

University of Twente, the Netherlands
Faculty of Behavioural, Management and Social Sciences
European Public Administration - Bachelor Thesis

The values on which the Union is founded – and how the GDPR protects them

1st supervisor: Dr. Claudio Matera

2nd supervisor: Dr. Pieter-Jan Klok

Anna Alicia Kier (s1680692)

05th July 2018

List of abbreviations

AGG	Allgemeines Gleichstellungsgesetz (General Equal Treatment Act)
BDSG	Bundesdatenschutzgesetz (German Data Protection Act)
BfDI	Bundesbeauftragte für Datenschutz und Informationssicherheit (Federal Commissioner for Data Protection)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
CCTV	Close-circuit television
CJEU	Court of Justice of the European Union
CFREU	Convention on Fundamental Rights of the European Union
DPA	Data Protection Act in Germany (outdated by the BDSG)
DPD	EU Data Protection Directive 1995 (Directive 95/46/EC)
EC	Council of Europe
EEA	European Economic Area
EU	European Union
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
FCC	Federal Constitutional Court Germany (Bundesverfassungsgericht)
FRA	European Union Agency for Fundamental Rights
GDR	German Democratic Republic
GDPR	EU General Data Protection Directive (Directive 2016/681)
GG	Grundgesetz (German Basic Law)
ICJ	International Court of Justice
LED	EU Law Enforcement Directive (Directive 2016/680)
OECD	Organisation for Economic Co-operation and development
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TMG	Telemedia-Gesetz (telemedia law in Germany)
TKG	Telekommunikations-Gesetz (telecommunications law in Germany)
UDHR	Universal Declaration of Human Rights
UN	United Nations

Table of Contents

Chapter 1: Introduction	6
1. I. Research design and methodology	7
1. II. Key concepts and Body of Knowledge	10
i. Overall body of knowledge	10
ii. Key concepts	11
a) Equality and non-discrimination	11
b) Data processing	13
c) Data protection principles	13
1. III. Scientific and social relevance	14
1. IV. Conclusion	15
Chapter 2: The principles of equality and non- discrimination	16
2. I. UN Declaration of Human Rights	16
2. II. Human Rights in Europe	18
2. III. Human Rights in Germany	20
2. IV. Conclusion	22
Chapter 3: The role of equality and non-discrimination in prior data protection legislation	24
3. I. Background of prior data protection legislation	25
3. II. The EU Data Protection Directive	26
3. III. The German Data Protection Act	27
3. IV. Conclusion	29
Chapter 4: The GDPR and how it protects equality and non-discrimination	31
4. I. What is the GDPR?	31
4. II. How does it address equality and non-discrimination?	32
a) General data protection clauses	32
b) Processing of sensitive personal data	33
c) Profiling	35
d) Protective mechanisms	35

e) Cooperation with third countries	37
4. III. Potential Exceptions	37
a) General measures	37
b) Processing special categories of data	39
c) Exceptions regarding profiling	40
4. IV. Conclusion	41
Chapter 5: Germany and equality and non-discrimination in its data protection	43
5. I. How is the GDPR transferred into the BDSG?	43
5. II. Equality and non-discrimination in the BDSG	44
a) Equality and non-discrimination in Part 1/2 BDSG (corresponding to the GDPR)	45
b) Equality and non-discrimination in Part 3 BDSG (corresponding to the LED)	48
5. III. How are the rights safeguarded?	50
a) Safeguards implemented in Part 1/2 BDSG (corresponding to the GDPR)	50
b) Safeguards implemented in Part 3 BDSG (corresponding to the LED)	52
5. IV. Conclusion	53
Chapter 6: Conclusion	54
Chapter 7: Literature	58
Chapter 8: Appendix	63

Summary

The research presented in this paper will investigate the extent to which the principles of equality and non-discrimination as mentioned in Article 2 TEU will be promoted in the European Union through the General Data Protection Regulation after it entered into force in May 2018. Specifically, it will answer the question *“To what extent does the GDPR promote the status of equality and non-discrimination in data processing?”*. The legislation prior to the GDPR of the EU and the member state Germany as a case example will be employed to establish a basic understanding of equality and non-discrimination in data processing for a point of comparison. The next step will be to analyse the regulation itself and find out how the principles are protected. In the following, the legislation as applied in Germany will be analysed, because the EU regulation leaves some room for member states to implement it themselves. Once that part is completed, it will be able to determine whether the state of equality and non-discrimination in the law has advanced. Because the law lays down basic rights and duties every citizen or resident is entitled to, it is important that it pays attention to the principles that shape society. This research shows that the advancements with regard to the principles of equality and non-discrimination are very limited and that the main goal of a harmonious data protection landscape has not been reached as far as these are concerned.

CHAPTER 1

Introduction

During the last years, data protection has become an increasingly relevant topic. With revelations like Cambridge Analytica currently in the press, personal data have transformed into a valuable good that many companies and organisations want in exchange for their services. Many are offered without paying a fee, but still collect a large amount of personal data instead. Aside from the fact that companies make use of personal data, state agencies and institutions gather it as well, although with different guidelines and often for other purposes. The collection of data itself seems to be no sensitive issue for most people, because information about ethnicity, nationality, sexual orientation, or religion is not something that needs to be hidden. That is the general assumption, which has been found increasingly untrue for the people belonging to a minority. Every EU citizen is entitled to fundamental rights, and this paper will focus on two in particular: the rights to equality and non-discrimination. When the data is gathered, customers should all provide the same information, but how it is shared and processed can depend upon the given answers and hence make the difference that leads to discrimination. The EU prohibits this sort of unequal treatment, but also states that fundamental rights can be limited if it serves the public interest or is otherwise justified. The Data Protection Directive (DPD) was the point of reference and laid down the rules on how for instance data on ethnic origin can be collected (European Commission, 2017). The new legislation called General Data Protection Regulation (GDPR) proposes new rules and updates the old framework from 1995, so this paper seeks to find out to what extent the new regulation has also updated the use and sharing of specific personal data. If controllers filter the data based on a certain religion or ethnicity and then process it, the people whose data is processed would be subject to discrimination. Therefore, this paper will investigate the extent to which the GDPR will influence the status of equality and non-discrimination in data processing. It is important to determine what the actors involved do to achieve the goal of equality and

non-discrimination in a data driven economy and to get to know the mechanisms they employ, profiling being one example.

With the EU already established as a key actor in the field of data protection in its member states (FRA, 2010), the GDPR, which was adopted in 2016 and entered into force this spring, is considered as a groundbreaking legislation that will change the way data is processed. It sets rules not only for member states, but also for all actors that are conducting business in EU member states, which accounts for a large portion of companies and institutions worldwide. Furthermore, the regulation gives important new rights to citizens over the use of their personal information (The Guardian, 2017). This will not only change the way companies process their data, but is also viewed as giving citizens more leverage to take back control over their own data. Since the GDPR is creating a lot of attention, there are various information available on how it will change the current situation, but there are next to no studies that focus on the impact it will have on fundamental rights other than data protection. As a result, the amount of data focusing on citizens' rights to equality and non-discrimination is very limited. The European Union Agency for Fundamental Rights as well as the European Commission seek to inform the population about the changes, the new rights they are granted and how companies need to adapt to the new situation. However, since it has just entered into force, there is no literature available on how it will factually change the situation. The member states have been given two years to prepare for the entry into force, but whether the EU will actively sanction companies breaching the law or if citizens will make use of their new rights is still widely unknown. This paper can therefore contribute to the ongoing debate by focusing on the change the GDPR will bring to the processing of data with regard to the equality and non-discrimination of its citizens. Having laid out the broad topic, the main research question this paper investigates will be

To what extent does the GDPR promote equality and non-discrimination in data processing?

1. I. Research design and methodology

To answer the aforementioned question, four sub questions are listed in this section. The first will elaborate on the principles of equality and non-discrimination, and how these are portrayed in the current legislation. In the evaluative part (Matera, 2016), it is investigated what the likely effects of the new regulation will be and how it influences or changes the current situation. Lastly, it will deal with the justifiability of putting fundamental rights on hold in exceptions and what this implicates. In order to find an answer, several sub questions are employed. The narrower focus of those will allow for a response to the main research question. But before stating them, the phrasing will be explained first. It utilises the word 'promote', which in this case should be understood as influencing and integrating equality and non-discrimination in data processing. As the remainder of this paper will show, the field

of data protection law is extending and needs to cope with more challenges - one of them being discrimination though for instance algorithms and big data. Therefore, it will be analysed if the GDPR pays more attention to equality and non-discrimination, if there are articles that strengthen the rights of data subjects in that regard and if there are safeguards to ensure that these rights do not only exist on paper.

Since the research question employs some technical terms, this paper will firstly offer a definition of equality and non-discrimination in legislation. It will help to clarify the research question and provides sufficient background information to understand what this paper will entail. The principles of equality and non-discrimination will be defined by analysing articles from UN and EU legislation as well as legislation from the Council of Europe. In order to explain these definitions, elaborations on the topic from the European Union Agency for Fundamental Rights will be employed. Because Germany is used as a case study in this paper, a closer look will also be taken on how the German national definitions differ from the international standards. Hence the first sub question comprising descriptive characteristics is:

What are the principles of equality and non-discrimination?

Having established the basis for the analysis, this paper will continue investigating to what extent the previous legislation has addressed the principle of equality and non-discrimination and its importance. The following sub question therefore comprises descriptive and explanatory elements (Matera, 2016). The question includes an evaluative part determining to what extent the legislators paid attention to the principles, although it can be seen as a rather subjective assessment. Hence, the third chapter will take a look at prior legislation, namely the EU Data Protection Directive from 1995 and how it was implemented in Germany. With assistance from handbooks on European data protection law published at that time, a thorough legal analysis of the safeguards for equality and non-discrimination established in legislation adopted prior to the GDPR will be conducted. The next step will focus on the following sub question:

To what extent were equality and non-discrimination in data processing protected in the previous European legislation?

