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The countdown is on: EU's General Data Protection Regulation to become effective in two years

The General Data Protection Regulation (GDPR), which will enter into force on 25 May 2018, provides for a new, directly applicable data protection law for all of Europe. Enterprises (as well as government entities, which are included in the scope of the new regulation) need to comply with a multitude of new obligations to be implemented in their own organisations. Failure to do so risks severe penalties: fines of up to € 20m or up to 4% of their worldwide turnover.

1. List of processing operations

Data controllers (natural or legal persons that commission data processing activities) and data processors (natural or legal persons which process personal data on behalf of the controller) will have to keep a list of their data applications, to be known as "list of processing operations", which covers own contact data, the purposes of the applications, a description of the data categories included in each data application, the categories of recipients, data transfers to third countries (separately shown) and, to the extent possible, the planned duration of the data storage and a general description of the technical and organisational measures taken to ensure data security.

Enterprises with fewer than 250 employees will need to keep such a list only:

- when their data processing poses a considerable risk to the rights and freedoms of the data

subjects and data processing is carried out regularly; or

- when sensitive data or data regarding criminal behaviour are processed.

2. Obligatory Data Protection Officer

A **Data Protection Officer (DPO)** will have to be **designated** whenever:

- data processing is carried out by a **public authority or body**; or
- the **core activities of the controller or the processor** consist of processing operations, which, by virtue of their nature, their scope and/or their purposes, require **in-depth, regular and systematic monitoring of data subjects**; or
- when **the controller's or processor's core activity requires in-depth processing of sensitive data or criminal convictions**.

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The DPO needs to be appointed on the strength of his/her occupational quality and expert know-how of the laws and practices of data protection.

3. New duties of information and new rights of data subjects

The GDPR will accord data subjects (identified natural persons) **much more extensive rights**. When it comes to collecting, receiving or disclosing data, the duties to inform data subjects will be substantially enlarged. **Existing rights are extended to cover the right to receive information and to request rectification or erasure**. Data controllers/processors will need to inform on how long the data will be stored and will have to comply with data subjects' rights within one month. Implementing the so-called **"right to be forgotten"** will require some intense efforts, as will the new obligation **to inform all those whose data are transferred** of their rights to have processed data rectified, erased or restricted. The new **right of "data portability"** requires data controllers to furnish data in a structured and commonly used, machine-readable format; a data subject may even request the controller to transfer such **data directly (!) from one controller to another controller**.

4. International data transfer – complex as ever

The basic premise remains that it is generally **forbidden to transfer data to third countries** outside the EU unless one of the data transfer tools applies. Existing tools are the **standard contract clauses** and the **Binding Corporate Rules**, added to which are the **Code of Conduct** and **approved certification mechanisms**.

The GDPR states expressly that **data transfer approvals issued by national data protection authorities remain valid**. It is thus **possible to proactively prepare for 2018**.

5. Technical and organisational obligations

Entirely new obligations apply with regard to **"data protection by technology"** and **data-protecti-on-friendly settings**. The GDPR introduces a novel obligation to perform a data protection impact

assessment (DPIA): when data are processed by tools that use new technologies and that may involve a high risk of infringing on the privacy of data subjects in terms of type, scope, context and purposes it is necessary to assess their impact.

6. Processor contract management is necessary

It will continue to be necessary for the controller and its processor to enter into a **processor contract** the minimum content of which is defined in the GDPR. Enterprises should therefore introduce a **service provider contract management system** since **non-compliance with the rules carries fines of up to € 10m or 2% of the group's annual turnover**.

7. Data breach: to be reported within 72 hours

The GDPR introduces at a European level the **obligation to report any data breach** such as was already specified in the Austrian Data Protection Act of 2000. If a breach occurs the controller must **promptly inform the data subject** if it is liable to be affected, as well as the competent **data protection authority**, to the extent possible **within 72 hours** of obtaining knowledge of such an data breach.

8. Conclusion: tight timeline required

This string of obligations makes it clear that **public as well as private controllers and processors need to follow a tight timeline** in order to prepare for May 2018 because the GDPR makes **no provision for a grace period**.

