

Austria amends DP law to comply with GDPR provisions

The law includes legal persons and reduces the age when children can consent to 14.

By **Rainer Knyrim**, Vienna.

The EU General Data Protection Regulation (GDPR) will enter into force on 25 May 2018. Data protection law will definitely be lifted to a new level with the coming into force of this regulation. Every company which processes data will be subject to new statutory liabilities, such as maintaining documentation about the company's data processing to satisfy accountability requirements, conducting risk assessments, and in many cases appointing a Data Protection Officer. If a data processor does not adhere to these stipulations, it will possibly face draconian financial penalties, claims for compensation and suffer damage to its reputation.

As an "accompanying" measure, to supplement and give force to the General Data Protection Regulation, Austrian law-makers have comprehensively amended the Data Protection Law (DSG). This law will enter into force in May next year. The new version of the DSG is not an entirely new law, but amends the current Data Protection Law of 2000. The background to this legislative turn-around is that the two-thirds parliamentary majority required for amending the provisions of the constitution could not be achieved. This meant that, without further ado, the already existing constitutional provisions were simply adopted from the 2000 DSG which have been in force since that time.

Based on the remaining constitutional provisions, to date, "everyone" has a right to any personally identifiable information relating to them being treated as confidential. For this reason, also data of legal persons continues to be protected by the DSG in Austria. While it is true that this procedure is contrary to the idea of harmonisation of the European Union, according to a statement issued by the Office of the Federal Chancellor,

which compiled the draft version, it is expected to be allowed under EU and constitutional law. What should be noted, however, is the fact that data of legal persons may, in certain circumstances, not be protected by the respective national law applying in case of data transfers within the European Union.

The "age of a child with regard to data protection law" and consent requirements have been reduced from 16 to 14 years. This provision provides relief, especially for online shops. Online shop operators will, however, need to make sure that any purchasers or users exceed the age threshold laid down by the data protection legislation. It has not been made clear by the lawmakers exactly what form of monitoring will be put in place to ensure this outcome.

The new law lays down that the processing of any data relevant to criminal proceedings can also be justified by a party with a valid interest in such data. This means that processing data relevant to criminal proceedings, such as in the case of whistleblower hotlines, will also continue to be permitted, subject to certain conditions being observed.

The new law contains a separate section on the processing of images. The new regulation aims basically to regulate all image-taking by responsible persons in the private domain insofar as they are not exempt from the scope of the data protection law's application due to the "Household exemption" provision. This provision encompasses both photographic and video images. According to this provision, taking an image is also permitted if the persons concerned have agreed to the image being made of them, and in individual cases, if the person taking the image has an overriding interest for doing so and proportionality is assured.

The regulation prescribes that

existing consents, which had legal force according to the 2000 Data Protection Law operating until now, continue to apply. This will, however, only apply if these declarations of consent also satisfy the requirements of the GDPR. It is to be noted that the GDPR's consent requirements are more stringent. Should data processing be conducted solely on a legal basis of consent, then this should be subject to legal review as a matter of urgency.

Austria's Data Protection Authority will be the body which will impose the financial penalties of up to €20 million euros or 4% of the worldwide turnover of a company group. These financial penalties can be imposed on both natural and legal persons. The data protection authority is entitled, after submitting notice, to audit data controllers.

Any person who has suffered damage as a result of data contamination, even if only of an intangible nature, can claim compensation from the data processor as well as the data-controller. The possible cases where intangible compensation can apply in cases of data protection violations are multiplied due to the lapse of the restrictions applying to data:

1. Rendering the data of a person affected accessible to third parties without consent;
2. Observation by means of a detective agency;
3. Non-permitted video surveillance;
4. Data leaks;
5. The posting of photographs on social media sites without consent;
6. Identity theft;
7. Cases in the domain of Big Data and Profiling;
8. Making unauthorised contact for marketing purposes; and
9. Any form whatsoever of illegal data processing.

So-called Data Protection NGOs can be charged with the judicial enforcement of claims for compensation. These

data protection NGOs will assume a substantial role in the course of “private enforcement” as they can share the procedural risk between several persons. Any data-processing company failing to abide by data protection law is, in the final analysis, exposed to at least two consequences in terms of sanctions:

1. The danger of draconian financial penalties imposed by the Data Protection Authority; and
2. The assertion of claims for compensation by the person affected.

The Data Processing Register will be abolished and replaced by the GDPR’s accountability requirements,

under which companies are obliged to maintain their own records. It is advisable to retain existing Data Protection registration entries. These approvals by the Data Protection Authority, and declarations of consent are still valid if they also comply with the GDPR provisions.