Since this research will investigate the possible changes that result from the GDPR entering into force, the GDPR will be subject to analysis as well. In order to understand the complexity and impact of this new legislation, this paper will summarise the main advancements. Based on the legislation itself as well as various handbooks or commentaries, the way it protects the principles of equality and non-discrimination will be elaborated. Afterwards, possible exemptions the GDPR offers that might lead to discrimination will be discussed. Comprised of both descriptive and explanatory elements (Matera, 2016), the next sub question will investigate how the regulation itself values equality and non-discrimination:

What is the GDPR and to what extent does it protect equality and non-discrimination data processing?

In addition to the previous sub questions, this paper is going to hand the reader an overview of how the regulation is implemented in one member state. Due to its generally high standards with regard to human rights and data protection, Germany will be introduced as a case example (Goethe Institut, 2014). The German data protection law and how it safeguards the principles of equality and non-discrimination is going to be explained in more detail. Based on information material from the German Federal Data Protection Officer and other scholars, the comparison with the previous legislation will discover whether there has been an increased protection of equality and non-discrimination. Because the German act directly corresponds to the GDPR, it also promotes equality and non-discrimination, but the chapter will also investigate whether Germany makes use of the opening clauses, etc, and how it uses the room for adaption given by the GDPR. Therefore the last (explanatory) sub questions this paper aims to answer is:

How is the GDPR integrated into national German legislation with regard to equality and non-discrimination in data processing?

The paper will respond to the main research question by using these sub questions as the outline for the research. By investigating the status quo before and after the GDPR was implemented, it will be possible to conclude to what extent its introduction has an effect on the promotion of the principle of equality and non-discrimination. Several sources will be compared to draw a picture how these two fundamental rights are viewed and protected in general. In connection to that, the paper will continue with describing the origin and history of Article 2 Treaty on the European Union (TEU) to show its importance in EU policy making.

Since the main piece of legislation evaluated - the GDPR - has just entered into force, it is not possible to do a retrospective analysis that takes into consideration the implemented legislation of Germany as the exemplary member state. The number of analyses is limited, which is due to the newness of the regulation. Hence, this research is based on analyses of publications by the EU and other agencies that deal with the subject of data protection. Although the Charter of Fundamental Rights of the European Union is binding and sets standards for how human rights are protected in its member states, they are not uniform. For instance, member states may add additional grounds for discrimination such as sexual orientation that are not included by other member state.. The principles of equality and non-discrimination in the context of the GDPR are not the same within all 28 member states. That is why this paper will focus on the EU in general and on one member state – Germany - in particular. When this paper describes data subjects, citizens or residents, it does not include children, but refers to adults consenting to the processing of their data. Children are protected by separate rules particularly tailored to meet their needs, but the analysis of those rules would be too much for the scope of this research.

1. II. Key concepts and Body of Knowledge

i. Overall body of knowledge

Because the DPD published in 1995 was not binding in itself, but set out a “binding” goal each member state had to achieve (European Union, 2018), this paper will look at the legislation of a national member state to assess the implementation. The member state Germany was selected, because it is known for its high standards with regard to human rights and data protection (Dot Magazine, 2017) and has recently undergone extensive reforms (FRA, 2017). The national data protection act of Germany serves as the foregoing piece of legislation of the GDPR for this paper. The German Data Protection Act called “Bundesdatenschutzgesetz (BDSG)” was passed in 1995 in its original form and amended several times. The last amendment was initiated to compile with the newest data regulation from the European Union and came into force in 2017. Naturally, for the part of this paper that will dealing with the legislation that was published prior to the GDPR a different version will be utilised than for the sub question dealing with the legislation adapting the regulation.

The main legislation is the General Data Protection Regulation (GDPR), which already has a large impact on companies and institutions around the globe due to the stricter rules and new guidelines it manifests for its member states and the actors conducting business with them. Adopted in 2016, it repeals the now outdated DPD from 1995 and sets new standards when it entered into force in May 2018. It also presents new citizens’ rights, such as the “right to be forgotten” (right to erasure, Art. 17 GDPR), which means that citizens can require companies to erase their personal data if they withdraw their consent or the data is not longer necessary for the purposes it was once collected for (European Commission, 2018a). Policy documents that were published before as guidance on the subject now become redundant, because the GDPR includes more aspects than its forbearer does and manifests them in binding legislation. Since the regulation entered into force in May, there is no case law based on it yet. Nevertheless, there are analyses that forecast the impact the GDPR will have on EU member states and on the other actors active in or with one or more member states. The other part of the body of knowledge will consist of independent reviews, for instance by the FRA or other academic articles and essays. The paper will make use of journal articles and scientific publications to reflect the mindset and public opinion where it is applicable.

The conclusions will be drawn based on the interpretive and comparative analysis of the national legislation implementing the DPD and the GDPR. The amount of articles/paragraphs dedicated to the topic will serve as an indication of relevance, while other publications will provide additional information on the role of equality and non-discrimination in the European data protection in practice. This will be useful when this paper describes under which circumstances the principles might be limited for some persons in order to protect others.

ii. Key concepts

a) Equality and non-discrimination

The principles of equality and non-discrimination as noted down in human rights have been a part of Europe before the EU was founded. It ensures that diversity does not have a negative effect on decisions, albeit it was not always widely accepted. Starting with the Magna Carta in 1215, equality before the law was deemed a principle that should be protected. Although not in its current dimension, it laid the fundament for a development of rights that are essential today. But the *wave* of human rights began to catch up speed after the UN adopted the Universal Declaration of Human Rights as a result of the “barbarous acts that have outraged the conscience of mankind” (UN, 1948). It states equality of the law and the “equal protection by the law without any discrimination” in Article 7 and more precisely in Article 2 of the declaration¹.

Two years after the UN adopted its human rights declaration, the members of the Council of Europe adopted the European Convention of Fundamental Rights (ECHR) in 1950. The convention refers to equality and non-discrimination in Article 14 ECHR, by stating that everyone is equal and discrimination is prohibited. The article states the same grounds for discrimination as the UN Declaration, with the exception that it adds “association with a national minority” as an explicit ground. To ensure that member states uphold the rights protected in the convention, the European Court of Human Rights (ECtHR) was founded (FRA, 2014). Later on, the EU’s own binding Charter of Fundamental Rights of the European Union was adopted in 2000 and entered into force in 2009, which proclaims equality and prohibits discrimination in Article 20 and 21. However, these are not the only articles concerning equality in the charter; an entire chapter is devoted to it, hence it mentions various forms of possible discrimination, and grounds for unequal treatments specifically. The introduction of the human rights in EU law was firstly initiated in order to eliminate discrimination in the labour market and to create equal economic chances regardless of nationality. By promoting EU-wide rights that are the same for everyone, integration was fostered by tearing down barriers and instead allowing everyone equal opportunities to work. As integration deepened, the human rights also spilled over into other aspects of Union space.

The German Basic Law (GG) codifies the “inviolable and inalienable human rights as the basis for every community, of peace and justice in the world” (Article 1 GG, 1949) and therefore acknowledges the human rights in general, before explicitly listing them in the following articles. For the research presented here, it should be noted that Article 3 GG on equality before the law also states that equality is given on more explicitly mentioned grounds than the UN Declaration which was published a year

¹ see appendix for a quote of the article

earlier. As with the UN Declaration, the main purpose of the introduction of human rights in the German Basic Law was to lay down laws that protect the freedoms of individuals after the Second World War. This is also one of the reasons why the articles are protected with an eternity clause. It means that they cannot be revoked as long as the Federal Republic of Germany stays to exist in its current form.

Equality in general is based on the principle *ius respicit aequitatem*, which means that the law should respect people equally under equal circumstances, unless there is an objective reason not to. It refers to the same treatment under the same circumstances. That means that for example cases brought in front of the court are treated equally if they prove to be comparable. Hence, the right to equality means a right to equal treatment in an equal situation. According to the European Network of Legal Experts in the field of Gender Equality, “the principle of equality precludes comparable situations from being treated differently, and different situations from being treated in the same way, unless the treatment is objectively justified” (European Network of Legal Experts in the field of Gender Equality, 2009).

Non-discrimination connects to the aforementioned principle, but is nevertheless not exactly the same. To elaborate, discrimination is prohibited on many grounds, specifically sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (Article 14 Racial Equality Directive², 2000). The explicitly mentioned grounds are not to be considered exhaustive, which is why the ECtHR has been able to implicitly extend that list to also include disability, age and sexual orientation or characteristics such as fatherhood, marital status, membership of an organisation, military rank, parenthood of a child born out of wedlock or place of residence (FRA, 2010b).

Discrimination is divided into two dimensions - direct and indirect discrimination. Starting with direct discrimination, Article 2 (2) of the Racial Equality Directive defines direct discriminations as “[occurring] where one person is treated less favourably than another is, has been or would be treated in a comparable situation”, such as receiving less pay for equal work. To determine direct discrimination, a comparator is needed which was treated differently under similar circumstances (FRA, 2010b). Indirect discrimination is defined under Article 2 (2) (b) of the same directive and “shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons”. Like the FRA states, indirect discrimination differs from direct discrimination in that it moves the focus away from differential treatment to look at differential effects. The challenge is the identification of indirect discrimination, because the causal effect is different since the law does not state it clearly.

² Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

The principles of equality and non-discrimination were enshrined in the functioning of the EU from its very beginning. They are two of the most important principles for a functioning democracy in which all citizens and residents have duties and rights. As the basis for every piece of legislation the EU adopts, it is important that these principles are protected. Considering that it is not without its difficulties to treat everybody equally, it is essential that the development is progressive and that the GDPR signals a step forward. With the recent processes showing that Europe still experiences prejudiced ideologies like xenophobia or homophobia, it is important to present the values on which this Union is built according to the TEU and ensure that the legislation provides a solid foundation to eliminate direct discrimination, and establishes measures against indirect discrimination.

b) Data processing

The main point of reference for the definition of the data processing will be the GDPR, which defines data processing in Article 4 (2) GDPR as a set of operations performed on personal data³.