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Company in distress – remedies and solution

When a corporation has spent all its equity through the accumulation of losses, thus showing a negative equity in its balance sheet, Section 225 (1) of the Business Enterprise Code (UGB) prescribes that its management must explain in the notes to the annual accounts whether the debt level is high enough to be of relevance under insolvency law. This would be the case if a negative continuity forecast were added to the debts on the books.

Same as when it is unable to pay, the company needs to file for insolvency proceedings as otherwise the management could be made liable under the relevant rules of civil and company law and might expect to suffer consequences under criminal law.

Yet tools to counter a crisis in good time before insolvency proceedings need to be instituted do exist and are explained below:

Eliminating an excessive calculatory debt by waiver of priority

If no new (equity) capital is contributed, a typical remedy is to reduce the priority of debts in order to eliminate excessive debts from the books.

This remedy must involve a so-called qualified waiver ("Nachrangabrede") which complies with the requirements of Section 67 (3) of the Insolvency Act (IO). According to this provision, a debt need not be posted in the balance sheet when the creditor states that it wants to be satisfied only after a (possible) negative equity is made good (Section 225 (1) UGB) or, in the case of liquidation, after all other creditors have been satisfied, so that no insolvency proceedings need to be filed because of this debt. All three conditions (satisfaction after elimination of the negative equity, after all other creditors in the event of liquidation, and no need to institute insolvency proceedings because of this debt) need to be stated cumulatively so that the obligation to carry the debt as a liability on the balance sheet can be waived.

If the management is able to remove the excessive (calculatory) debt from its books, it has found a loophole to escape the crisis because such a debt is ignored when looking at the company from an insolvency law point of view. Thus: if debts deprioritised by qualified waivers exceed the negative equity, the company is not deemed to be in excessive debt and the crisis is over (at least for the time being).

This approach involving a waiver of priority applies not just to claims by shareholders but also to (outside) capital claims by banks, where such outside capital becomes functionally similar to equity and is typically known as mezzanine capital. Such a waiver may even allow a company to take out a loan on the market.

In a group context, the crisis may be overcome by obtaining a so-called "binding letter of comfort" from other group companies, typically the parent. However, this requires the unit issuing such a letter to have adequate financial means to actually satisfy the debts of the distressed unit.

Positive continuity forecast

If priority waivers do not help to ensure a company's survival, the management is required to carry out a continuity forecast in order to establish that the excessive debt on the books does not oblige it to file for insolvency. It is only when the forecast arrives at a positive result that this condition is satisfied; if not, insolvency proceedings must be instituted. Basically,

such a forecast needs to reason whether the company is likely to be able to continue its business activities while meeting its payment obligations. To this end, a primary forecast looks at the company's ability to pay in the next six to twelve months, based on a financial schedule. A secondary forecast, which extends for a longer period of about three years, comprises planned profit and planned loss accounts, planned balance sheets and cash flows. Together, these figures need to show a sustainable reversal of the company's fortunes in order to constitute a positive continuity forecast.

Preparing the continuity forecast is the duty of the management. Practical experience has shown that particular care should be lavished on it, given the liability risks noted above.

Legal support

When in distress, a company should quickly obtain the advice of insolvency and restructurisation experts so as to ensure that ways and means of coping with the crisis are used in a targeted and timely manner.

Summary

Once a crisis has solidified and the company's equity has been spent on covering losses, a qualified waiver of priority may help eliminate excessive debts from the books, always providing that this method complies with the strict provisions of Section 67 (3) IO. If this should fail, a continuity forecast must be performed, which needs to be positive in order to avoid the obligation to file for insolvency proceedings, i.e. it must confirm that the company has a high probability of survival.

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P) Inside

On 11 May 2016, some 80 expectant guests took up our invitation to a client workshop at the bel étage of the Café Landtmann. Rainer Knyrim and Gerald Trieb, our experts in data protection law, reported on "Compliance with the EU's General Data Protection Regulation". The audience, a melange of business folk and legal eagles, was informed of the many changes and requirements of the new regulation which will become effective in 2018 and which requires the corporate world to start preparing now. The subsequent coffeehouse brunch was interspersed with animated discussions and head-to-head consultations. Given the intense interest (the event had been solidly booked within six hours), the workshop will be repeated on 21 June 2016 (and has already been fully booked as well).

Our client workshop on insolvency law and restructurisation, to be held on 15 June 2016, still offers a few slots. Our advice: register soon!



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