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The new German Data Protection Act and its compatibility with the European Data Protection Directive☆

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ABSTRACT

A substitution of the right to maintain mailing lists for marketing purposes (the so-called list privilege) by a strict opt-in requirement as proposed by the German Government for the amendment of the German Data Protection Act does not conform with European law. Making the use of relatively innocuous data like name and address for marketing purposes subject to the data subject's declaration of consent infringes upon the requirements of the European Data Protection Directive. The Directive allows for the use of personal data either on the basis of a data subject's declaration of consent or after a balancing of legally protected interests. Reducing this two-track model to a one-track model (based on the data subject's declaration of consent only) does not do justice to the idea of balancing of interests or free movement of goods and services which are a mandatory part of European law. The draft bill interferes drastically with the free movement of goods and services. A tightening of the opt-in requirements would be a severe burden for the German economy because it is impossible for businesses to distribute their goods and services without the help of marketing measures. The economic cycle would be hit at its weakest point, i.e. the link between businesses and consumers which is gaining more and more importance especially with a view to cross-border competition.

1. Introduction

German ministers agreed at the end of 2008 to update federal data protection laws for the digital age in the wake of scandals showing how easily personal details can be bought on the Internet. The government wants to make it illegal for data to be passed between firms without the permission of the person concerned. In future an individual's "express consent" would be needed to pass on any personal data for direct marketing purposes. The following text sets out to analyze whether the recent plans of the German Government to amend German federal data protection law (German Parliament Official Journal – BT-Drs. 16/12011, available at: http://dip21.bundestag.de/dip21/btd/16/120/1612011.pdf) are in compliance with the requirements of the European Data Protection Directive (95/46/EC).

In the first part (2) the changes by the draft bill will be described. A presentation of the European Data Protection Directive is following (3). The first main part argues that balancing of legally protected interests is a mandatory requirement of European law (4). The second main part deals with the question whether the European Data Protection Directive statues a minimum or maximum harmonization (5). The last part points out the implications of the draft bill (6).

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2. The German Government's draft bill

In its draft bill,[1] the German Government proposes to delete the so-called "list privilege" (governed to date by Section 28 Para. 3 Sentence 1 No. 3 German Federal Data Protection Act = Bundesdatenschutzgesetz, BDSG) and to substitute it by a requirement for a declaration of consent. Similar rulings are only adopted in Slovenia, Slovakia and Hungary.[2] The list privilege represents a balancing of legally protected interests under constitutional law between the data subject's privacy interests and the industry's interest in pursuing direct marketing with as little constraints as possible. This balancing of legally protected interests is viewed as a lawful expression of the requirements of constitutional law also by data protection experts. Roßnagel, for example, explains that even though there existed no irrelevant data, the dimensions of the risk of misuse had to be assessed according to the data concerned.[3] As long as the risk of misuse could be considered as low, it was justifiable to subordinate it to the general interest in information from a legal perspective.

Pursuant to the new Section 28 Para. 3 of the draft bill, the processing or use of personal data for the purposes of address sales, marketing or market or opinion research shall only be lawful if the data subject has declared his/her consent pursuant to Section 28 Para. 3a. In addition, the processing or use of personal data shall also be lawful if the data which are compiled in lists or otherwise combined as well as the processing are restricted to marketing purposes regarding the controller's own offers or for the controller's own market or opinion research. In this case, Section 28 Para. 3 Sentence 5 of the draft bill provides that processing or use shall only be lawful if they are not contrary to the data subjects' legitimate interests. Thus, apart from marketing and opinion research for own purposes, a combination of listed data will only be lawful after the prior declaration of consent by the data subject. The reasons given in the governmental draft are: "In future, the controller shall have to approach the data subject and convince him to declare his consent, e.g. by granting him advantages". The lawfulness of the data processing shall be based strictly on the data subject's declaration of consent.