It therefore includes the administration of payrolls and promotional emails, but also video recordings like CCTV (European Commission, 2018b). If the data processing is used for other purposes, special EU rules come into play. The legal framework of data processing is defined in Article 6 GDPR and expresses that such processing is lawful if at least one of the listed conditions apply. The conditions listed in the GDPR are consent, necessity, proportionality, or the assurance of certain safeguards. In the following articles of the regulation, further conditions and prohibitions are expressed as well. The regulation articulates that prohibitions include for instance the processing of personal data revealing racial or ethnic origin, etc., but lists exceptions. One of these exceptions occurs if processing is necessary for reasons of substantial public interest⁴.

Coming back to the context of equality and non-discrimination, data processing is discriminatory if the data is filtered in search for particular characteristics without having the legitimisation that justifies the means of public institutions (e.g. serving the public interest) (European Data Protection Supervisor, 2012). Without having the authority to process this data in the frame of national law, such an analysis would be considered discriminatory on the grounds of a particular feature and hence unlawful.

c) Data protection principles

The GDPR writes about upholding data protection principles and defines them⁵. However, the GDPR does not explain the principles in further detail. The German Federal Commissioner for Data

³ see appendix for a quote

⁴ see appendix for a quote

⁵ see appendix for a quote

Protection offers more elaborate explanations of the principles used in the GDPR in German. Some will be discussed here to establish an overview. To start with, the processing of data is justified if the exceptions laid down in the regulation apply; otherwise, the data subject's consent is needed to process them. Data minimisation refers to the fact that every data only is processed to the extent to which this is necessary and relevant for the purpose of said task. Data security is another important part, which declares that the level of protection of the data should be in accordance with the risk that stems from the data (BfDI, 2017). Hence, data connected to bank accounts would need a different level of protection than a mail address used for a commercial newsletter.

The DPD also stated *principles of protection* that relate back to a guideline published by the OECD in 1980. In the OECD "Guidelines on the Protection of Privacy and Transborder Flows of Personal Data," eight non-binding principles for data protection were introduced that were then implemented in the DPD. These principles include collection limitation, data quality, purpose specification, use limitation, security safeguards, openness, individual participation, and accountability (OECD, 1980). Although they have been revised several times, the core of the principles is still valid.

1. III. Scientific and social relevance

Nowadays, it is inevitable to leave traces online - social media profiles are used to stay in touch with friends, online newspapers to stay up to date, and there are platforms that help find employment by uploading curricula vitae. However, as the reveal of the Cambridge Analytica files show, these profiles are not only there to improve the lives of their users. The analysts are able to track personality traits or political views with so little as a few likes on Facebook (The Guardian, 2018). If such trivial data is already that revealing, it makes one wonder how personal data is actually processed. The positive aspects of sharing ones live online are frequently put forward and used to promote online platforms. But what about the disadvantages? What if a company searching for new employees would be able to filter the profiles not by the qualifications, but by the race of the applicants (European Parliament, 2017)? These increasing freedoms and possibilities also pose a growing risk for manipulation and discrimination. That is why it is important for states and other institutions like the EU to try to protect its citizens and residents from such exploitation with regard to data protection. It is necessary to make sure that global players - however big they may be - also abide by the rules.

The law serves as the basic assembly of rules to which everybody should be held accountable and lays down fundamental rights to protect citizens and residents alike. If there would be no progress or continuance of the most basic principles of society initiated by the very people leading it, how are the citizens supposed to uphold principles that are not laid down in the law? As society evolves, technology is finding its way into all parts of life, which also offers governments possibilities to make

use of technology and employ it to their advantage, e.g. by having large data banks at their service. Big data and the storage of large amounts of data allow for different processing, that together with algorithms and/or artificial intelligence increase the possibilities such processing can create. When algorithms evolve, they have the opportunity to combine categories of data and establish connections that would restrict the protection of personal data (FRA, 2017b). Due to the increased use of technology, this research is relevant because it investigates whether there is progress demonstrating (the possibility for) equality and non-discrimination - at least in the field of data protection.

1. IV. Conclusion

As the societal relevance section of this chapter suggests, the protection of all fundamental rights in the field of data protection becomes increasingly important. This paper focuses on equality and non-discrimination in particular, because they are among the most basic rights, considering that everybody is born equal. The sub questions will serve as a guide throughout the paper, as each chapter will answer one sub question. Serving as an introduction to the topic, this chapter has briefly elaborated why this paper is relevant and how it will proceed to answer the questions. As such, the societal relevance will now be embedded in human rights legislation.

CHAPTER 2

The principles of equality and non-discrimination

Because fundamental rights are designed to set protective limits to governmental actions (Schütze, 2015), this chapter will discuss human rights declarations, conventions and charters from three different governmental levels in terms of how they define equality and non-discrimination. Furthermore, the influence of the courts on the substantive reach of the non-discrimination principles will be elaborated as well. Starting with the most international one, the Universal Declaration of Human Rights (UDHR) and the corresponding International Court of Justice (ICJ), this chapter will then move on to the European human rights. Here it will be investigated how both the European Union (EU) and the European Court of Human Rights (ECtHR) act out their possible influence on legislation. Lastly, the national legislation of Germany and how human rights, particularly the principles of equality and non-discrimination, are protected in the German basic law will be explained. Additionally, a look at the influence of court judgements on German human rights legislation will be taken.

2. I. UN Declaration of Human Rights

The United Nations were established on 24 October 1945 at the San Francisco Conference in an effort to promote world peace. When the General Assembly first came together in 1946, the member states decided to create a fundamental human rights charter in addition to the existing UN Charter (UN, 2018). Another year later, a commission was created which gave delegations of eight member states the opportunity to draft a declaration taking into account the large amount of diversity of its member states and would make sure that it is applicable to all human beings alike. Eleanor Roosevelt was

selected to chair the committee and mediate the differences that presented themselves, as the world was still strictly divided between East and West. After the final draft (known as the Geneva draft) was written and sent to the Commission of Human Rights, all member states were asked for their input before adopting 30 articles that formed the UDHR in 1948 (UN, 2018). Although not legally binding, it encourages member states to continue with implementing their own declarations of human rights in national law (Article 28, UDHR). Member states recognise these rights as being universal and applicable to every human being. After having lived through two world wars and other injustices like segregation, the degradation of entire peoples based on their religion or belonging to a minority, the declaration was a milestone and served as a rallying point for oppression in cases such as Lech Walesa or Nelson Mandela (Gardner, 1988).

The Declaration of Human Rights was the first of its kind in an international context and is based on the seemingly simple principle that “all human beings are born free and equal in dignity and rights” (Article 1, UDHR, 1948). That article in itself eliminates discrimination and replaces it with equality, but the declaration sets forth other articles that define it more explicitly, such as Article 2 in its original form⁶. Later on, the article was amended to also include the status of the country to which a person belongs⁷. With this addition, the declaration offers more grounds that prohibit discrimination to also include the type of country on which the nationality is based. Next to that, Article 7 UDHR also forbids discrimination whilst simultaneously establishing equality before the law⁸.

Lastly, the UDHR lies down that these rights apply to everyone, which in turn means that everybody is responsible for putting them into practice and ensuring that no group discriminates or threatens the rights. It is remarkable that Article 30 reminds the reader of its duty to play a part in the creation of a world where human rights are respected. It expresses that this is not a one-way-street, meaning that it clearly states that rights go hand in hand with the task to make them a reality. As Roosevelt said: “Human rights exist to the degree that they are respected by the people in relations with each other and by governments in relations with their citizens” (UN Women, 2018). Human rights only work if individuals acknowledge their existence - not only for themselves, but also for others and show equal respect to those. Rights cannot be taken for granted, because citizens need to value them. It signifies that their value depends on the attention citizens give them⁹.

The declaration is viewed to be the origin of international human rights law and being the first of its kind - to have inspired various legally binding international treaties on human rights (UN, 2018c). However, according to Cook, the ICJ itself has not had much influence on international human rights

⁶ see appendix for a quote

⁷ see appendix for a quote

⁸ see appendix for a quote

⁹ see appendix for a quote

legislation (Cook, 2004). Instead, it has rarely dealt with human rights violations and if it did, the court judgements did not contribute to the discipline. Deppermann on the other hand argues that the ICJ “has the capacity under the current international legal regime to take a more active role in combating human rights violations” and that it is “undeniable that the ICJ has played a role in the formation of human rights law” (Deppermann, 2013). Other courts like the International Criminal Court deal with mass violations of human rights, such as crimes against humanity or genocide, which suggests that it handles human rights violations on a larger scale.

2. II. Human Rights in Europe

Two years after the UN adopted its human rights declaration, the members of the Council of Europe adopted the European Convention of Human Rights in 1950. The convention (formerly known as the Convention for the protection of Human Rights and Fundamental Freedoms) was adopted by the 12 member states of the Council of Europe (EC) in Rome in 1950. With its entry into force in 1953, it was the first instrument that gave a binding effect to the UDHR (EC, 2018). Furthermore, the ECHR was also the first treaty that established a supranational body and codified that human rights would have precedence over national legislation by giving every citizen of the member states the possibility to challenge human rights violations at the European Court. For all other members that joined afterwards, signing the Convention is prerequisite to joining (EC, 2018). The convention was last amended by Protocol 15, introducing the principle of subsidiarity; and Protocol 16, which will allow states to ask courts for advisory opinions on how to implement human rights. Both protocols were introduced in 2013, but Protocol 16 will enter into force as of 1 August 2018 in the countries that have signed and ratified it (ECtHR, 2018).

The EU considers itself to be founded on the values mentioned in Art 2 TEU¹⁰, which gives human rights a ‘foundational’ status and consequently limits the exercise of all Union competences (Schütze, 2015). Human rights in EU law were initially introduced to create equal chances on the labour market independent from nationality in 2000 with the adoption of its own Charter of Fundamental Rights of the European Union (CFREU). The charter entered into force nine years later with the Lisbon Treaty. This codification moment led to an expansion of rights, because new ones were introduced. The charter is now a separate document that is protecting people affected by EU laws. One of the reasons for adopting a separate charter tailored to the needs of the EU was that the treaty did not allow for the ECHR to be applied by the courts. Because no unanimity could be found to adapt the treaties, it was instead proposed to create a separate charter (Anderson & Murphy, 2011). The charter was not introduced as a legally binding instrument and represented a compromise, but it was nevertheless

¹⁰ Treaty on European Union 92/C 191/01 (also known as the Maastricht Treaty)

drafted as a legal text (Anderson& Murphy, 2011). After being rejected as part of the Constitutional Treaty, it became binding through the Lisbon Treaty. By promoting EU-wide rights, the EU was able to foster integration and tear down barriers by allowing everyone equal opportunities to work. As integration widened, human rights also spilled over into other aspects of Union law, like social policy. Additionally, Protocol 12 has amended the declaration and “prohibits discrimination in relation to ‘enjoyment of any right set forth by law’ and is thus greater in substantive reach than Article 14 [ECHR]” (FRA, 2010b). It prohibits discrimination taking place in both public and personal contexts, where individuals are placed in a position to decide how public goods are offered (FRA, 2010b). The European Convention includes an article on the prohibition of discrimination¹¹.