CONCLUSION

In summary, the national lawmakers have given substance to the GDPR on points of practical importance which is a positive result. In general, data protection regulation has been liberalised somewhat in favour of data processors.

The key point for international projects, however, is the fact that the data of legal persons will continue in Austria, in contrast to other EU Member States, to be protected under constitutional law.

AUTHOR

Dr Rainer Knyrim is a Partner at Knyrim Trieb Rechtsanwälte OG, Vienna.
Email: ky@kt.at

European Court of Human Rights limits right to monitor employees’ emails

A decision by the European Court of Human Rights of 5 September states that monitoring of an employee’s electronic communications amounted to a breach of his right to private life and correspondence (Article 8 of the European Convention on Human Rights).

The judgement in the case of *Bărbulescu v. Romania* (application no. 61496/08) concludes that the national authorities had not adequately protected Bogdan Mihai Bărbulescu’s right to respect for his private life and correspondence. In particular, the national courts had failed to determine whether Bărbulescu had received prior notice from his employer of the possibility that his communications might be monitored.

His communications consisted of messages he had exchanged with his brother and his fiancée relating to personal matters, some of the messages

being of an intimate nature. The company terminated Bărbulescu’s employment contract for breach of the company’s internal regulations that prohibited the use of company resources for personal purposes. The court noted that although it was questionable whether Bărbulescu could have had a reasonable expectation of privacy in view of his employer’s restrictive regulations on Internet use, of which he had been informed, an employer’s instructions could not

reduce private social life in the workplace to zero. The right to respect for private life and for the privacy of correspondence continued to exist, even if these might be restricted in so far as necessary.

This decision, taken by the Grand Chamber which consists of 17 judges, is final (Article 44 of the Convention).

However, the Court says in a separate Q&A document that companies can still in some circumstances monitor employees if they suspect that they are using the Internet at work for private purposes. The Court considers that States should ensure that, when an employer takes measures to monitor employees’ communications, these measures are accompanied by adequate and sufficient safeguards against abuse.

- See the judgement at ecbr.coe.int/Pages/home.aspx?p=home

PRIVACY IN THE WORKPLACE

Privacy Laws & Business is considering running a one-day workshop on data protection issues in employment, including monitoring of employees and privacy issues posed by use of wearable technologies.

To register your interest, please email kan.thomas@privacylaws.com

Luxembourg issues GDPR implementation Bill

Luxembourg published, on 12 September, a draft bill implementing the EU General Data Protection Regulation (Draft Bill - N°: 7184), law firm Loyens & Loeff reports.

The Bill will replace the current DP Act of 2002, and provides a derogation for the processing of sensitive data,

including health data. “Such processing is allowed for the relevant medical bodies and healthcare professionals in the framework of their activities, as well as for research bodies (with appropriate safeguards), social security organisms, insurance companies, pension funds, the Medical and Surgical

Mutual Fund and other approved organisations. The lawful transfer of sensitive data between these actors is also facilitated” Florence d’Ath of Loyens & Loeff writes.

- See <http://bit.ly/2xACDql>



ESTABLISHED
1987

INTERNATIONAL REPORT

PRIVACY LAWS & BUSINESS

DATA PROTECTION & PRIVACY INFORMATION WORLDWIDE

Issue 149

October 2017

NEWS

- 2 - **Comment**
Can the GDPR create a new global standard?
- 12 - **EU-US Privacy Shield – success so far**
- 27 - **‘Speaking the inconvenient truth’: UN Special Rapporteur on privacy**
- 29 - **Asian privacy scholars meet**

ANALYSIS

- 18 - **Privacy in eight South Asian States**
- 21 - **European data privacy standards in laws outside Europe**
- 25 - **Industrial Internet of Things: Data privacy and intellectual property**

LEGISLATION

- 10 - **Austria amends DP law to comply with GDPR provisions**
- 16 - **Iceland shows how an EEA country steers parallel to the EU**
- 23 - **South Korea faces GDPR hurdles**

MANAGEMENT

- 7 - **Belgian DPA publishes guidance on DPOs and internal records**
- 14 - **Think tank says DPAs should fine only seriously negligent conduct**

NEWS IN BRIEF

- 9 - **CNIL publishes processor guidance**
- 9 - **EU DPAs issue GDPR guidance**
- 11 - **Human Rights court rules to limit monitoring of employee emails**
- 11 - **Luxembourg issues GDPR Bill**
- 17 - **UK ICO welcomes draft DP Bill**
- 26 - **Hungary moves on with the GDPR**
- 28 - **Uber settles with US FTC**
- 30 - **Guidance on driverless vehicles**
- 31 - **EU to tackle data localisation**
- 31 - **Canada’s DPA to step up enforcement**
- 31 - **Call records ruling in Portugal**

East meets West: Converging regimes, different approaches

Data Protection Authorities discussed legislative frameworks, data transfers and new technologies at their 39th International Conference. **Laura Linkomies** reports from Hong Kong.