3. The European Data Protection Directive

The following assessment is based on the criteria provided for by the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[4] ("Data Protection Directive"). On the one side this Directive seeks to ensure a high level of protection in the Community (Recital 10). But on the other side in accordance with the free movement of goods and services provided for in Article 7a of the EC Treaty, the Data Protection Directive aims to guarantee the necessary conditions for the establishment and functioning of an internal market with regard to data protection requirements (Recitals 3 and 5). The difference in levels of protection with regard to the right of privacy afforded in the Member States was judged to be an "obstacle to the pursuit of a number of economic activities at Community level" by the European decision-making bodies (Recital 7). In order to regulate cross-border flow of personal data in a consistent manner and in compliance with the objectives of the internal market, the Data Protection Directive obliges the Member States to realize an equivalent level of data protection (Recital 8). Therefore, the Member States are not allowed to inhibit the free movement of personal data between them on grounds relating to protection of the right to privacy (Recital 9).

The reference to commercial advertising found in Recital 30 is of particular importance. Pursuant to this Recital, the Member States are allowed to specify the conditions "under which personal data may be disclosed to a third party for the purposes of marketing whether carried out commercially or by a charitable organization or by any other association or foundation (...)". In Recital 30, the Data Protection Directive explicitly restricts the Member States to the extent that they may only act "subject to the provisions allowing a data subject to object to the processing of data regarding him, at no cost and without having to state his reasons". In addition, the Recital only refers to the conditions under which the data may be "disclosed" and not to any other processing or use of personal data for marketing purposes as the German Government rules in its draft bill.

Recital 71 specifies that the Data Protection Directive "does not stand in the way of a Member State's regulating marketing activities aimed at consumers residing in territory in so far as such regulation does not concern the protection of individuals with regard to the processing of personal data". Vice versa, it may be concluded that data protection issues related to commercial advertising shall be subject to the Data Protection Directive only and that Member States are not allowed to implement separate rulings on a national level.

The Data Protection Directive itself specifies a clear-cut mechanism for the legitimacy of data processing. Article 7 bases legitimacy on the declaration of consent just as well as on the realization of legitimate interests.[5] Pursuant to this Article, the Member States shall only grant processing of personal data if the data subject has unambiguously given his/her consent (lit. a) or if the processing is necessary for the purposes of legitimate interests (lit. f), except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject.[6] This mechanism derived from the BDSG which also sees the legitimacy of any data processing activities based on a declaration of consent or

[1] Bundestag printed matter 16/12011, available at: http://dip21.bundestag.de/dip21/btd/16/120/1612011.pdf.
[2] http://www.heise.de/newsticker/Expertenstreit-im-Bundestag-um-Datenschutzreform-/meldung/135022.
[3] Roßnagel, Konflikte zwischen Informationsfreiheit und Datenschutz? Multimedia und Recht, 2007, p. 16 (p. 19).
[4] Official Journal of the European Communities No. L 281 dated 23 November 1995, p. 31.
[5] Cf. Korff. The effects of the EC Draft Directive on Business. In: Dumortier, editor. Recent developments in data privacy. Leuven; 1992. p. 47.
[6] Cf. Dressel, Die gemeinschaftsrechtliche Harmonisierung des Europäischen Datenschutzrechts, Munich 1995, p. 258 et seq.

a comprehensive evaluation of the rights and interests of all parties concerned (Sections 28, 29 BDSG).[7]

The dualistic model of a legitimation via declaration of consent and balancing of interests was meant to accommodate the concerns of the industry. The Federation of European Direct Marketing (FEDIM), in particular, had a strong influence on the relevant wording.[8] The balancing of legally protected interests model has found entrance into nearly all data protection laws within the European Union.[9] In Spain, which is the only country using the model in a restricted version, the supervisory authorities apply the idea of a balancing of legally protected interests in their decision-making processes.[10] Italy had restricted the application of a balancing of legally protected interests when the Data Protection Directive was first implemented. This restriction was revoked, however, in one of the following amendments. A similar development could be seen in Austria.