Both the articles from the ECHR as well as the CFREU include the formulation of ‘such as’ when listing the grounds for discrimination, which means that the list is to be considered as non-exhaustive. The mentioning of other grounds means that the ones given are exemplary and offers the possibility to include those that other non-discrimination directives include, for instance disability or sexual orientation (FRA, 2010b). The Convention of the EU devotes an entire chapter to equality (Chapter III), which includes Articles 20-26. Non-discrimination is prohibited in Article 21 CFREU and is similar to the clause mentioned in the Convention. According to the FRA, the non-discrimination clause draws on Art. 19 TFEU¹², which states that appropriate actions may be taken to combat discrimination.

Especially the second part of the article can be considered to be implemented for the aforementioned economic reasons that go hand in hand with the free movement within the Union. Other member states of the European Economic Area (EEA) also need to oblige EU law when it concerns economic matters (FRA, 2011). That means that for instance discrimination at the workplace would fall under the scope of EU law and would be violating EU human rights legislation. As one can see, the articles by the Council of Europe and the European Union bear a stark resemblance to each other, but are not identical. Article 14 ECHR includes the prohibition on other grounds, whereas Article 21 CFREU lists more reasons, but does not include the same formulation. However, it can be assumed that the mentioning of ‘any ground’ would include other grounds not explicitly mentioned in the article as well.

Both declarations also add an article that prohibits the abuse of rights, namely Article 17 ECHR and Article 54 CFREU by writing that they cannot be interpreted in a way that would allow states to perform activities which would infringe the rights¹³.

¹¹ see appendix for a quote

¹² Treaty on the Functioning of the European Union 2012/C 326/01 (also known as Treaty of Rome)

¹³ see appendix for quotes

According to the Council of Europe, the court's rulings "have resulted in many changes to legislation and have helped to strengthen the rule of law in Europe" (Council of Europe, 2018b) and has become a powerful instrument. The ECtHR is being thought of to be extremely strict with regard to racial or ethnic discrimination as it states that no difference in treatment which is exclusively based on the ethnic origin is objectively justified in a democratic society (FRA, 2010b). The Court and its rulings have led to an inclusion of further grounds such as father-/ parenthood, marital status, military rank or place of residence (FRA, 2010b). The Court of Justice of the European Union (CJEU) functions as the supreme court of the EU and is therefore responsible for keeping the legislative in check. It controls whether legislative acts comply with human rights before they enter into force and can annul them if they breach fundamental rights. Its main task is to settle disputes between EU institutions and member states, but it also offers the possibility for individuals to bring their claims (European Union, 2018). Its power and influence can therefore be seen to resemble those of a national supreme court.

A Eurobarometer survey from 2015 showed discrimination itself does not necessarily decrease, but that there is a growing support for people who are (at risk of) being discriminated. The degrees of acceptance still vary greatly between countries, but younger and better-educated people are more likely to express tolerant views. This could suggest a downward trend with regard to discrimination. What is important for discrimination in data processing is that the awareness of citizens' rights is increasing. That means that even though a new piece of legislation entered into force which potentially limits the extent of discrimination, people might still be more likely to realise that they are treated unequally and report it (Eurobarometer 437, 2015). Next to the human rights legislation, there are various other directives that prohibit discrimination. The Racial Inequality Directive for instance prohibits discrimination that is based on race or ethnicity in the context of employment and the welfare system (FRA, 2011). Others like the Gender Equality Directives are installed to prohibit sexual harassment and other discriminatory acts that are based on gender or sexual identity. The Employment Equality Directive focuses on discrimination in the context of employment as well, but lays broader emphasis on factors like disabilities. Therefore various directives are in place that deal with a specific form of discrimination in more detail.

2. III. Human Rights in Germany

Since Germany is a nation state and as such a member of all supranational bodies mentioned above, the declarations or conventions issued by them are also applicable in Germany. The German Basic Law as a draft version was firstly introduced at the Frankfurt conference, where the three Western Allies introduced an advice on how a German state should look like. In 1949, the first German state after the Second World War was initiated. But because the state did not include all former federal

states of Germany, the founders wanted to signal that the constitution was only preliminary until Germany could be reunified (bpb, 2018). Hence, the document is not called a constitution, but Basic Law. Further, since Germany was the initiator of two world wars, it was to assure that this should not happen again and that human rights were valued. That is also one of the reasons why the basic rights can be found at the beginning and why they are protected through an eternity clause (Art. 79 (3) GG, 1949¹⁴). This means that these articles cannot be modified or deleted as long as the Federal Republic of Germany stays to exist in its current form. The German Basic Law codifies basic rights in Articles 1-19 GG, starting with the clause that “human dignity shall be inviolable” (Art. 1 GG, 2014). Although not specifically about discrimination, it lays a foundation for everyone living in dignity, one could argue this also includes no one suffering from discrimination (Reaume, 2003).

The Basic Law does not have a single article that prohibits discrimination, but instead divides it between the different grounds, for instance with regarding to equality before the law (Art.3 GG, 2014) it says that no person shall be (dis-)favoured on the basis on a list of grounds¹⁵.

It lists fewer grounds for discrimination than other similar documents, but is the only declaration that includes the wording of ‘homeland’ instead of national/ethnic origin, which suggests a form of strong attachment to the country if one considers it a home. Interestingly, the entire German Basic Law does not once mention the word ‘discrimination’ in any context. Instead, it makes use of the words (dis-)favoured, which simultaneously seems to prohibit positive discrimination. But since there is not one article specifically about non-discrimination, there are numerous implicit references to it. These articles include for instance Article 2 GG, which explicitly states that personal freedoms should not be limited, or explicitly connect to faith, freedom of expression, etc.¹⁶.

There is no other mention of discrimination in particular, but stating that everybody is entitled to these rights prohibits a selection, therefore suggesting that they apply to everyone equally and without discrimination. The General Equal Treatment Act implements four European directives regarding equal treatment in employment, gender and race and seeks to prevent or eliminate discrimination (Federal Anti-Discrimination Agency, 2010). The General Equal Treatment Act (AGG) was adopted in 2006 and is the first comprehensive legislation that prohibits discrimination on various grounds through private actors such as landlords or employers. It prescribes duties and rights for both employers and employees to eliminate discrimination. Furthermore, it allows for sanctions that range from a warning to the determination of the employment contract all whilst guaranteeing no disadvantage to the one who brought a claim forward. It has recently been evaluated for its ten year anniversary and various improvements have been suggested by the Federal Anti Discrimination

¹⁴ for this paper, the version of the Basic Law (GG) that was last amended on 23 December 2014 will be used

¹⁵ see appendix for a quote

¹⁶ see appendix for a quote

Agency to close gaps in the protection of claimants, but they are yet to be implemented (Federal Anti-Discrimination Agency, 2018).

The German Constitutional Court has the responsibility to protect the rights of each individual and to secure democracy in Germany (Planet Wissen, 2018). As a member state of the European Union, the EU decisions are directly applicable to German citizens, which is why the German Constitutional Court is also influenced by rulings made at EU level. The Court is also responsible for guaranteeing the compliance of the legislative with human rights (Streintz, 2013). It therefore does not necessarily broaden the substantive reach, but it makes sure that standards are upheld.

2. IV. Conclusion

As the UDHR already states that rights are universal, the declaration in itself is valid and gives equal rights to everyone. However, various supranational institutions as well as the nation states themselves have implemented similar documents that put down the fundamental right in legislation. A possible reason for that is the fact that they were all drafted at approximately the same time. There are minor differences, for instance in the formulation of the articles and the way they are comprised, but they all strive towards the same goal. With regard to equality and non-discrimination, each piece of legislation lays down several grounds on which discrimination is prohibited, and generally proclaims that every human being is equal.

There are different views on how large the courts' influence on the list of discriminatory grounds is, since the actual impact on legislation is subject to interpretation. However, this paper would claim that the ECtHR and the Court of Justice of the European Union have a greater impact than the ICJ, because it rules on disputes between states. This is based on the build-up of the respective legal systems and literature resources suggesting a greater influence. Rulings issued by the European institutions are also influencing the legislation in Germany, as the principle of *lex superior* suggests that law issued by the EU has a direct effect on the national legislation of its member states. Therefore, Germany is required to implement European Union law, which in turn means that the German courts also need to take rulings by the CJEU into account when forming their opinions. There are various landmark cases issued by the European courts, such as *Küküdevci* or *Mangold* that elaborate more on anti-discrimination rules in the EU.

Nevertheless, the principles of equality and non-discrimination can be considered to be well-protected in international human rights legislation, since they are seen as the basis on which further rights are built on. Through amendments it is ensured that the documents stay updated and newly acknowledged

grounds for discrimination are included. Furthermore, the European courts support the inclusion of further grounds by issuing judgements in favour of the claimant, even though the grounds were not previously included in the charter, for instance fatherhood (FRA, 2010b). Now that the significance of equality and non-discrimination in human rights has been considered and analysed, this thesis will use it to determine how EU and German legislation respect equality and non-discrimination regarding data protection.

