction to bring the processing into compliance including a penalty payment of up to €100 per day of delay, and / or an administrative fine of up to €20,000. Sanction decisions issued pursuant to the simplified sanction procedure are not published.

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 (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).

## 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 (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 (e.g. 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 to be replaced by a Regulation. However, it is currently uncertain when this is going to happen, as the European 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.

The Law does not contain explicit provisions with respect to electronic marketing. However, Article L. 34-5 of the French Postal and Electronic Communications Code regulates electronic marketing in France. The CNIL has issued guidelines on the basis of this provision.

The CNIL distinguishes between B2B and B2C relationships. In any event, all electronic marketing messages must specify the name of the advertiser and allow the recipient to object to the receipt of similar messages in the future.

### Electronic marketing to consumers (B2C)

## ELECTRONIC MARKETING

The GDPR will apply to most electronic marketing activities, as these will involve some use of personal data (e.g. 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 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 &#8216;same service / product&#8217; 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

Electronic marketing activities are authorised provided that the recipient has given consent at the time of collection of his / her email address.

This principle does not apply when:

- the concerned individual is already a customer of the company and if the marketing messages sent pertain to products or services similar to those already provided by the company; or

Note that the CNIL considers that the creation of an account does not prejudice the eventual ordering of products or services from the company. The CNIL considers that in the absence of a purchase, the company cannot purposefully invoke the benefit of the soft opt-in exception created by article L. 34-5 of the French Postal and Electronic Communications Code.

- the marketing messages are not commercial in nature.

In any event the concerned individual, at the time of collection of his / her email address, must be informed that it will be used for electronic marketing activities, and be able to easily and freely object to such use.

## Electronic marketing to professionals (B2B)

Electronic marketing activities are authorized provided that the recipient has been, at the time of collection of his / her email address:

- informed that it will be used for electronic marketing activities, and
- able to easily and freely object to such use.

The message sent must relate to the concerned individual's professional activity. Please note that email addresses such as `contact@companyname.fr` are not subject to the requirements of prior consent and the right to object.

- 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* &#8211; "**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 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 &#8216;same service / product&#8217; 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.

## ONLINE PRIVACY

### Cookies

The EU Cookie Directive has been implemented in the Law. It states that any subscriber or user of electronic communications services must be fully and clearly informed by the data controller or its representative of:

- the purpose of any cookie (i.e. any means of accessing or storing information on the subscriber's / user's device, e.g. when visiting a website, reading an email, installing or using software or an app); and
- the means of refusing cookies,

unless the subscriber / user has already been so informed.

Cookies are lawfully deployed if the subscriber / user has expressly consented after having received information. Valid consent can be expressed via browser settings if the user can choose the cookies he / she accepts and for which purpose.

However, the foregoing provisions do not apply:

- to cookies the sole purpose of which is to allow or facilitate electronic communication by a user; or
- if the cookie is strictly necessary to provide online communication services specifically requested by the user.

### Location and traffic data

The Postal and Electronic Communications Code deals with the collection and processing of location and traffic data by electronic communication service providers (CSPs).

All traffic data held by a CSP must be erased or anonymised. However, traffic data may be retained, for example:

## 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 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

- for the purpose of finding, observing and prosecuting criminal offences;
- for the purpose of billing and payment of electronic communications services; or
- for the CSP's marketing of its own communication services, provided the user has given consent thereto.

Subject to exceptions (observing and prosecuting criminal offences; billing and payment of electronic communications services), location data may be used in very limited circumstances, for example:

- during the communication, for the proper routing of such communication; and
- where the subscriber has given informed consent, in which case the location data may be processed and stored after the communication has ended. Consent can be revoked free of charge at any time.

## Cookies

The French Data Protection Supervisory Authority (CNIL) replaced its 2013 guidelines regarding cookies and trackers, which were no more compliant with the GDPR, by revised guidelines. Following the adoption of a version of its guidelines on cookies and other trackers on July 4, 2019, which have been partially annulled by a decision from the French highest administrative Court, the *Conseil d'Etat*, on 19 June 2020, the CNIL has adopted revised guidelines and the final version of its recommendations on the practical procedures for collecting consent concerning cookies and other trackers. The CNIL's revised guidelines, adopted by way of deliberation No. 2020-091 of September 17th, 2020, are based on Article 82 of the Law, implementing Article 5 (3) of EU directive 2002/59, into French law.

While the Revised Guidelines provide the CNIL's guidance on how to read the relevant provisions of the French Data Protection Act, which governs the use of cookies and other trackers in France, the Recommendations adopted by a deliberation No. 2020-92 of September 17th 2020 provide practical guidance and examples to help professionals navigate the rules applicable to cookies and other trackers and comply with the requirements of Article 82 of

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 Directive 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.

## 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

the French Data Protection Act. These two documents constitute soft law; and are not binding, but provide strong references for organizations to anticipate how the CNIL may conduct its compliance investigations.