Article 14 Sentence 1a stipulates that the Member States shall grant the data subject the right to object at any time on compelling legitimate grounds relating to his/her particular situation to the processing of data relating to him/her. The second option of the right to object explicitly refers to direct marketing (Article 14 Sentence 1 lit. b) and is instantly reminiscent of Section 28 Para. 3 BDSG. In both regulations, the use of data for marketing purposes is not linked to an explicit declaration of consent of the data subject but is regarded as principally lawful.[11] With regard to the implementation of the right to object, the Data Protection Directive explicitly grants the freedom to use alternative methods which has been made use of in various ways. In Denmark, Norway and Sweden, for example, legally mandatory Robinson lists were introduced for objections to advertising.

These requirements of the Data Protection Directive have found their way into further documents of the decision-makers in Brussels. Most notably, the Safe Harbor Privacy Principles should be mentioned here. US firms have the option to comply with these Principles in order to guarantee an adequate level of protection for data transfers to the US. The Safe Harbor Privacy Principles provide for a mandatory choice for the data subject with regard to the disclosure of data to third parties and possible changes to the purposes of the data collection (opt-out). In addition, direct marketing is explicitly mentioned and the Principles grant the data subject the right to object to receiving further direct marketing material.[12]

4. Balancing of legally protected interests as a mandatory requirement of European law

Pursuant to a decision by the European Court of Justice (ECJ) dated 20 May 2003,[13] the requirements of any European directive must always be interpreted with a view to the fundamental rights and freedoms which, according to prevailing case law, belong to the set of general legal principles the ECJ, amongst others, has to adhere to.[14] In the following discussion it will be demonstrated that the balancing of a legally protected interests model specified in Article 7 lit. f of the Data Protection Directive is based on a concordance between the free movement of services on the one hand and data privacy, which is mandatory provided for by the European law, on the other. If this is correct, then the Member States cannot claim the right to unilaterally abolish the data protection model based on the balancing of interests in favor of a model based on the declaration of consent.

4.1. *General legal principles*

The general legal principles common to the legal systems of all Member States constitute legal matter which is on an equal level with the primary Community law.[15] While the case of whether a general legal principle is common to the legal systems of all Member States can be argued by anybody (Community entities, Member States and their institutions, Common Market citizens), it is only the ECJ which can render a binding decision. The essential criteria are that the existence of the legal principle can be identified in the legal systems of the Member States, that its essence has been captured by the legal systems on a national level and that the primary Community law leaves room for its application.

The ECJ has, in the meantime, recognized various general legal principles, in particular also the principle of proportionality.[16] The principle of proportionality throws into relief the difficult relationship between a directive and the objectives of the Community. It must be possible to classify a directive as an adequate and necessary means to fulfill the duty to regulate. As such, a directive will only be acceptable from a European law perspective, if it guarantees minimal interference into existing rights. Thus, it will always be necessary to verify if there exist any compelling needs for

[7] For the German background of Article 7 see Simitis, Die EU-Datenschutzrichtlinie – Stillstand oder Anreiz? Neue Juristische Wochenschrift, 1997, p. 281 (p. 282).

[8] FEDIM, Guide to Second Draft of the EC Framework Directive on Data Protection SYN 287 and its Implications for Direct Marketing, Brussels, October 1992, p. 2 et seq. For the role of the industry concerning the adoption of the Directive, see also Wuermeling, Handelshemmnis Datenschutz, Munich 2000, p. 27 et seq.

[9] Kuner, European Data Protection Law, Oxford 2007, p. 245 et seq. with diagrams.

[10] Kuner, European Data Protection Law, Oxford 2007, p. 245, with a reference to European Commission, First Report on the implementation of the Data Protection Directive (95/46/EC), COM (2003) 265 final, p. 10 et seq.

[11] Verbatim Simitis, Die EU-Datenschutzrichtlinie – Stillstand oder Anreiz?, Neue Juristische Wochenschrift, 1997, p. 281 (p. 286).

[12] Cf. FAQ 12, cf. also Räther/Seitz, Übermittlung personenbezogener Daten in Drittstaaten – Angemessenheitsklausel, Safe Harbor und die Einwilligung, Multimedia und Recht, 2002, p. 425 (p. 428).

[13] ECJ, Cases C-465/00, C-138/01 and C-139/01, Compilation 2003 I-4989 – ORF.