CHAPTER 3

The role of equality and non-discrimination in prior data protection legislation

As technologies evolve, more information is shared digitally and processed by automated means; the protection of data develops as well. This is why data protection laws have become more extensive over the last two decades. As seen in the second chapter, equality and non-discrimination are protected in the (inter-) national human rights legislation. Data protection is a separate fundamental human right within these documents, so it is possible that legislation about this fundamental right also directly or indirectly promotes equality and non-discrimination. Therefore, this chapter starts with giving a short background on the origin of data protection law. In order to determine whether the General Data Protection Regulation (GDPR) does more to promote equality and non-discrimination than previous EU legislation, the state of the principles in the Data Protection Directive (DPD) from 1995 needs to be determined first. This will allow for a thorough analysis of the GDPR with respect to the principles of equality and non-discrimination in chapter four. In connection with the DPD, this chapter will also examine what German data protection law looks like to create a basis for chapter five, in which the updated version of the German data protection act will be the subject of analysis.

3. I. Background of prior data protection legislation

Data protection as a right was firstly established in the context of the right to privacy within the Universal Declaration of Human Rights (UDHR) in 1948 under Article 12 which states that no one shall be subject to arbitrary interference¹⁷.

Other institutions like the Council of Europe soon followed suit and introduced their own laws. Germany was among the first nation states to establish national privacy laws, with the federal state of Hessen establishing the first modern privacy law in 1970. When data protection became a fundamental human right, it was not already called data protection. Instead, the right to respect for private life was introduced before computers were even developed. Now, the respect for private life and the right to data protection are two distinct rights, although they have similar values. The right to respect for private life was seen as ensuring that no arbitrary observations took place and that family and property were protected by the state. The right mainly included the right to privacy, but the technological advancements were not that far evolved during this point, it was formerly initiated to prohibit family homes from being invaded or otherwise violated without reason. Also included is the prohibition of unpredictable searches of homes or (postal) correspondence. At the first point of initiation in the late 1940s, the scope of the protection of privacy into the realms of data protection was not thought of. The UDHR for instance does not include data protection as a separate right. Instead, it has issued wide-reaching resolutions on privacy (FRA, 2018). The very high regard for data protection in Germany can be seen as twofold. Firstly, during the NS-regime the state systematically invaded the private sphere by collecting a vast amount of data about individuals (e.g. the so-called Jew-index which documented everyone with Jewish faith back to grandparents of individuals). Additionally, the Gestapo relied on civilians reporting information more or less voluntary (Freude, 2016). Secondly, in the German Democratic Republic (GDR) it was common that the Stasi observed most of its citizens very closely and monitored everything, including their innermost private conversations. One could never be certain whether a close friend was not also simultaneously spying for the government as an IM (inoffizieller Mitarbeiter - unofficial employee) and reporting conversations (or critique on the regime) (Lutz, 2016). Having that sort of background, it is understandable how Germany is coined to have a very high regard for privacy, especially since half of the current population could not take it for granted up until about 30 years ago. Data protection is a field that is rapidly changing and shows no signs of slowing down. With inventions like the internet becoming popular only 25 years ago, it shows how many advancements are possible in a small amount of time and how much can change very fast. With legal proceedings taking several years from beginning to end, data protection legislation needs to be able to keep up with the developments while at the same time ensuring that the act will not be outdated by the time it enters into force. Data protection is an active right, which requires frequent

¹⁷ see appendix for a quote

updates, checks and balances that need to be installed. Hence, static definitions or rules will not be able to ensure sufficient protection.

3. II. The EU Data Protection Directive

The Data Protection Directive (DPD) was introduced in 1995, with “the objection to ensure economic and social progress [...] and to eliminate barriers” (rec. 1 DPD, 1995), especially with regards to the flow of free data - as this directive is about data protection¹⁸. With integration spilling over into more and more aspects of life within the EU, there was a need for an increasing exchange of (personal) data and more (automated) processing. This in turn led the European Union (EU) to establish a directive for more coherence among the member states and to protect its citizens as well as their data (FRA, 2014). Due to its form as a directive, it is not directly binding for EU member states, but instead sets out a goal that all member states must achieve (European Union, 2018). Nevertheless, they are obliged to determine how they reach these goals and how to implement them in national legislation.

The directive itself does not refer to non-discrimination and equality explicitly, but it lays down guidelines that should uphold the fundamental rights and freedoms of its citizens. Although this mainly refers to the right to the protection of personal data, it also includes all other fundamental rights, such as the principles of equality and non-discrimination. It is frequently mentioned within the directive that every action needs to comply with the fundamental rights and freedoms. Furthermore, the directive requires member states to determine beforehand whether a process might pose specific risks to the rights and freedoms of the citizens (Art. 20 DPD, 1995¹⁹). This includes checking whether (automated) processing is discriminatory in any way or could violate the principle of equality before the processing begins (FRA, 2014). Therefore, it does not impose any conditions, but it is completely up to the member states to determine (Paal & Pauly, 2018)

In the very first recital of the DPD it says that the directive was published “in order to [ensure] economic and social progress [...] and [to strengthen] peace and liberty and promoting democracy on the basis of the fundamental rights” (rec. 1 DPD, 1995). The object that “fundamental rights of individuals should be safeguarded” (rec. 4 DPD, 1995) is constantly mentioned throughout the directive (for instance rec. 10, 11, 12, 26, 55, Art. 1, Art. 8 DPD, 1995). Additionally, it refers to the European Convention for the Protection of Human Rights and Fundamental Freedoms (rec. 10 DPD, 1995) and hence defines which ones they refer to. Article 21 of the Charter of Fundamental Rights of the European Union (CFREU) prohibits discrimination and proclaims that all people are equal.

¹⁸ an overview of the instruments applied in the legislation of the third, fourth and fifth chapter can be found in the appendix under Table 1

¹⁹ an overview of the articles mentioned through chapters three to five can be found in the appendix under Table 2

Therefore one can be certain that the directive and its implementation in national laws are not discriminatory.

Hinting at the principles of equality and non-discrimination, the DPD states that “member states shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life” (Art. 8 DPD, 1995). Hence, discrimination based on these grounds should not happen, if that data (according to the CFREU) cannot be processed to start with. However, information regarding *inter alia* ethnic and racial origin can still be required or processed, but only in cases where the information can no longer be traced back to a certain individual, for instance if it is anonymised and used for scientific purposes. The DPD and its principles of protection “must apply to any information concerning an identified or identifiable person” (rec. 26 DPD, 1995). This in turn would suggest that the principles of protection do not apply to any data from which a person can no longer be identified.

The DPD was firstly initiated as an attempt to comply with the precedent of Article 16 of the Treaty on the Functioning of the European Union (TFEU), which was adopted in 2007 (Lisbon Treaty). Article 16 TFEU states that everyone has the right to the protection of their personal data²⁰.

With the directive, the EU ‘lays down the rules’ about how EU citizens should be protected. According to Reding, the Data Protection “Directive 95/46/EC set a milestone in the history of the protection of personal data in the European Union” (Reding, 2012). Later on, the TFEU also laid down the basis for future data protection acts by implementing Article 16 TFEU. It tried to unify the different standards of the member states and harmonise the data protection laws they had in place so far through establishing minimum standards, with stricter rules always being a possibility. And there are still considerable divergences in the level of protection across the different member states. The directive enshrines two of the oldest ambitions of the European integration process: the rights and freedom of the individual and the achievement of the internal market - the flow of personal data in this case (Reding, 2012). However, it leads to a fragmented legal landscape that results in unequal protection for the data subject and uncertainty (Reding, 2012).

3. III. The German Data Protection Act

Germany has been a frontrunner in the field of data protection from the very start (Werry, 2017), with the German *Land* of Hessen introducing the first modern privacy law in 1970 (Freude, 2016). The right to data protection is not directly enshrined in the Basic Law, but Articles 10-13 GG do grant rights concerning the privacy of correspondence as well as protection from home invasion (Art.10-13

²⁰ see appendix for a quote

GG, 2003). The first Data Protection Act (DPA) was introduced in 1977 with the intention to “protect against abuse in their storage, transmission, modification and deletion (in data processing)” (Freude, 2016) and revised several times to stay updated. The Federal Constitutional Court (FCC) decided that in addition to the rights in the Basic Law, German citizens have a right to self-determination over their personal data in what the Bertelsmann Foundation calls a “landmark case” (Freude, 2016). The FCC made this judgement in the context of the 1983 census, which was originally supposed to collect a lot of data from the citizens and have it stored and processed digitally for the first time. This sparked protests by citizens who feared that the government could see through them like through glass (bpb, 2017).

The purpose of the DPA was to protect the individual from having his/her personality rights infringed by usage of his/her data (DPA §1 (1), 2003). The DPA is only applicable to data that is collected within the borders of Germany (DPA §1(5), 2003), which also includes third countries that gather data in Germany. According to Freude, it is based on six key principles which can (in some form) also be found in the DPD: ban subject to permission, direct collection, data economy, data minimisation, purpose limitation, transparency and necessity. These principles mean that data can only be collected by the corresponding individual and not from anyone else. They should be stored for the necessary time period, only necessary data is collected and if it is, it can only serve a predefined purpose. Furthermore, the individuals must be informed that data is collected from them, for which purpose and of its necessity. Next to that, Germany is known to apply the unwritten maxim that everything which is not explicitly allowed is in principle forbidden - called a general ban with reservation for permission (Churchill in Rose, 2018; BfDI Info 1, 2017). The DPA has been amended 20 times over the course of the years to cope with changes, the last one being an adaption to comply with the GDPR in 2017(datenschutz-wiki, 2018). The changes range from new formulations to comply with other laws (such as the ones concerning railways, post or media) over adapting to the new currency reform when the fines were changed from DM to Euro (BDBI I Nr. 60 S. 3322, 2002) to adding new paragraphs (BGBI I Nr.40 S.1970, 2006). They also include changes to strengthen citizen and/or consumer protection (e.g. BGBI I Nr.49 S.2355, 2009). For this paper, the act from 1990 which was last amended in 2003 will be utilised.

The German DPA does not really define what personal data entails in much detail, it only states that they are singular remarks about personal or objective circumstances of a certain or identifiable natural person (affected person). As an alternative, it defines what is meant by sensitive personal data in §3 and §3 (9). Here it says that special types of personal data are for instance “remarks about racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, health or sex life” (DPA §3, 2003). Nevertheless, it is important that a distinction is drawn. Sensitive personal data is clearly framed, which consequently defines personal data by being everything apart from what

is included in the former. It therefore states that information which serve as the most frequent forms of discrimination deserve a special protection.

