

# Data Protection in Germany

## 1 An Introductory Overview

As every other legal matter in Germany the subject of data protection is demarcated in a twofold manner in that there are public law and private law on the one hand and federal and laender regulations on the other hand. A further particularity of German data protection law lies in the fact that in addition to the Federal Data Protection Act (20 December 1990, Federal Law Gazette I 1990 p. 2954 with amendments), which is serving as an omnibus law, there are numerous so-called sector-specific provisions. All these rules are granting the data subject a variety of possibilities aiming at the respect of his individual data protection rights.

There are in the first place the means of selfprotection of the individual. Public and private-sector organizations must on request provide the citizen with details of the data they hold on him (sect. 19 and 34 of the Federal Data Protection Act – Bundesdatenschutzgesetz (BDSG); provisions cited hereinafter are exclusively those of the BDSG). Sect. 26 par. 5 requires the Federal Data Protection Commissioner to keep a register of automated data banks containing personal information, which the public may consult. The right of notification (sect. 33) is another important means to answer the question of who is processing which data of a person. Furthermore there are the data subject's rights to correction, erasure and blocking of data (sect. 20 and 35) and the possibility to exercise the right of objection vis-à-vis the controller of the data file to the use or communication of data for purposes of advertising or of market or opinion research (sect. 28 par. 3).

The law provides compensation by public (sect. 7) and private (sect. 8) bodies and regards certain misbehaviours on the controller's side as administrative (sect. 44) or even criminal (sect. 43) offences.

There is a statutory prescription of the appointment – under certain circumstances – of a data protection officer for private bodies (sect. 36 par. 1). In implementation of the European data protection directive 95/46/EC from 24 October 1995 the new law to come will contain an obligatory provision also for the public sector.

## 2 The Data Protection Commissioners of the Federation and of the Laender and the Supervisory Authorities for the Non-Public Sector

As opposed to these control mechanisms carried out by self-protection of the individual and by inhouse supervision there are the institutional controls by external supervising agencies which help the data subject to achieve his rights and which also are taking preventive action to ensure adherence to the rules on data protection. Due to the division of jurisdiction between the Federation and the Laender on the one hand and the constitutional balance of competences on the other hand the control of data protection in Germany is divided as such:

- The Federal Data Protection Commissioner is responsible for the audits/controls of all federal agencies, all telecommunication services and all postal services.
- The 16 Commissioners of the Laender are responsible for the

audits/controls of all agencies of the Laender including municipalities and local authorities and some of them (Berlin, Bremen, Hamburg, Lower Saxony and Northrhine-Westphalia) are also responsible for private sector agencies.

- So-called supervisory authorities for data protection (according to the terminology of sect. 38) are institutions of the Laender. They are responsible for controls of private sector agencies.

- Finally there are particular rules in existence for the media (broadcasting and press) and for the churches and religious communities.

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### 3 The Federal Data Protection Commissioner

#### 3.1 The legal Basis: Sect. 22 et seq. of the Federal Data Protection Act

The federal law creates an independent Data Protection Commissioner, who, by advising the federal government and individual ministers, ensures that the Data Protection Act is implemented. If the commissioner discovers infringements of the law in the processing of personal data, he can submit a complaint to the competent authority.

Within its Part Two named "Data Processing by Public Bodies" the Federal Data Protection Act is dedicating a whole chapter solely to the data protection authority of the Federation. Titled "Federal Data Protection Commissioner" Chapter Three is dealing in its provisions of sections 22 to 26 with the status and the position as well as with the duties and the powers of both the institution and the holder of the office of the data protection commissioner of the Federation.

The regulations are superscribed as follows:

- Election of the Federal Data Protection Commissioner (sect. 22)
- Legal status of the Federal Data Protection Commissioner (sect. 23)
- Monitoring by the Federal Data Protection Commissioner (sect. 24)
- Complaints lodged by the Federal Data Protection Commissioner (sect. 25)
- Further duties of the Federal Data Protection Commissioner, register of data files (sect. 26).

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#### 3.2 Status and Position of the Federal Commissioner

##### 3.2.1 The Organizational and Hierarchical Status

###### 3.2.1.1 The Organizational Position

The Commissioner's organizational position is described in sect. 22 par. 5 sent. 1, sent. 3 to 5 and par. 6. According to these rules the Federal Commissioner is established with the Federal Ministry of the Interior. He is provided with the personnel and material resources necessary for the performance of his duties. These resources are shown in a separate chapter of the budget of the Federal Ministry of the Interior. The posts are filled in agreement with the Federal Commissioner. If they do not agree to the envisaged measure, staff members may be transferred, delegated or relocated only in agreement with the Federal Commissioner.

###### 3.2.1.2 The Personal Status

The personal status of the Commissioner is dealt with in sect. 22 par. 1 to 3, par. 4 sent. 1, par. 5 sent 2 and sect. 23. Pursuant to sect. 22 par. 1 the Federal Parliament elects, on a proposal from the Government, the Federal Data Protection Commissioner with over half of the statutory number of its members. The candidate must be at least 35 years old at the time of his election. The person elected shall be appointed by the Federal President. The term of office of the Commissioner is five years; it may be renewed once (sect. 22 par. 3).