The conference was attended by more than 750 representatives from Data Protection Authorities, policymakers, government and business leaders. The DPAs, in their closed session, accepted as new members the Data Protection Authorities of Japan,

Montenegro, South Africa and Turkey, and Belgium’s Supervisory Authority for Police Information Management.

The DPAs adopted resolutions on automated vehicles (p.30),

Continued on p.3

Poland takes further steps to adjust to the GDPR

DPA to conduct inspections without prior notification. Specific rules for processing of employee data. By **Joanna Tomaszewska** and **Filip Drgas** of Spaczyński, Szczepaniak & Wspólnicy, Warsaw.

After a few months of silence (following the announcement of the partial draft of the new data protection law in March 2017 – the “March Proposal”), Poland’s Ministry of Digital Affairs has finally published the draft of the

new act on data protection and the draft of a separate act seeking to implement the GDPR into Polish law in sectoral provisions (both proposals are referred to as the “Draft”).

Continued on p.5

Online search available www.privacylaws.com

Subscribers to paper and electronic editions can access the following:

- Back Issues since 1987
- Special Reports
- Materials from PL&B events
- Videos and audio recordings

See the back page or www.privacylaws.com/subscription_info

To check your type of subscription, contact kan.thomas@privacylaws.com or telephone +44 (0)20 8868 9200.

PL&B Services: Publications • Conferences • Consulting • Recruitment
Training • Compliance Audits • Privacy Officers Networks • Roundtables • Research

INTERNATIONAL
report

ISSUE NO 149

OCTOBER 2017

PUBLISHER**Stewart H Dresner**
stewart.dresner@privacylaws.com**EDITOR****Laura Linkomies**
laura.linkomies@privacylaws.com**DEPUTY EDITOR****Tom Cooper**
tom.cooper@privacylaws.com**ASIA-PACIFIC EDITOR****Professor Graham Greenleaf**
graham@austlii.edu.au**REPORT SUBSCRIPTIONS****K'an Thomas**
kan.thomas@privacylaws.com**CONTRIBUTORS****Robert Belair**
Arnall Golden Gregory LLP, US**Sarah Cadiot**
Wilson Sonsini Goodrich & Rosati, Belgium**Rainer Knyrim**
Knyrim Trieb Attorneys at Law, Austria**Whon-il Park**
Kyung Hee University, South Korea**John Selby**
Macquarie University, Australia**Joanna Tomaszewska and Filip Drgas**
Spaczyński, Szczepaniak & Wspólnicy, Poland**Patricia Gelabert**
PL&B Correspondent**Published by**Privacy Laws & Business, 2nd Floor,
Monument House, 215 Marsh Road, Pinner,
Middlesex HA5 5NE, United Kingdom**Tel: +44 (0)20 8868 9200****Fax: +44 (0)20 8868 5215****Email: info@privacylaws.com****Website: www.privacylaws.com****Subscriptions:** The *Privacy Laws & Business* International Report is produced six times a year and is available on an annual subscription basis only. Subscription details are at the back of this report.

Whilst every care is taken to provide accurate information, the publishers cannot accept liability for errors or omissions or for any advice given.

Design by ProCreative +44 (0)845 3003753

Printed by Rapidity Communications Ltd +44 (0)20 7689 8686

ISSN 2046-844X

Copyright: No part of this publication in whole or in part may be reproduced or transmitted in any form without the prior written permission of the publisher.

© 2017 Privacy Laws & Business

**comment**

Can the GDPR create a new global standard?

European privacy principles and the GDPR have a huge impact outside of Europe (p.21). In the US, companies are signing up to the EU-US Privacy Shield to ensure continued data flows, but the arrangement's future is still not certain, although the first year looks promising (p.12). The first annual review started 18 September, and the EU Commission should release its assessment any day now, to be followed by a separate report by the EU Data Protection Authorities (p.9).