As with the DPD, the DPA also frequently mentions that rights should be upheld while processing data, that data should be anonymised or that agencies need to check compliance. Through anonymisation it ensures that individuals cannot be discriminated on the basis of this data, since it cannot be traced back to them if proper safeguards are installed. Regarding the collection of (anonymised) data, the ruling by the FCC has further strengthened the data protection rights of German citizens in 1987. Equality and non-discrimination as well as disfavouring are not directly mentioned, which is the formulation chosen in the German basic law. Discrimination/disfavouring is only explicitly prohibited in the context of the data protection officer (§4f DPA, 2003). It states that the person holding the position is not to be discriminated for trying to fulfil his/her tasks and that the data protection office should be able to act independently without interference from others. Otherwise, the act only mentions that the fundamental rights (of others) should not be limited by dealing with the citizens' data in any way (§23 (6) (1) DPA, 2003).

Additionally, the DPA is not the only piece of legislation in place describing how data may be processed or stored. Legislative acts like the Criminal Code, the Civil Code, the Telecommunications Act or the Telemedia Act specify data protection for the corresponding field (Freude, 2016).

The Criminal Code states that violations of privacy through recordings, pictures, etc. can be punished as well as using data that was obtained unlawfully (Chapter 15 Section 201 ff., German Criminal Code, 2013). The Civil Code (BGB) describes how data of for instance associations should be treated, more specifically, that the principles of proper data processing are observed while dealing with data (Section 55a (1) (1) BGB, 2013). Lastly, the Telecommunication Act (TKG) describes how the providers of telecommunication services are to treat their customers' data in Chapter 1 §12 (§12 TKG, 1998) and dictates rules for how the data should be protected in Part XI of the act. It states explicitly that changes should be given to the Data Protection Offer in order to make comments (§87 (1), TKG, 1998) and enumerates other guidelines for how the telecommunication secrecy is applied and what safeguards for the consumer's data should be applied. Likewise, the fourth section of the Telemedia Act (TMG) from 2007 also sets rules for the data protection by stating for instance that user data can only be requested if other laws regarding telemedia especially say so (§12 TMG, 2007) and if there is a reasonable need to do so (§14 TMG, 2007).

3. IV. Conclusion

To conclude this chapter, one could say that the DPD and the DPA codified data protection and privacy as fundamental rights in the digital era. The fundamental rights now go hand in hand with

other rights, such as data protection. They have been part of the EU and Germany since the late 1940s/50s and were protected implicitly in the former data protection acts and directives. Since the primary task of these aforementioned legislative acts is to promote data protection, equality and non-discrimination are more of a secondary concern. As the landmark judgements from 1983 shows, the German courts take their task very seriously and issue additional protections of the data of individuals, which in this case also influences equality and non-discrimination. Nevertheless, within the legislative acts, there should be no trade-off between fundamental rights or substituting one for another. This is why even though the acts do not mention equality and non-discrimination, it still seems that they are well-protected within the frame of possibilities and do not suffer in comparison to the main right of concern. What is missing is a clearer indication of how the prohibition listed in Art. 8 DPD is put into practice. As a directive, it does not list safeguards, but instead leaves it open for the member states to determine. This leaves room for improvement, because the right to data protection is there, but the extent to which it protects equality and non-discrimination is still in question. Especially in Germany, various acts include rules for data processing in the respective fields next to a general legislative act on data protection. However, data processing has evolved a lot over the last twenty years since the acts and directives were passed. Hence, it is possible that even though fundamental rights - particularly equality and non-discrimination - seem to be protected well, technology has evolved in a way that this legislation might no longer suffice. Furthermore, more than a prohibition of discrimination based on the information one has on the data subjects in German legislation might be necessary. To what extent the legislation has evolved and if the GDPR offers better protection will be examined in the following chapter.

CHAPTER 4

The GDPR and how it protects equality and non-discrimination

When the General Data Protection (GDPR) entered into force, several aspects changed with regards to how data is both processed and protected. Noticeable for most consumers are the mails from websites, which need to inform consumers about their updated privacy policies. Other changes citizens may observe are the initiations of data protection officers in more companies or other organisations. This chapter will firstly give a general overview of what the GDPR is exactly, before elaborating on how equality and non-discrimination are protected. In the next step, potential exceptions as possible threats will be analysed. As seen before, the Data Protection Directive (DPD) and the German Data Protection Act (DPA) did not introduce direct measures to combat or prohibit discrimination. Therefore it will be interesting to see if the GDPR introduces them. Furthermore, equality and non-discrimination are well-established as principles in human rights legislation both internationally and in Germany. The question will now be how they are protected in the GDPR, since big data and the use of algorithms or artificial intelligence allow for manifold possibilities to discriminate.

4. I. What is the GDPR?

The GDPR or *Regulation 2016/679 on the protection of natural persons with regards to the processing of personal data and on the free movement of such data* is a new regulation passed by the European Parliament and the Council of the European Union on 27 April 2016. It entered into force on 25 May 2018, which granted member states two years to adapt national law and eliminate any obstacles for the GDPR. Furthermore, in this case it is also important that it gives all other actors involved two years to comply with the new standards and adopt their data protection policies

accordingly. This is due to the fact that the GDPR has a wide-reaching impact not only on EU member states and the respective actors within them, but also on companies or other actors that are in business with European Union (EU) member states, institutions, companies or consumers. The GDPR repealed the DPD (Directive 95/46/EC) when it entered into force this spring. With it, the administrative mechanism and the governance of data protection had to be revised in accordance with the GDPR. However, critics claim that the GDPR is a regulation which applies the systematics of a directive (e.g. Gierschmann, 2018). Next to strengthening citizens' rights, it further tries to unify the varying standards of data protection across the 28 member states. It complies with Article 16 of the Treaty on the Functioning of the European Union (TFEU) and focuses first and foremost on the fundamental right to the protection of (personal) data²¹.

Hence, the European Union is required to issue rules that explain how the data should be protected. It updated the DPD by taking into consideration the more recent technical developments and evolution that has taken place since it was passed. One of the main points is to strengthen consumer and citizens' rights. It enshrines more possibilities for citizens and consumers, for instance the right to erasure (Art. 17 GDPR, 2016) or the right of access by the data subject (Art. 15 GDPR, 2016). The regulation is divided into eleven chapters dealing with different topics ranging from rights of the data subject to remedies, liabilities and penalties.

4. II. How does it address equality and non-discrimination?

As the GDPR is part of a wide range of EU regulations, directives and other guidelines, according to Article 6 (3) TEU it is also required to uphold the fundamental rights the EU committed itself to in the Charter on Fundamental Rights of the European Union (CFREU). Its main aim is to contribute directly to the promotion of data protection within the EU and to strengthen the right to privacy and data protection for citizens and residents. Doing so, it simultaneously connects to other fundamental rights as well. Keeping big data as an example, different data protection standards can have connections to discrimination and equality, i.e. if it prohibits the processing of certain categories of data or the use of fully automated processes that form decisions. In the following paragraphs it will therefore be investigated how the GDPR (in-) directly addresses or affects the principles of equality and non-discrimination in particular.

a) General data protection clauses

Starting with the first theme, the GDPR includes aspects that protect fundamental rights. Both recital 166 and Article 1 (2) GDPR state that the objective of this regulation is to protect the fundamental

²¹ see appendix for a quote

rights and freedoms of natural persons. Additionally, it forbids the member states to hinder the free flow of data and as such can definitely be seen as a prohibition of discrimination, because it does not include a selection and instead refers to *all* data (Gierschmann, 2018). Therefore, it directly promotes the principles of equality and non-discrimination, but addresses it only indirectly in connection with all other fundamental rights. It protects individuals regardless of nationality or place of residence (Voigt & von dem Bussche, 2017), by stating that it protects rights of natural persons (Art. 1 (2) GDPR, 2016), which means that they are equal under the GDPR. So regardless of their nationality, residents who enter a contract are protected, because everyone is a natural person and being an EU citizen is no prerequisite. The right to the protection of personal data is considered to be a human right, not a right only for EU citizens (Paal & Pauly, 2018). Furthermore, the data holders need to comply with the GDPR, irrespectively of where they are located, as long as they process data of EU residents. Especially the right to the protection of personal data plays an important role in the regulation, since it aims to reform the DPD. Albeit they are not directly mentioned, the principles of equality and non-discrimination should therefore also be included in the general phrase of ‘fundamental rights’ which was chosen. The CFREU is introduced as a standard of fundamental rights that has to be upheld by the GDPR as well as by other entities that are involved. It prescribes that “restrictions [...] should be in accordance with the requirements set out in the Charter and in the European Convention for the Protection of Human Rights and Fundamental Freedoms” (rec. 73 GDPR, 2016).

b) Processing of sensitive personal data

The GDPR sets the rules when it comes to revelations of personal data that could potentially result in discrimination. Starting with Article 9 (1) GDPR, it should be considered that data processing does not only pose a risk to the right to data protection, but also to other rights - such as equality and non-discrimination. The article lists the categories of sensitive data, but only the following recital mentions that misuse of those categories could lead to discrimination. In contrast to the Article 8 DPD, the GDPR includes genetic and biometric data as well as information about sexual orientation in the article, which aims are stated in the following recital. It says that misuse could lead to discrimination and the deprivation of rights²².