[14] ECJ, Decision dated 6 March 2001 – Case C-274/99 5, Compilation 2001 – I-1611.

[15] Compilation in: Oppermann, Europarecht, 2nd edition, Munich 1999, marginal notes 406 et seq.

[16] Digest of the case law 1971, 1161.

regulation in a society and if the measures are in proportion to the legitimate interests pursued in that case.[17]

Already pursuant to the decision in the Case "Internationale Handelsgesellschaft" dating back to 1970, the protection of the fundamental rights must be ensured "within the framework of the structure and objectives of the Community". In compliance with the legal practice regarding fundamental rights in Germany, the ECJ investigated if the common interests pursued by the disputed regulation were apt to justify the interference with fundamental rights. The relevant criterion here is the principle of proportionality.[18] The preconditions under which regulations are proportional are set out comprehensively in the decision of the case "Schräder" dated July 1989:

> *By virtue of that principle, measures imposing financial charges on economic operators are lawful provided that the measures are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question. Of course, when there is a choice between several appropriate measures, the least onerous measure must be used and the charges imposed must not be disproportionate to the aims pursued.*[19]

It needs to be taken into consideration that the Data Protection Directive primarily aims to protect the free movement of services. This principle is one of the pillars of the internal market and, thus, the rule. In contrast, each restriction must be viewed as an exception, especially if it was introduced on the grounds of a surplus regulation on the national level. In case of doubt, the decision should be made in favor of the free movement of services; the burden of demonstration and of proof for an objective common interest thus rests with the Member State introducing the restriction. Accordingly, it is requisite also in the present case to carry out a balancing of legally protected interests between free trade within an integrated internal market on the one hand and any other national regulatory objectives on the other.

German Constitutional law here differs from European law in so far as informational self-determination,[20] pursuant to constitutional law on the national level, clearly takes priority.[21] Pursuant to European law, however, the free movement of services is the main point of interest and the core regulation vis-à-vis which any fundamental rights – which are anyway protected on a national level worldwide – are to be regarded as the exception.[22] Even if the relationship between rule and exception is differently assessed on the grounds of the European Convention on Human Rights, informational self-determination and privacy will not always be guaranteed if they collide with other core regulations.[23] In certain cases, specific protective interests may give reason for a restriction of informational self-determination; depending on the specific context, the freedom of communication may take precedence over the right to informational self-determination. Any law not accommodating this complex context of balancing of legally protected interests infringes upon the regulatory objectives which have to be granted by constitutional as well as by European law.

4.2. *Balancing of legally protected interests according to European law and the Data Protection Directive*

The Data Protection Directive's main objective is to guarantee free movement of personal data.[24] At the same time, the Directive, as set out in Article 1 Para. 1, shall encourage the Member States "to guarantee" the protection of the fundamental rights and freedoms as well as, in particular, the protection of the individual's privacy in the context of the processing of personal data. As a result, it was attempted here to harmonize the fundamental rights with the needs of the free movement of services. The effort to bring about a practical concordance between the legally protected interests concerned here is bound to lead to a situation where neither of the two protective aims can unilaterally take precedence over the other. Much rather, all of the protected interests shall be given equal room to develop as far as possible.

This interpretation is supported by the ECJ decision in the case "Lindqvist".[25] There, the ECJ underlined that, pursuant to Recital 7 of the Data Protection Directive, the establishment and functioning of the common market were liable to be seriously affected by differences in national rules applicable to the processing of personal data. Any such separate rules were going to be eliminated by the Data Protection Directive itself. It was true that the Member States had freedom in implementing Directive 95/46. "However, there is nothing to suggest that the regime it provides for lacks predictability or that its provisions are, as such, contrary to the general principles of Community law and, in particular, to the fundamental rights protected by the Community legal order" (Cipher 84). Thus, it was, "rather, at the stage of the application at national level of the legislation implementing Directive 95/46 in individual cases that a balance must be found between the rights and interests involved" (Cipher 85). Consequently, it was for the authorities and courts of the Member States "not only to interpret their national law in a manner consistent with Directive 95/46 but also to make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of

[17] ECHR, Decision dated 24 November 1986, Series A, No. 109, Section 55.