At the Data Protection Authorities' 39th International Conference in Hong Kong in September which I attended with *PL&B* publisher Stewart Dresner and Asia-Pacific Editor, Professor Graham Greenleaf, many speakers from Asian countries told the participants how they are preparing for the GDPR. The Hong Kong Privacy Commissioner's Office has developed a Privacy Management Programme to mark a strategic shift from compliance to accountability. This is one of the examples of how the thinking in the East meets West (p.1), even if there is not a common regulatory framework.

South Korea has applied for an EU adequacy decision but our correspondent says that it may have to be satisfied with a partial adequacy assessment in the area of information and communications networks (p.23). Read an overview of privacy developments in South Asian countries on p.18, and a short summary of the Asian Privacy Scholars Network conference which discussed a wide range of topical privacy issues (p.29).

Country-specific reports in this issue discuss GDPR implementation in Poland (p.1) and Austria (p.10), and how it also affects data protection in a European Economic Area country, Iceland (p.16). In addition, we report on the Belgian DPA's recommendation on the role of Data Protection Officers (p.7). Progress is being made with GDPR implementation in Spain and Ireland, and we will report on them in a future issue. We are also following closely in our UK Report (to be published next month) progress on the UK's draft DP law which will implement both the GDPR and the so-called Police Directive (p.17). If you would like to inform us of GDPR implementation in your country, please contact me.

In this issue, we also report for the first time on the work of the United Nations Special Rapporteur on the Right to Privacy (p.27), and data privacy and intellectual property challenges with the Industrial Internet of Things (p.25).

Laura Linkomies, Editor

PRIVACY LAWS & BUSINESS

Contribute to PL&B reports

Do you have a case study or opinion you wish us to publish? Contributions to this publication and books for review are always welcome. If you wish to offer reports or news items, please contact Laura Linkomies on Tel: +44 (0)20 8868 9200 or email laura.linkomies@privacylaws.com.

Join the Privacy Laws & Business community

Six issues published annually

PL&B's International Report will help you to:

Stay informed of data protection legislative developments in 100+ countries.

Learn from others' experience through case studies and analysis.

Incorporate compliance solutions into your business strategy.

Find out about future regulatory plans.

Understand laws, regulations, court and tribunal decisions and what they will mean to you.

Be alert to future privacy and data protection law issues that will affect your organisation's compliance.

Included in your subscription:

1. Online search functionality

Search for the most relevant content from all *PL&B* publications and events. You can then click straight through from the search results into the PDF documents.

2. Electronic Access

We will email you the PDF edition which you can also access via the *PL&B* website. You may also choose to receive one printed copy.

3. E-Mail Updates

E-mail updates help to keep you regularly informed of the latest developments in data protection and privacy issues worldwide.

4. Back Issues

Access all the *PL&B International Report* back issues since 1987.

5. Special Reports

Access *PL&B* special reports on Data Privacy Laws in 100+ countries and a book on Data Privacy Laws in the Asia-Pacific region.

6. Events Documentation

Access International and/or UK events documentation such as Roundtables with Data Protection Commissioners and *PL&B Annual International Conferences*, in July, in Cambridge, UK.

7. Helpline Enquiry Service

Contact the *PL&B* team with questions such as the current status of privacy legislation worldwide, and sources for specific issues and texts. This service does not offer legal advice or provide consultancy.

To Subscribe: www.privacylaws.com/subscribe

“*PL&B's International Report* is a powerhouse of information that provides relevant insight across a variety of jurisdictions in a timely manner. **Mark Keddie, Global Data Protection Officer, Dentsu Aegis Network**”

Subscription Fees

Single User Access

International Edition £550 + VAT*

UK Edition £440 + VAT*

UK & *International* Combined Edition £880 + VAT*

* VAT only applies to UK based subscribers

Multi User Access

Discounts for 2-10 users. Enterprise licence for 11+ users.

Subscription Discounts

Introductory 50% discount. Use code HPSUB (first year only) for DPAs, public sector, charities, academic institutions and small and medium companies.

Discounts for 2 and 3 year subscriptions

International Postage (outside UK):

Individual *International* or UK Edition

Rest of Europe = £22, Outside Europe = £30

Combined *International* and UK Editions

Rest of Europe = £44, Outside Europe = £60

Satisfaction Guarantee

If you are dissatisfied with the *Report* in any way, the unexpired portion of your subscription will be repaid.

Privacy Laws & Business also publishes the United Kingdom Report.

www.privacylaws.com/UK