In contrast to the DPD, the GDPR defines data concerning health and phrases it as personal data that inform about the physical or mental health of natural persons (Art. 4 (15) GDPR, 2018). Being aware of these probable threats means that measures need to be taken against the possibilities. This seems to be done by mentioning time and again that fundamental rights need to be respected, and by installing precautions like supervisory authorities or data protection officers whose task it is to check for violations and promote equal treatment. Such a measure is mentioned in Article 9 (1) GDPR, where it states that the processing of sensitive personal data “shall be prohibited unless there is consent or it is

²² see appendix for a quote

necessary for some legitimate activity” (Art. 9 (1) GDPR, 2016). This results from the fact that processing might entail high risks for the freedoms of individuals (Voigt & von dem Bussche, 2017). By prohibiting the processing of such data, it lays down a clear rule that minimises the risk of misuse. The list of exceptions is exhaustive, so the GDPR clearly states what is allowed. According to Paal and Pauly, Article 9 (2) (h) GDPR is considered the widest-reaching one of these exceptions to the general ban. Connecting to Art. 8 (3) of the DPD, it demands special secrecy for i.e. medical personnel or other professions that require a higher form of secrecy regarding the patients’/clients’ data (Paal & Pauly, 2018). Therefore, Article 9 seems to eliminate the discrimination recital 75 describes by prohibiting the processing of sensitive categories of data. However, the second paragraph lists several exceptions and leaves it open for the member states to add further ones, which is why it still promotes equality and non-discrimination similarly to the DPD, which already included a similar phrase (Art. 8 DPD, 1995). Therefore, it does not constitute a significant advancement. Instead, it assumes that the prohibition alone is able to prevent discrimination, but more detailed guidelines should be required. This is because discriminatory effects depend largely on the context, so other information can be combined to retrieve the data nonetheless. It could be claimed that this article does not affect equality and non-discrimination directly, despite referring to it. Hence, sensitive personal data would need more protective measures to prevent discrimination.

Member states may provide for special rules when the personal data of employees is processed in the employment context (Art. 88 GDPR 2016), as long as the employees consent and it is used for the purposes of exercise and enjoyment of rights. A similar article cannot be found in the DPD, but it has been included in the GDPR with particular regard for the in Germany commonly used employment conditions through collective agreements (Gierschmann, 2018). This is another example which shows that additional (inter-) national legislation might be developed in specific contexts, as long as they serve the purpose of data protection and fulfil the objective of the GDPR to promote fundamental rights. Article 88 GDPR manifests that aim by noting that member states can lay down further rules to “ensure the protection of the rights and freedoms in respect of the processing of employees’ personal data” (Art. 88 GDPR, 2016) and therefore includes an opening clause. These rules should furthermore serve a secondary purpose to promote equality and diversity in the workplace. Because discrimination is not mentioned anywhere, diversity can be seen as a step towards eliminating discrimination and has a direct effect. Nevertheless, the article states that member states may include additional provisions, which consequently suggests that member states may choose not to provide additional rules that would protect employment-related data specifically and promote the rights of employees. As a result, equality and non-discrimination are not necessarily promoted comprehensively. Naturally, the promotion of diversity does not mean that discrimination is immediately prohibited, since one can create a more diverse environment for instance with regard to age, but still leave out other nationalities or genders. Discrimination is manifold, but increased diversity is likely to result in heightened awareness for other possible forms of discrimination. So with that in mind, it is not sufficient to make the implementation

of further rules voluntary. The goal is to protect employees' data and encourage employers to think about ways to promote equality and diversity. Nowadays, companies are often claiming to be an equal opportunity employer, which suggests that they do not discriminate. Recent research however has shown that the drive towards eliminating discrimination in the workplace is stagnating (Stainback & Tomaskovic-Devey, 2012), which is exactly why voluntary rules will likely not be enough to close the gap.

c) Profiling

Additionally, Article 22 (1) GDPR expresses that automated processing - such as profiling - cannot be the only tool employed to make a decision which would result in legal actions (Art. 22 (1) GDPR, 2016). Automated decisions are seen as particularly crucial by the legislator, which is why this article can be seen to first and foremost express this concern. The prohibition results from the commandment that decisions which could have potentially disadvantageous results should be made by human beings (Gierschmann, 2018). This means that decisions which could incriminate data subjects cannot be made by machines or algorithms alone, but need to include a supervising human factor. According to Gierschmann, the exact protective goal of the prohibition of automated decisions is not clear, but one could argue that it seeks to prevent possible discriminatory or economically disadvantageous effects (Gierschmann, 2018). Article 20 GDPR prohibits the trade-off between rights by stating that "the right [to receive the personal data concerning him or her] shall not adversely affect the rights and freedoms of others (Art. 20 (4) GDPR, 2016). Therefore, principles of equality and non-discrimination are not allowed to suffer in order to fulfil other rights or duties, but the right to data protection needs to be balanced against other rights (FRA, 2014). However, the weighing of rights could also lead to the fact that the data processors rights' are seen to have a higher priority (Gierschmann, 2018). Even though it does not mention discrimination explicitly, the inclusion of a human factor in the decision making can potentially lead to a reduction of discriminatory effects. It can be argued that algorithms or other programmes that process data automatically would not notice discrimination, but - trusting that persons will abide by ethical guidelines - if the human component is large enough, he or she would discover a systematic discrimination and report it. As such, it has a direct effect if the emphasis is put on *systematic* discrimination. A natural person may not notice discrimination in a singular case, but the discrimination of entire groups should create attention. Publishing the algorithms could be considered to be more transparent, but one needs to have a deep understanding of how they work in order to discover unequal practices.

d) Protective mechanisms

Next to the codification of rights, the GDPR also creates mechanisms of protection. Hence, compliance with all rights is mandatory, which includes equality and non-discrimination. As the recitals only state the objectives and do not have a binding effect, they cannot be seen as directly

influencing the promotion of equality and non-discrimination. It could be seen as an incentive for the member states to implement more specific regulations in their national laws, but that effect would be indirect at most. Articles 77-84 GDPR set the rights data subjects have when they want to process a violation. The recital states the aim of installing safeguards, but the GDPR itself lays down the data protection principles. Alternatively, member states should formulate (examples of) safeguards themselves. It introduces measures like pseudonymisation or anonymisation, but it would have been helpful to initiate more measures concretely to promote harmonisation of the data protection laws within the EU. The member states should have the possibility for further additions, but giving a more specific indication of what measures the EU had in mind would have eased the process of harmonisation and at the same time perhaps increased the protection of users. The articles allow for citizens that fear unequal treatment or are discriminated to bring their case to the courts. Simultaneously to the fact that legal safeguards need to be installed, Article 78 (2) GDPR also suggests that matters need to be resolved in a timely manner, since inaction can lead to physical, material or non-material damages as well as limitation of their rights, discrimination, or illegal reversal of pseudonymisation,” etc. (Art. 78 (2) GDPR, 2016). This article explicitly addresses the principles of equality and non-discrimination and has a direct effect, as it demands a swift solution. Nevertheless, the question here is whether it has a direct effect on discrimination before it occurred, or on limiting the damages once a discriminatory act has been committed. If the mistake has already been made, it can only limit the extent to which the rights are infringed, because they have already been violated. Ideally, Article 78 GDPR would refer to the former and have a direct effect. In order to protect the data subjects from these damages, safeguards should be installed. Article 25 GDPR lists pseudonymisation as a potential safeguard to protect data subjects. As an additional measure, controllers are asked to communicate breaches to the data subjects if they bear the potential of leading to an infringement of rights (Art. 34 GDPR, 2016). The GDPR specifies that this is necessary to allow for the subjects to take required precautions, i.e. changing passwords. The data protection authorities also come into play with regards to matters where an infringement could potentially occur. It is specified that supervisory authorities should be consulted prior to the start of activities where a data protection impact assessment indicates that processing results in a high risk to the rights and freedoms of natural persons if no safeguards are installed (Art. 35 GDPR, 2016).

With the introduction of the impact assessment, the GDPR connects to the proclaimed risk-based approach and creates a distance towards the black-and-white patterns the DPD followed (Paal & Pauly, 2018). The meaning of this is twofold: firstly, it demands that an impact assessment is carried out prior to any processing and secondly, it requires the processors to contact authorities and install sufficient safeguards with their support to ensure proper protection. Similar impact assessments have been part of French and British law before, but in this form the assessment is one of the few innovations the GDPR introduces (Paal & Pauly, 2018). The impact assessment does not directly refer to equality and non-discrimination, but to the fundamental rights in general. Still, it can also reveal

that the process is discriminatory, which is why a direct effect on the promotion of equality is possible. That is because safeguarding measures to eliminate risks should be suggested, next to the elaborating on the risks that exist.

e) Cooperation with third countries

While the GDPR requires parties to uphold fundamental rights and lists the CFREU as a reference, it also specifies that previous international agreements are still valid, as long as they uphold a similar standard of fundamental rights or do not otherwise conflict with EU provisions (Art. 96 GDPR, 2016). This way the EU can ensure that citizens can rely on a level of protection in international agreements within the range of EU member states. They will have the same standards of rights and the data of EU citizens/residents will be treated in accordance with EU law. Transfers outside of previously conducted agreements can take place when the Commission has deemed the third country or international organisation to have adequate levels of protection and concluded a new agreement. However, it can be questioned which standards third countries need to fulfil, if one takes a look at how these values are acknowledged in some EU member states. Taking into account recent developments in Hungary, Poland or Romania, they have limited the powers of the independent press or tried to influence the independence of the judiciary, which would ensure that the fundamental rights of data subjects are enforced. The treatment of national minorities like Roma leaves some questions, because if the EU tolerates a frequent discrimination and/or exclusion among its own ranks (see for instance FRA - Roma for more information about their treatment) one does not know whether the conditions set forth in Art. 45 GDPR will be interpreted in a very strict sense or a more lenient way. The latter would have an impact on the perception of fundamental rights in the EU, if even the largest ethnic minority is not granted sufficient protection. Consequently, the large variance of standards within EU member states leaves uncertainties about which criteria will be applied for third countries, and if this rule will have a measurable effect on the promotion of equality and non-discrimination.

4. III. Potential Exceptions

a) General measures

Although fundamental rights like equality and non-discrimination are protected in the GDPR, the regulation lays down possible exception that would justify an infringement of the individual rights, which are mentioned in Article 21-23 GDPR. Starting with Article 21 GDPR, even though the time period in which data can be processed is limited, “compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject” may serve as an exception that justify the processing beyond the original time frame or purpose (Art. 21 GDPR, 2016). In the case of Article 21 GDPR, it refers to the fact that an objection to the processing is not possible when other

overriding interests are at stake (Gierschmann, 2018). It also simultaneously suggests that there needs to be some human action when the decision is made by the controller. This interaction needs to have a substantial effect on the quality of the decision and cannot entail the simple act of ticking a box at the end of the process (Gola, 2018). A decision made through automated processing would not suffice if data is to be kept for an extended period of time. Continuing with Article 22 (1) GDPR, it states that decisions cannot be made through fully automated means²³.