[18] ECJ Rec. 1970, p. 1125 (p. 1135) = Neue Juristische Wochenschrift, 1971, p. 343.

[19] ECJ, Decision dated 11 July 1989 – Case 265/87 – cipher 21.

[20] Cf. Hornung/Schnabel, 25 CLSR (2009), p. 84 et seq.

[21] Scholz/Pitschas. Informationelle Selbstbestimmung und staatliche Informationsverantwortung. Berlin; 1984, p. 36.

[22] Wuermeling, Handelshemmnis Datenschutz, Munich 2000, p. 171 rightly assumes that the European Union's legislative competence (Article 95 EC Treaty) in itself is enough to make the harmonization claim and the free flow of data take precedence over the protection of the personal rights.

[23] Simitis (ed.), Bundesdatenschutzgesetz, 6th edition 2006, Section 1 marginal note 90.

[24] ECJ, Matter C-465/00, C-138/01 and C-139/01, Compilation 2003 I-4989 – ORF – cipher 75.

[25] ECJ, Decision dated 6 November 2003 – Case C-101/01, Europäische Zeitschrift für Wirtschaftsrecht, 2004, p. 245.

Community law, such as inter alia the principle of proportionality" (Cipher 87).

The Data Protection Directive takes account of this by not relying solely on the data subject's declaration of consent. Much rather, it provides in Article 7 lit. f that the balancing of legally protected interests may also lead to instances of use of personal data which are compliant with data protection law. One criterion for the balancing of legally protected interests will always be the sensitivity of the data involved as it was done in the German Data Protection Law. This concept was implemented by the Data Protection Directive into the German Data Protection Law, which previously only based on the purpose of use. In the case of data of an objectively high sensitive character, balancing of legally protected interests will regularly give precedence to the data subject's interests. The enumeration in Article 8 Para. 1 could be an example for such sensitive data. In the case of data of an objectively low sensitive character, balancing of legally protected interests will lead to a forum for the free movement of services and the interests of the direct marketing businesses. Such data might be the name and the address of a person, if they are not e.g. in a debtor list. With respect to the implementation of a practical concordance between data protection and free movement of services, already the current BDSG has borne witness to the legal deliberations on a European as well as on a constitutional level. Where a government, however, strictly demands a declaration of consent for the processing or use of the most inconsequential data, the principle of balancing of legally protected interests and of the practical concordance is infringed upon.[26] A one-sided preferential treatment of the data subject's privacy interests infringes upon the free movement of services and their realization pursuant to Article 7 lit. f of the Data Protection Directive.

In consequence, the combination of the declaration of consent and the balancing of interests models in Article 7 of the Data Protection Directive is mandatory pursuant to European law. Member States cannot simply make changes to the different models of legitimation of Article 7; doing this, they may easily be blamed for not accommodating the concordance between free movement of services and data protection necessary pursuant to European law. This is especially true if they even demand an explicit declaration of consent for the processing of relatively inconsequential data like the data subject's address.

5. Minimum or maximum harmonization?

Furthermore, it should be investigated as to whether the Data Protection Directive is not designed to be mandatory in itself and thus does not leave room for any individual plans of the German Government.

European Directives often provide the standard for a minimum harmonization, i.e. the Member States may exceed the requirements of the directive. If the Data Protection Directive was a market harmonization tool, the Member States would be able to implement much tighter data privacy regulations. This would only be possible, however, as long as the objectives of the Directive were adhered to.

The distinctive feature here is that the Data Protection Directive, pursuant to Article 1 Para. 1, grants the protection of privacy to individuals and, pursuant to Para. 2, regulates that the Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under Para. 1. The two objectives of the Data Protection Directive, thus, have contrary aims. More protection of privacy means at the same time a restriction of the free flow of personal data. As soon as this conflict collides with legislation procedures on the national level, the Member States have to accommodate and comply with the balancing of conflicting interests as dealt with in the Directive. Since European law takes precedence, the Member States must not introduce any regulations deviating from the freedom provided by the Directive.