On 1 July 1993 Dr. Joachim Jacob became the first German Federal Data Protection Commissioner to be elected by the Federal Parliament. Reelected by a vast majority on 28 May 1998 for another five years' tenure he began his second term of office on 1 July 1998.

The incumbent has a public-law official status with respect to the Federation (sect. 22 par. 4) and he is subject only to the hierarchical supervision (Dienstaufsicht) of the Federal Ministry of the Interior (sect. 22 par. 5 sent. 2).

According to sect. 23 par. 1 the mandate of the Commissioner commences on delivery of the certificate of appointment. It ends on expiry of his term of office or on his dismissal the prerequisites of which are laid down in that same provision.

Par. 4 rules that the Commissioner is entitled to refuse to give testimony as a witness on persons who have entrusted information to him in his capacity as Federal Commissioner and on such information itself. This also applies to the staff of the Federal Commissioner, on condition that he decides on the exercise of this right. Within the scope of the Commissioner's right to refuse to give testimony as a witness, he may not be required to submit or surrender records or other documents.

Pursuant to par. 7 the Commissioner receives the remuneration of a grade B 9 federal official which means that his salary – and thus by implication his rank – is that of head of department in a federal ministry.

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### 3.2.2 The Independence of the Commissioner

The legal extent of the Commissioner's independence is laid down in sect. 22 par. 4 sent. 2 and 3. He is independent in the performance of his duties and subject to the law only. He is subject merely to the legal supervision (Rechtsaufsicht) of the Federal Government. It is to be noted that following Art. 28 par. 1 subpar. 2 of the European Directive the data protection authorities shall act with complete independence in exercising the functions entrusted in them.

## 3.3 Duties and Competences

### 3.3.1 Control of the Data Processing Bodies of the Federation

Sedes materiae of the Commissioner's control activities are sect. 24 and 25.

#### 3.3.1.1 Monitoring by the Commissioner

In accordance with sect. 24 par. 1 he monitors compliance with the provisions of the Federal Data Protection Act and other data protection provisions by public bodies of the Federation. Where personal data in records are

processed or used, the Federal Commissioner monitors their collection, processing or use if the data subject adequately indicates that his rights have been infringed in this respect or if the Commissioner has in his possession adequate indications of such infringement. Federal courts are subject to monitoring by the Commissioner only where they deal with administrative matters (sect. 24 par. 3). Par. 4 of sect. 24 regulates that public bodies of the Federation are obliged to support the Commissioner and his assistants in the performance of their duties. In particular they are granted information in reply to their questions as well as the opportunity to inspect all documents and records, especially stored data and data processing programs, connected with the monitoring referred to in par. 1 and access to all official premises at any time. The Commissioner informs the public body of the results of his monitoring. He may combine them with proposals for improving data protection, especially for rectifying irregularities discovered in the processing or use of personal data (par. 5).

The office of the Commissioner prepares an annual plan for its activities regarding supervision, investigation and auditing. It is free to set its own priorities and to create its own agenda which is enabling it to be more responsive to current affairs. The several units of the Commissioner's office carry out investigations of various types of information systems, based upon citizens' complaints or a suspicion that a particular area requires detailed examination. Systematic audits are planned over a several-year period, thus increasing the scope and range of data protection activities.

#### 3.3.1.2 Complaints Lodged by the Commissioner

In case he discovers infringements of the Federal Data Protection Act or of other data protection provisions or other irregularities in the processing or use of personal data, the Commissioner will lodge a complaint. In the case of the federal administration he does so with the competent supreme federal authority and he requests a statement by a date which he determines (sect. 25 par. 1). The Commissioner may dispense with a complaint or with a statement from the body concerned especially if the irregularities involved are insignificant or have meanwhile been rectified (par. 2).

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#### 3.3.2 Communication with Citizens and Agencies

##### 3.3.2.1 Appeals to the Commissioner

Following Act. 21 anyone may appeal to the Commissioner if he believes that his rights have been infringed through the collection, processing or use of his personal data by public bodies of the Federation. But this applies to the collection, processing or use of personal data by courts of the Federation only in so far as they deal with administrative matters.

##### 3.3.2.2 Cooperation with the Laender Commissioners and the Supervisory Authorities for the Non-Public Sector

According to sect. 26 par. 4 the Commissioner shall seek cooperation with public bodies responsible for monitoring compliance with data protection provisions in the Laender and with supervisory authorities under section 38 of this Act.

This stipulation requires cooperation among supervisory authorities themselves and relationships among the various data protection

commissioners of both the Federation and the Laender and the federal and Laender Ministries of the Interior. The federal and Laender commissioners meet at least twice a year to discuss data protection problems. In addition, there are special working groups on selected issues. These consultative groups seek to harmonize legal opinions on pending legislation and on the practices of the various types of agencies. A minor barrier to cooperation is that the commissioners are legally independent and ultimately responsible for data protection only in their jurisdictions. Moreover, the customary conflicts between the Federation and the Laender may extend to data protection as well.