Regarding consent, the CNIL has now specified that consent must be:

- **unambiguous:** to align with the guidelines on consent issued by the Article 29 Working Party, the CNIL repeals its previous position according to which scrolling down, browsing or swiping through a website or app was considered as an acceptable expression of consent to cookies and allowed for cookies to be placed. Therefore, for the CNIL, continuing to navigate on a website or using an application is no more acceptable to evidence a consent to cookies. The absence of action from the user (i.e., no choice from the user) can no longer be construed as a valid consent but should rather be construed as refusal. This operates a shift from soft opt-in; to active consent. The revised guidelines also outlines that pre-ticked boxes do not meet the GDPR standard of consent;
- **freely given:** the data subject must be able to exercise freely his / her choice. The CNIL has revised (albeit subtly) its previous positioning regarding cookie walls; (the practice of subjecting prior access to a website or application to the acceptance of cookies) where the CNIL considered that consent could never be freely given when collected using cookie walls, the revised guidelines now specify that cookie walls are likely to hinder freely given consent. In addition, the CNIL has specified in its case law, that failure to provide a mean to refuse cookies as easily; as it is to accept them (e.g., by way of dedicated buttons on a cookie banner) results in consent being not freely given, since users will lean toward accepting cookies rather than performing multiple clicks to refuse;

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-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.

- **specific:** consent must be tailored to each purpose. Therefore acceptance of the general terms and conditions as a whole (bundled consent) does not constitute valid consent; informed: information to data subjects must be easily understandable by any of them. Information must be given in plain language. The use of complex technical or legal terms does not meet the requirement of prior information. Such information must at least include (i) the identity of the data controller(s) implementing the trackers (ii) a thorough list of the purpose(s) of the reading or writing operations (iii) the means available to consent or object to the use of cookies (iv) the consequences of accepting or refusing the use of cookies and (v) the right to withdraw consent;
- **evidenced:** all organizations that use cookies must implement appropriate mechanisms that allow them to demonstrate, at all times, that they have validly obtained consent from users. the revised guidelines specifically provide that users choices, be it consent or refusal, must be (i) clearly presented to users, notably as regards the available means to exercise such choice, (ii) collected and clearly evidenced (the recommendations give examples of how to ensure such evidence through the use of a consent management platform, screen capture, etc.) and (iii) recorded by data controllers, for an appropriate duration during which they would not ask the users again for their consent. Such duration may vary depending on the nature of the site or application concerned. According to the Recommendations, a good practice in that respect is 6 months; at the expiry of that term, controllers could ask users again to consent (or refuse) to the use of cookies and trackers; and
- **revocable:** organizations are encouraged to put in place user-friendly solutions to allow users to withdraw their consent as easily as they gave it. The CNIL highlights the fact that means to refuse cookies and trackers must be as easy;

as means available to accept use thereof. As a result, users must not be subjected to complex procedures for refusing cookies and trackers and withdraw their consent, which they must be able to do at any time. To that end, the CNIL provides practical examples and good practices in the Recommendations, from the use of a “reject all” button to the availability of a visible “cookies” icon enabling users to parameter their choices and withdraw their consent.

The updated guidelines do not provide a general rule regarding the data retention of cookies and the information collected via such cookies. The CNIL simply recommends that the user’s consent (or refusal) is renewed every 6 months. However, the CNIL has maintained, as guidance, the following data retention terms for certain analytics cookies that do not require users’ consent:

- the lifetime of these cookies should be limited to a period that allows a relevant comparison of audiences over time, as it is the case with a period of 13 months, and is not automatically extended for new visits;
- the information collected via these cookies is kept for a maximum period of 25 months; and
- the above-mentioned lifetimes and retention periods are periodically reviewed to ensure that they are limited to what is strictly necessary.

In course of 2021 and 2022, the CNIL undertook massive online investigations in order to check whether the organizations were compliant with the new guidelines. Further to said investigations, several formal notices have been sent to organizations from different sectors (major platforms of the digital economy, e-commerce companies, car rental companies, public service authorities, bank companies, etc.). The CNIL has also fined companies for non-compliance regarding the use of cookies. Heavy sanctions have been applied to GAFAM companies in particular, with administrative fines up to 90 million Euros for failures to comply with Article 82 of the Law. It is interesting to note that, in its



decisions regarding cookies, the CNIL imposes its competence even in the presence of a Lead Authority appointed by the company sanctioned, on the ground that the French Supervisory Authority remains the competent authority to control compliance of the e-Privacy Directive requirements, which are specific rules prevailing on the general rules resulting from the GDPR where thus the “One Stop Shop” process does not apply. In March 2023, the CNIL announced that user tracking by mobile phones was a priority topic for its investigations in 2023. It indicated that it carried out several investigations on applications that access identifiers generated by mobile operating systems in the absence of user consent.

## KEY CONTACTS



### Denise Lebeau-Marianna

Partner

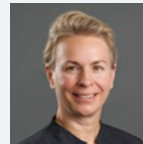
T + 33 (0)1 40 15 24 98

denise.lebeau-  
marianna@dlapiper.com

## DATA PRIVACY TOOL

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

## KEY CONTACTS

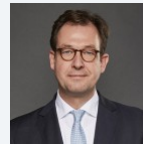


### Verena Grentzenberg

Partner

T +49 40 188 88 203

verena.grentzenberg@dlapiper.  
com



### Dr. Jan Geert Meents

Partner

T +49 89 23 23 72 130

jan.meents@dlapiper.com



### Jan Pohle

Partner

T +49 221 277 277 391

jan.pohle@dlapiper.com

## DATA PRIVACY TOOL

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

## Disclaimer

DLA Piper is a global law firm operating through various separate and distinct legal entities. Further details of these entities can be found at [www.dlapiper.com](http://www.dlapiper.com).

This publication is intended as a general overview and discussion of the subjects dealt with, and does not create a lawyer-client relationship. It is not intended to be, and should not be used as, a substitute for taking legal advice in any specific situation. DLA Piper will accept no responsibility for any actions taken or not taken on the basis of this publication.

This may qualify as 'Lawyer Advertising' requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

Copyright © 2022 DLA Piper. All rights reserved.