In the following, the freedom the Data Protection Directive provides for the Member States will be discussed. Pursuant to Article 7 lit. f of the Data Protection Directive, the Member States shall guarantee that any processing of data necessary for the realization of the legitimate interests is lawful as far as the data subject's interests do not override them. In these cases, the Data Protection Directive has obviously decided against using the declaration of consent as the sole criterion. Any such instance of data processing based on good faith (Recital 28) can be justified with just a legitimate interest. If one Member State now tightens this requirement by relying solely on a declaration of consent, the restrictions for personal data will be further enhanced but the free flow of data pursuant to Article 1 Para. 2 will be restricted.

In the "Lindquist" decision, the ECJ has restricted the Member States' scope for action. While it was true that Directive 95/46 allowed the Member States freedom in certain areas:

> *However, such possibilities must be made use of in the manner provided for by Directive 95/46 and in accordance with its objective of maintaining a balance between the free movement of personal data and the protection of private life. (Cipher 97).*[27]

The Member States are free, however, to deviate from the regulations of the Data Protection Directive within a certain scope. Here, in particular, Recital 9 of the Data Protection Directive comes into play:

> *(...) whereas Member States will be left a margin for manoeuvre, which may, in the context of implementation of the Directive, also be exercised by the business and social partners; whereas Member States will therefore be able to specify in their national law the general conditions governing the lawfulness of data processing; (...)*

[26] In favor of this position regarding BDSG: Woertge, Die Prinzipien des Datenschutzrechts und ihre Realisierung im geltenden Recht, Heidelberg 1984, p. 180 et seq.

[27] ECJ, Decision dated 6 November 2003 – Matter C-101/01, Europäische Zeitschrift für Wirtschaftsrecht, 2004, p. 245.

This freedom was not granted unconditionally, however.[28] There are clear references to certain regulations which can be found in the Data Protection Directive itself.[29] The requirements in Articles 10, 11 Para. 1, 14 Sentence 1 lit. a, 17 Para. 3 or 19 Para. 1 make clear through the wordings like "at least" or "in particular", that Data Protection Directive can only be understood as a minimum harmonization. There are similar references to be found in Article 14 Sentence 1 lit. b and Article 18 Para. 5 which explicitly mention the possibility to use alternative methods of regulation.

Another important point is contained in Recital 30 pursuant to which the Member States "may similarly specify the conditions under which personal data may be disclosed to a third party for the purposes of marketing (...)". This clause could be understood to mean that the Member States are given the freedom to find individual solutions for the issues related to address sales. The limits to any such regulations decreed on the national level, pursuant to Recital 30, are defined by the imperative to respect those provisions of the Data Protection Directive "allowing a data subject to object to the processing of data regarding him, at no cost and without having to state his reasons". Any such provision only has reason if one also takes into account Article 7 lit. f pursuant to which data may also be disclosed after the balancing of legally protected interests. The reference to the data subject's right to objection only makes sense for cases where data may be disclosed on the basis of a balancing of legally protected interests and without prior declaration of consent.[30]

For the rest, Recital 30 does not contain any legitimation for a tightening of marketing law on the national level. Much rather, the English version of the Data Protection Directive mentions that the Member States "may ... *specify* the conditions under which personal data may be disclosed to a third party for the purposes of marketing" (italicized by author). "Specify" means a specification or a concretion and refining, but not the creation of an "aliud". The Data Protection Directive itself defines the framework for a data flow for marketing purposes; within this mandatory framework, the Member States are free to detail and specify. Similarly the French version says "ils peuvent préciser les conditions".

This is equally true for the relevant clauses in Article 5 and Recital 22. Pursuant to Article 5 of the Data Protection Directive, it is up to the Member States to determine more precisely, "within the limits of the provisions of this Chapter", the conditions under which the processing of personal data is lawful. Recital 22 states that the "Member States shall more precisely define in the laws they enact or when bringing into force the measures taken under this Directive the general circumstances in which processing is lawful". Sentence 2 of the Recital explicitly contains the possibility to provide for special processing conditions for specific sectors and for the various categories of data. This clause was meant to cover situations where the data subject's interests take precedence.[31] According to Simitis/Damman, this provision only grants the possibility for the Member States "to specify the requirements contained in Chapter II with regard to the exact definition of the requirements for lawfulness".[32] Thus, these regulations only exist "in accordance with" the requirements of Articles 6–8 of the Data Protection Directive. The crucial point – as also underlined by Simitis/Dammann[33] – is the principle laid down in Article 7 Para. 1 Sentence 1 that any processing must only occur in compliance with the requirements specified in the Directive.