### 3.3.2.3 Register of Data Files

Among the "further duties" of the Commissioner sect. 26 names the keeping of a register of automatically operated data files in which personal data are stored (par. 5). The number of data controllers registered in the Commissioner's office is amounting to between 10.000 and 20.000. In the course of the new law to come, however, the figures will be on the decrease due to facilitation of the control mechanism which will in the first place be realized by an increase of the number of in-house data protection officers.

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### 3.3.3 Cooperation with Parliament and the Government

#### 3.3.3.1 Activity Report to the Federal Parliament

Every two years the Federal Commissioner shall, pursuant to sect. 26 par. 1, submit an activity report to the Federal Parliament. Such report should also contain a description of the main developments concerning data protection in the private sector.

The detailed biannual activity report to the preparing of which the Commissioner and his staff are devoting a considerable amount of time is a very good source for understanding the Commissioner's work. The federal report is delivered to the President of the Federal Parliament and then published as an official document of the legislature. Afterwards the report is printed in brochure form and contained in a CD-ROM version both of which are available free of charge at the Commissioner's office.

#### 3.3.3.2 Opinions, Reports and Investigations at the Request of Parliament or the Government

Sect. 26 par. 2 sent. 1 provides that the Federal Commissioner, when so requested by Parliament or the Government, draws up opinions and reports. Following sent. 2 of that same regulation the Commissioner, when so requested by the Federal Parliament, the Petitions Committee, the Internal Affairs Committee or the Federal Government, also investigates data protection matters and occurrences at public bodies of the Federation

#### 3.3.3.3 Direct Consultation of Parliament at Any Time

In accordance with sect. 26 par. 2 sent. 3 it is the Federal Commissioner's right to consult Parliament in a direct manner at any time.

#### 3.3.3.4 Recommendations and Advice to the Government in the Lawmaking Process

The Commissioner may make recommendations on the improvement of data

protection to the Federal Government and to certain bodies of the Federation and may advise them in matters regarding data protection (sect. 26 par. 3). In a practical manner this means that the Commissioner assists in the development of new laws on data protection, modification of existing laws and establishment of new guidelines. The Commissioner advises federal ministries and individual committees of the Parliament on the implications of a great many different legislative proposals. This work has been particularly influential not only in the development of new rules and regulations for police and social security data, but also as regards the revised version of the Federal Data Protection Act 1990 and the pending novellization of the Act in the course of the implementation of Directive 95/46/EC into German law.

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### 3.4 European and International Obligations

The steadily increasing number of transborder data flows has created, beyond the fields of activity as described above in accordance with the present Federal Data Protection Act, a variety of new involvements of data protection authorities. Thus, in particular in recent years, the scope of duties of the German Federal Data Protection Commissioner is more and more determined by his role in European and international data protection relations.

#### 3.4.1 European Affairs

##### 3.4.1.1 The European Union

At least since the days of deliberating the then draft directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data European data protection law has become a fixed item within the Commissioner's scope of work. During the German EU Presidency in the second half of the year 1994 the present incumbent, Dr. Jacob, presided the Council Working Group "Economic Questions (Data Protection)" which took care of the finalization of Directive 95/46/EC. The meetings of the Article 29 Group, which was established under that same provision of the Directive, are filling the Commissioner's timetable as do the reunions of the Joint Supervisory Body of Europol, the Joint Supervisory Authority of Schengen, the Committee on the Customs Information System and the Conferences of European Data Protection Commissioners which are held as the traditional "Spring Conferences" once a year.

##### 3.4.1.2 The Council of Europe

Since Germany is a member of the Council of Europe and has ratified the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data the Commissioner is attending the Strasbourg committees T-PD and CJ-PD regarding the Convention 108.

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#### 3.4.2 International Matters

On the non-European international level the Commissioner is present as a member of the Supervisory Board for the Internal Control of Interpol's Archives. He is represented in the International Working Group on Data Protection in Telecommunications and participating in the International Conference of Data Protection Commissioners which is taking place once a

year.

#### 4 Concluding Remarks

It is to be noted that the European data protection directive 95/46/EC from 24 October 1995 is, at present, not yet implemented into German law. However, the bulk of the provisions of sections 21 to 26 of the Federal Data Protection Act will most certainly remain unchanged in substance. And the minor changes envisaged will altogether lead to an improvement of the Commissioner's powers.

So the Cabinet's draft from 14 June 2000 provides for cancellation of the rule of sect. 24 par. 1 sent. 2 according to which the Commissioner shall monitor the processing of personal data in records only if the data subject adequately indicates that his rights have been infringed in this respect or if the Commissioner has in his possession adequate indications of such infringement. This regulation being cancelled the Commissioner could examine records even if there are no grounds to suppose that there have been any infringements of the data subject's rights.

Draft sect. 26 par. 1 sent. 2 provides for a further strengthening of the Commissioner's powers in the non-public sector as it states in a general manner that the Commissioner informs the Federal Parliament and the public "on essential developments of data protection".

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*Items marked \* are available free of charge at the office of the Federal Data Protection Commissioner*