The new EU General Data Protection Regulation and its impact on the protection of employee data.

BREAKTHROUGH IN BRUSSELS – THE NEW GENERAL DATA PROTECTION REGULATION

After nearly four years of negotiations, a breakthrough in the shape of the introduction of new and uniform EU-wide data-protection standards is finally at hand. This last Tuesday, 15 December 2015, the so-called "Trilogue," a panel composed of European Parliament deputies, the Council of Ministers and the European Commission, concluded its last round of talks to present its draft for EU data-protection reform.

CORNERSTONES OF EMPLOYEE-DATA PROTECTION

Aside from another directive concerning the protection of data by police and the judiciary, this EU data-protection reform most significantly encompasses the long-awaited **General Data Protection Regulation**, which contains numerous provisions on the protection of employee data. Pursuant to Art. 288 para. 2 sentence 2 of the Treaty on the Functioning of the European Union (TFEU), the General Data Protection Regulation, which is comparable to national laws, goes into effect immediately: There is no need for the German legislature to formally implement it, and the new General Data Protection Regulation provisions largely displace those of the Federal Data Protection Act (BDSG).

Just like BDSG, the General Data Protection Regulation is generally based on a principle which is known as "**prohibition subject to exemption**." Under Art. 6 of the General Data Protection Regulation, personally identifiable data may be processed if and to the extent that applicable law provides for an exemption. As for the specifics of such exemptions, the changes are a matter of detail:

In keeping with current legislation, the processing of data may proceed after the affected employee's **consent** is obtained in accordance with Art. 6 para. 1 lit. a) of the General Data Protection Regulation. For such consent to be valid, it must have been granted voluntarily and meet further requirements now tightened by the auxiliary provisions of Art. 7 of the General Data Protection Regulation as well as Supplemental Recitals Nos. 32-34.

In addition to consent, and this is of great significance to employee data-protection matters, a **works agreement** continues to constitute a potential legal exemption and therefore a basis for the processing of employee-related data (cf. especially Art. 82 Abs. 1 of the General Data Protection Regulation). Similar to the current practice of German courts, however, such works agreements must comply with the applicable data-protection legislation, now the General Data Protection Regulation; with respect to these new EU data protection legislations the legal requirements are likely shifting to transparent provisions and those that are readily understood.

Likewise in keeping with existing legislation, the General Data Protection Regulation provides additional legal exemptions, including but not limited to a **general exemption** on the basis of prevailing interest in data processing as part of a comprehensive assessment, as well as additional **exemptions relevant to compliance** concerning the collection of data for purposes of the prevention and investigation of criminal acts (cf. for instance Art. 6 para. 1 lit. f) of the General Data Protection Regulation).

What matters most in this context, however, is that while the General Data Protection Regulation establishes uniform data-protection standards in principle, it **exempts the area of employee-data protection** under Art. 82 of the General Data Protection Regulation, according to which member states continue to be free, especially in the area of employment law or employee-data protection, to introduce national data-protection provisions in order to specify the EU Regulation. As a result, current provisions such as § 32 BDSG as well as the clarifying case law of the Federal Employment Court (BAG) face a test.

At least for the time being, the highly significant question of a possible "intra-group-exemption" for data transfers among group divisions remains unresolved; at any rate, the current draft for the General Data Protection Regulation does not expressly provide for such **intra-group-exemption** according to which a group division would not be deemed as third party similar to the privileged status reserved for contract data processing. By contrast, the exemption under Art. 82 para. 2 leaves an opening for national legislatures as well as works agreements while the concrete legal opportunities and limitations are not yet to be specified (for now, cf. Recital No. 38a).

In addition, the General Data Protection Regulation gives employees **comprehensive individual rights** to information, access, correction, deletion as well as the disclosure of data (cf. Arts. 10 a et seq. of the General Data Protection Regulation), which is why companies will likely face an increasing array of individual employee claims related to data protection matters also in the context of termination or other conflict scenarios.

The provisions related to **foreign data transfers** and **contract data processing** (Arts. 26 et seqq., 40 et seqq. of the General Data Protection Regulation), on the other hand, are for the most part comparable to current legislation. This

includes the provisions on the appointment of a **company data-protection officer**, which provide − in addition to Art. 82 of the General Data Protection Regulation − for another area exemption and, hence, the possibility of the continued applicability of current BDSG provisions (cf. Arts. 35 et seqq., Art. 35 para. 4 of the General Data Protection Regulation).

One last aspect that does, however, differ materially from the existing legislation is the **tightened fine regime** the General Data Protection Regulation introduces for administrative offenses, with violations of data-protection laws now drawing fines of up to EUR 20 million or four percent of the total worldwide annual turnover of the preceding financial year under Art. 79 of the General Data Protection Regulation.

OUTLOOK / FUTURE DEVELOPMENTS

Now that the lead negotiators of the three EU institutions agreed to a joint draft for the Regulation as well as the Directive, on 15 December 2015, the text is to be presented to representatives of the member states and the members of the EU Parliament's Justice and Home Affairs Council this week. Thereafter, the Council of Ministers and the European Parliament will hold a vote on a final draft, presumably in January or February of 2016.

Since the representatives of the aforementioned institutions were already involved in the lengthy Trilogue talks, however, no material changes to the current text of the Regulation should be expected, and the new provisions of the General Data Protection Regulation should then take effect in early 2018.

In view of the exemption granted for the area of employee-data protection, however, it remains to be seen whether and how the German legislature will make use of the legislative freedom so afforded. This leaves open not only the possibility of eliminating or preserving current legislation, § 32 BDSG, but also of reviving the legislative initiative regarding a differentiated regime of employee-data protection as part of §§ 32 a et seqq., which has been put on hold for the time being in view of the General Data Protection Regulation. Since § 32 BDSG amounted to a legislative "shot from the hip" when it was introduced, this, too, represents a realistic scenario at the very least.

CONSEQUENCES FOR CURRENT PRACTICE

Starting at the time the General Data Protection Regulation is passed, in the spring of 2016, companies will thus have nearly two years' time to make the necessary adjustments and adapt to the new legislative environment.
The required measures do not only encompass amending existing works agreements to reflect the current requirements but also adapting existing − or implementing new − processes, which may range from IT-related measures (e.g. in the interest of data security) to the negotiation of new agreements or addenda with external providers as well as training seminars for affected employees.

In this context, one should also keep a close eye on future developments in the area of data-protection law not only with respect to additional initiatives by the European or national legislatures, but also in connection with related privacy-law trends − for instance, as a result of the European Court of Justice (ECJ) decision in the matter of "Safe Harbor (cf. Client Newsletter 6/2015).

In light of these developments, two years are not exactly ample time to take the required actions. As the tightened fine regime (up to four percent of a corporate group's global turnover) demonstrates above all, the consequences of inaction could be severe.

We will stay abreast of this issue accordingly and provide you with the latest information on anticipated developments in the area of employee-data protection in the coming months in the form of both, Client Newsletters and further panel discussion events on this issue.

In the meantime, we wish you a Merry Christmas and a Happy New Year!

YOUR CONTACTS

Dr. Thilo Mahnhold
t.mahnhold@justem.de

Dr. Daniel Klösel
d.kloesel@justem.de

www.justem.de