The freedom granted to the Member States, thus, can only be assumed to refer to the modalities and the arrangements within the system.[34] A fundamental change of systems is not covered, however. The explicit opening clauses in Recitals 9 and 30 aside, the regulatory density of the Data Protection Directive is to be interpreted as maximum harmonization.[35] This also follows from Recital 10 pursuant to which the approximation of the national laws must not result in any lessening of the protection they afford. Thus, the Data Protection Directive is to be considered as a harmonization "which is generally complete" as also the ECJ underlines in its "Lindqvist" decision.[36] In its "ORF" decision, the ECJ had also pointed out that it must follow from the Directive's essential objective of approximating the national laws, regulations and administrative provisions in order to eliminate obstacles to the functioning of the internal market deriving precisely from disparities between national legislations that the Member States cannot deviate from the common framework any longer once harmonization has been reached.[37] The Directive, thus, contains "material threshold values",[38] which sometimes require interpretation but still prohibit individual solutions on the national level. Ehmann/Helfrich, thus, rightly point out that the Directive only grants "margins for manoeuvre within strict limits" to the Member States.[39] Article 7 lit. f of the Data Protection Directive contains the legal

[28] On this note, however, Roßnagel/Pfitzmann/Garstka, Modernisierung des Datenschutzrechts. Gutachten im Auftrag des Bundesministeriums der Justiz, Berlin 2001, p. 77 et seq.; the authors see a limit only in those cases where data processing in other Member States is affected.

[29] Cf. also Wuermeling, Handelshemmnis Datenschutz, Munich 2000, p. 170 et seq.

[30] Cf. also Breinlinger, Abschaffen des Listenprivilegs – zum Entwurf eines Gesetzes zur Änderung des Bundesdatenschutzgesetzes (BDSG), Recht der Datenverarbeitung, 2008, p. 223 (p. 226).

[31] Amended Commission Proposal, Official Journal of the European Communities No. C 311 dated 27 November 1992, p. 14.

[32] Simitis/Dammann, EG-Datenschutzrichtlinie, Baden–Baden 1997, p. 134.

[33] Simitis/Dammann, EG-Datenschutzrichtlinie, Baden–Baden 1997, p. 134, speaking of the "open character of the Directive" are imprecise here.

[34] Thus, it is also called a Framework Agreement; cf. Kopp, Tendenzen der Harmonisierung des Datenschutzrechts in Europa, Datenschutz und Datensicherheit, 1995, p. 204 (p. 206).

[35] Simitis/Dammann, EG-Datenschutzrichtlinie, Baden–Baden 1997, p. 133.

[36] ECJ, Decision dated 6 November 2003 – Matter C-101/01, Europäische Zeitschrift für Wirtschaftsrecht, 2004, p. 245.

[37] ECJ, Decision dated 20 May 2003, Matter C-465/00, C-138/01 and C-139/01, Compilation 2003 I-4989 – ORF.

[38] Simitis/Dammann, EG-Datenschutzrichtlinie, Baden–Baden 1997, p. 134.

[39] Ehmann/Helfrich, EG-Datenschutzrichtlinie. Kurzkommentar, Cologne 1999, p. 107.

basis for the general balancing of interests clause. It does not quote a specific margin for manoeuvre, though.[40]

Also important is the imperative laid down in Article 1 Para. 2 of the Data Protection Directive pursuant to which Member States shall neither restrict nor prohibit the free flow of personal data between Member States. Thus, individual solutions on the national level with cross-border impact are prohibited in any case.[41] On the whole, the Member States' margin for manoeuvre is limited by the fundamental freedoms contained in the EC Treaty.[39] Thus, there is no room for any lawful single-handed attempt by the German Government to regulate direct marketing.

