# „The proposal for a new General Data Protection Regulation – problems solved?“

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# TOPICS

**General** DP Regulation ←→ national **sector specific** DP-law

Art. 6 (1) (a): **explicit** consent←→ Art. 6 (1) (f):legitimate interest

Art. 6 b (contract) ←→ **further use** of personal data

# Sector specific DP-law

- PROBLEM:

  Adopting an EU-Regulation will eliminate national competence to legislate →

  Can we survive without the sector specific DP–law adopted in the member states under the DP-Directive?

# Solutions?

- Creation of sector specific DP-law at EU level → is certainly the ideal solution, but this will take time!
- The draft General Regulation contains a small number of explicit delegations of the power to legislate to the member states
- What about the sectors which are not covered by such delegations?

# proposal

- Why not allow **in general** to have national sector specific DP-law for the interim period until EU sector specific DP-law is adopted?
- HOWEVER, special relationship:
  - National sector  specific data protection provisions should not be considered to be „leges speciales“ in the sense that they could override provisions of the General DP-Regulation
  - it should only be allowed to „particularize and complement“ the General DP-Regulation

# ‚Consent' in the General Regulation

- Art. 4 (8):

  'the data subject's consent' means any freely given specific, informed and explicit indication of his or her wishes by which the data subject, either by a statement or by a clear affirmative action, signifies agreement to personal data relating to them being processed;

- Recital 25

  "Clear affirmative action could include ticking a box when visiting an Internet website or any other statement *or conduct which clearly indicates in this context* the data subject's *acceptance* of the proposed processing of their personal data. *Silence or inactivity should therefore not constitute consent."*

- „Conduct which indicates in this context acceptance" = conclusive consent!!

# problem

- The DP-Directive requires „consent“ for processing „normal“ personal data and „explicit consent“ for the processing of sensitive data
- According to the new definition „explicit consent“ is the same as hitherto has been „consent“ (see WP 187, Art. 29 WP)

  → the level of protection is lowered, as sensitive data are no longer protected in a special way

  → confusion : explicit = also conclusive??

# Consequences (1)

- Requiring „explicit consent“ *in the sense of the definition of the General Regulation* does not result in a higher level of protection of the data subject
- We need a definition for „consent“, which
  - avoids confusion and
  - excludes consent by mere silence (opt-out)

# Proposals (1)

- Substitute in the definition of „consent“ in Art. 4 (8) the word „explicit“ by „**unambiguous**“:

  This is also, what the Art. 29 Working Party suggested in relation to possible amendments of the DP Directive

- The reference to an „affirmative action“ in Art. 4 (8) together with the last sentence of recital 25 make it sufficiently clear that opt-out does not signify „consent“.

# Consequences (2)

- Shall we  really strife for general „explicit consent“ in the civil law sense, that is:  consent by special statement?
  - Are data subjects rather
    - in danger of not being aware that they consent
    - or rather that they are not fully certain to what they are consenting?
  - Will controllers favour  „legitimate interests“ (Art. 6 (1) (f)) over „consent“ if only consent by special statement  is considered valid ?

# Proposals (2)

- NO, we should not opt for a general requirement of explicitness of consent – this would be felt to be unnecessarily bureaucratic, if not outright ridiculous, in many situations
- We should concentrate on better safeguarding that
  - the object of consenting is clearly defined and understandable for the data subject and that
  - also processing on grounds of consent keeps within the boundaries of proportionality → this should be made a condition under Art. 7 !!
- Requiring mandatory **certification** for certain cases of obtaining consent should be discussed

# ‚Consent' acc. to EU Parliament

- Proposal for an addition to Rec. 25, last sentence:

  „*Silence,* mere use of a service *or inactivity should therefore not constitute consent."*

  → „mere use of a service" shall never be recognized as a „clear affirmative action" !?!?
- Use of a service results in the – conclusive – closing of a contract – no extra consent needed

  → A contract legitimizes the use of data as far as this is necessary for fulfilling the contract
- **Shall conclusive closing of a contract be excluded as legal basis under Art. 6 (1) (b)**? Or does the EP target a situation where data, collected for fulfilling a contract with the data subject, shall be further used for a new purpose and therefore need consent as a new legal basis?

# Prohibition of linking-up purposes ?

- Is the controller entitled to include clauses into the contract which would additionally allow the use of data for unrelated („incompatible“) purposes, which are predominantly in the interest of the controller, like direct marketing?
- § 28 Abs. 3b of the German BDSG: Linking up purposes in contracts is prohibited, if goods or services are offered in a monopolistic situation
- Art. 6 (4)? Clarity on this point would be desirable!!

# Further use for incompatible purposes

- Personal data are assets
- Assets call for being made use of
- „big data“ are a powerful trend
- What are the requirements for protecting personal data in the context of further use for new purposes? Is Art. 6 (4) sufficient protection? How far shall exemptions from the purpose limitation principle be allowed?
  - This question is immensly relevant and needs more inspired regulation than is provided for by Art. 83 (1)