6. Implications of the German Government's draft bill

This regulatory approach of the German Government's draft bill is, however, contrary to the requirements of the European Data Protection Directive. Article 7 lit. f of the Data Protection Directive provides for a balancing of legally protected interests model as an alternative to the declaration of consent model. A general "opt-in" regulation as proposed by the German Government is not contained in the Data Protection Directive in such form. A separate German solution would have fatal repercussions on the internal market which usually is structured trans-nationally. For the rest, the balancing of legally protected interests model is a mandatory regulation under European law. It is based on the idea that the fundamental law of informational self-determination needs to be brought into concordance with the needs of the industry pursuant to European law, respecting especially the protection of the free movement of services and the principle of proportionality. This concordance demands that the requirement for a declaration of consent shall be waived if the data subject's legitimate interests are only marginally impaired and that the use of data shall be allowed after a balancing of legally protected interests pursuant to Article 7 lit. f. This result which is mandatory pursuant to European law, is correctly reflected in the Data Protection Directive; any solo attempt to regulate direct marketing on the national level as proposed by the current German draft bill would be contrary to the principle of concordance and proportionality and, thus, unlawful under European law.

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[40] Wuermeling, Handelshemmnis Datenschutz, Munich 2000, p. 170, marginal note 657.
[41] Cf. also Roßnagel/Pfitzmann/Garstka, Modernisierung des Datenschutzrechts. Gutachten im Auftrag des Bundesministeriums der Justiz, Berlin 2001, p. 78.

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Data retention in the UK: Pragmatic and proportionate, or a step too far?

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ABSTRACT

On 6 April 2009 new legislation came into force, for the first time putting Internet service providers' duty to retain significant amounts of data (relating to customers' email and Internet usage) on a compulsory, as opposed to a voluntary footing. It is a topic which has provoked intense protest from the privacy lobby and fuelled months of "Big Brother" headlines in the press. For the industry it raises operational challenges – how to facilitate storage and retrieval of colossal amounts of data. In this article we consider the policy background to the regime, the detail of the UK implementation and the practical implications for communications service providers. We weigh up the privacy and human rights concerns against the business case put forward by the Government. We also examine the Government's proposals – announced at the end of April – to significantly extend and "future proof" this regime in the form of its Intercept Modernisation Programme.

1. Policy background

1.1. *The rationale for data retention: "the difference between life and death"*

The Government's case for systematic retention of communications data, reiterated in various policy documents over the past few years, is that such information is a vital tool in counter terrorism and serious crime investigations, because it allows investigators to "identify suspects, examine their contacts, establish relationships between conspirators, and place them in a specific location at a certain time" and to "draw up a detailed profile of the suspect(s) either to inform prevention/disruption operations or for use as corroborative evidence in a prosecution".[1] In its latest policy document, the Government has gone even further, stating that such information "can mean the difference between life and death".[2]

Communications data is the "who", "when" and "where" of a phone call or Internet communication, as distinct from the message content, which is governed by separate legislation.[3] As communications technologies have advanced and diversified, the pool of evidence potentially available to investigators has grown – and so has the Government's desire to access it. Developments in UK policy during 2008 fuelled much press speculation about the advent of an Orwellian surveillance state.

1.2. *Data retention in the UK – a brief history*

Of course, the use of communications data for intelligence and counter terrorism purposes is not new. By late 2000, a regime for the lawful acquisition and disclosure of such data was already on the statute book, in the form of the Regulation of Investigatory Powers Act 2000[4] ("RIPA"). At this point, it is worth highlighting the distinction between data retention –

[1] See "Access to communications data – respecting privacy and protecting the public from harm", Home Office consultation, 27 March, repeated in August 2008 consultation document.
[2] The Home Secretary's Foreword to "Protecting the public in a changing communications environment", April 2009.
[3] Interception and disclosure of the content of communications is covered by Part 1, Chapter 1 of RIPA.
[4] Part 1 Chapter II RIPA; these provisions did not come into force until January 2004.

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