However, exceptions laid down in the next paragraphs of the article state that the 22 (1) GDPR does not apply under three possible circumstances. The second circumstance is the most relevant for this paper: it expresses that automated processing is allowed in cases where the Union authorised the procedure and where suitable measures are installed to safeguard the data subject's rights as well as legitimate interests (Art. 22 (3) GDPR, 2016). At least three possibilities to intervene need to be guaranteed: the right to human intervention, the right to present one's own point of view and the right to challenge the decision (Gierschmann, 2018). This would suggest that profiling is prohibited, unless measures are in place that restrict the potential risks - for instance of being discriminatory. Profiling, especially ethnic or racial profiling is generally seen as a crucial method to be employed by authorities and other institutions, since it easily offers the possibility to discriminate. It filters individuals based on pre-selected criteria, so one could claim that it is discriminatory in its nature. By employing criteria like ethnicity or religion, it automatically includes individuals due to characteristics that are out of their influence. Additionally, there are two types of profiling: the first one is filtering through masses of data to find data subjects that fit the criteria; the second one is to profile a single person, for instance to determine if they are worthy of a loan. The GDPR does not specify which one is allowed under special circumstances, so this paper will assume that it permits both. When it comes to the substantial reasons, it can be highly relevant if it concerns one person or a group of individuals - and the implemented safeguards can also be affected. Both practices can be equally discriminating, which means that one cannot be described as more discriminating than the other per se. Private institutions are subject to different rules than the public sphere, so if companies i.e. make use of profiling in their application process, it could result in discriminating people with an emigrational background. Furthermore, if private entities use the data placed online to create profiles of their users, they can distinguish the data very precisely and offer up to hundreds of very refined categories to potential advertising agencies who can then select an incredibly distinguished and refined group as their target audience.

So in theory, the GDPR regulates the matter by demanding the instalment of safeguards and the protection of fundamental rights. However, it refers to suitable measures without suggesting what suitable measures look like. Hence, it could theoretically be possible for each member state to determine a sufficient level of protection is. Therefore, the intention of protecting fundamental rights

²³ see appendix for a quote

even in exceptions is there, but more examples should be given to unify the national laws. Next to that, it does not suggest which authority permits the exception. For example, it could have proposed that the data protection officer needs to check if reasons are substantial or clearly indicate who has the power to determine. Additionally, member states are free to add further exceptions, so that profiling is allowed in more cases. A positive example of an exception would be to automatically filter out children to protect them from receiving advertisements or using their data otherwise (Gierschmann, 2018). Furthermore, Article 23 GDPR enunciates that Union or member state law may restrict rights if it is a “necessary and proportionate measure in a democratic society”, such as national or public security or the “protection of the data subject or the rights and freedoms of others” (Art. 23 (1) (i) GDPR, 2016). But even in this part the legislative measures need to have provisions as to for instance “the risk to the rights and freedoms of data subjects” (Art. 23 (2) (g) GDPR, 2016). The requirement that profiling should not be discriminatory is also mentioned in the recital 71 GDPR²⁴.

b) Processing special categories of data

As for processing special categories of personal data, Article 9 (2) GDPR states an exhaustive list of exceptions (Voigt & von dem Bussche, 2017), which includes explicit consent as well as the protection of vital interests or reasons of substantial public interest. In this case, legislation must be proportionate and ensure proper safeguards (Voigt & von dem Bussche, 2017). The principle of proportionality also includes justifications why an exception is relevant. This would mean that it is not possible for a single person to abuse the system for any number of reasons, but that there is an official procedure in place which needs to be followed. As such, the protection seems sufficient, but the safeguards’ content should be elaborated as well. All potential exceptions or requirements to limit the fundamental rights must have a legal basis that is adequately accessible and foreseeable (FRA, 2018b). Here, the principle of necessity is employed to assess the restriction of fundamental rights. In the context of processing personal data it means that “the limiting of the fundamental right to the protection of personal data must be strictly necessary” (European Data Protection Supervisor, 2018). Any limitation on fundamental rights protected in the charter - which include equality and non-discrimination - must respect the essence of these rights. Therefore, it does not directly address the principles, but it indirectly affects them.

Yet, the risk with these exceptions is that the institution determining when exceptions are justified is also the one which would process the information in said exceptions. These special cases cannot be explicitly defined in the law, as they may consist of circumstances that do not exist today - however, that is precisely what increases risks. When oddities cannot be pre-defined, it depends on the ones in charge to determine what will justify an infringement of rights and what constitutes a vital interest overruling other rights and freedoms. Since there is no case law until now which member states can

²⁴ see appendix for a quote

use as orientation, the position of the corresponding institutions that make the decision will be highly influential. Thus, it creates another point where member states may apply different standards on how high they value the rights and freedoms of their citizens and how many exceptions the ones in control will tolerate.

e) Exceptions regarding profiling

When authorities, e.g. administrative institutions or law enforcement agencies, employ profiling, they need to comply with a set of rules that offers them slightly more possibilities. Taking law enforcement as an example, the EU Directive 2016/680 (LED) introduces an updated version of laws, for instance that they need to install safeguards (rec. 37 LED, 2016) or that “profiling that results in discrimination [...] shall be prohibited” (Art. 11(3) LED, 2016). But public policy might still look a little different: according to the German Institute for Human Rights police officers frequently discriminate when they are asked to randomly select people from a crowd to control their ID, because they base their assessment solely on phenotypical characteristics (Deutsches Institut für Menschenrechte, 2013). Furthermore, what public policy is and the circumstances under which profiling is allowed may change. Bavaria extended the powers of the law enforcement agencies in 2017 and again in May this year by introducing a new police law that wants to determine (and consequently store) the “biogeographical ancestry” of potential suspects (Momsen & Weichert, 2018). Next to that, it allows for more interference when there is a threat - not only when there is concrete evidence, which means that the police can tap phones and search online storages when there is an indication that a person might be dangerous (Huber, 2018). This action would only be legitimate if necessary for public security. How exactly this indication should look like is not specified, and could therefore also have consequences for violations of the non-discrimination principle. Potentially, indications like a particular religion combined with an ethnic origin or other characteristics can then be reason enough to see the threat of danger. An example could be to discriminate Muslims based on their religion in search for Islamic extremists.

As such, this example is more closely connected to the LED, but because the GDPR set a wider basis, it could be assumed that stricter rules in the GDPR may also have an influence on the LED. The method of profiling mentioned in the last sentences does not seem to be legitimate, although the law was passed. A possible explanation could be found when looking at the principles of necessity and proportionality. Simply put, the principle of necessity means that the limitation of fundamental rights such as equality and non-discrimination need to be based on a strict necessity; hence it needs to be necessary to prevent the violation of another right. Proportionality states that one must strike a balance between means and the end they try to achieve it only when it stops what is what is strictly necessary, i.e. combats a threat. So what if the meaning of necessity is starting to change in the face of growing xeno- and islamophobia and more and more is deemed necessary to protect the citizens and residents?

This may further lead to an increased scope of proportionality, because the disadvantages of the data subjects and the limitation of their rights still seem to be justified by the greater good, even if it was previously out of the question. In general, for this situation one could refer to the risk-based approach of the GDPR and claim that everything which is not explicitly allowed is prohibited. But taking a look at the LED suggests that one could choose a more specific formulation. In Article 11 (1) LED, the formulation was selected that automated decisions are prohibited when it produces adverse legal effects (Art. 11 (1) LED, 2016). The same paragraph also states that Union or member state law may provide for exceptions, but it is nevertheless a stronger formulation than the GDPR chose. On the other hand, the GDPR writes that profiling is only allowed while it respects fundamental human rights and other data protection principles. This would suggest that it does not tolerate discriminatory practices, because through the principles it secures rights by independent and effective safeguards and allowance only for what is strictly needed. However, if the practices currently carried out in profiling are considered to be legitimate forms of automated processing, it bears the question whether the definition of legitimate could be too far reaching. Acknowledging the current developments, the GDPR does not include more explicit formulations or measures to prohibit (the possibility of) discrimination.

4. IV. Conclusion

Equality and non-discrimination are two fundamental rights that are protected in the CFREU as well as in international human rights legislation. By their very nature as a human right, they are protected both within the GDPR and valid international regulations on data processing and sharing. The GDPR states that all agreements, regulations, directives, etc. - including itself - need to respect the fundamental rights laid down in the CFREU or offer an otherwise equal protection. Equality in particular is mentioned with regards to additional acts about data protection within the frame of employment. Here data protection rules should pay special attention towards promoting equality and diversity in the workplace. Discrimination or the prohibition thereof is explicitly stated in the context of profiling. Here, the GDPR states that profiling or automated processing should not be of a discriminatory nature and that personal data like sexual orientation, etc., which could lead to discrimination are prohibited from being processed. If exceptions apply, processing needs to be done with special care. Therefore, the principles of equality and non-discrimination seem to be well-protected in the data processing rules laid down in the GDPR. In contrast to the DPD, the GDPR now also formally includes genetic and biometric data in the categories of sensitive personal data. However, the simple prohibition of such processing whilst listing numerous exceptions in the next paragraph does not seem to promote the rights sufficiently. To what extent these rules are actually upheld in practice has to be determined at a later point. The issue with the exceptions that allow legitimate profiling is that the safeguards are not defined in the GDPR itself and therefore leave the

possibility for discrimination. In this instance, it should also be mentioned that first (and so far only) direct connection between data protection and the prohibition of discrimination has been made by the courts last year on 26 July 2017 (Kuner, 2018)²⁵. This is after the final version of the GDPR has been adopted, but it could indicate that there will be further judgements by the courts that directly refer to discrimination in the context of data protection in the future. Another point stressed by Lahuerta is that there is a difference of treatment between whether ethnic origins have been wrongfully disclosed and whether they have been used to discriminate, because the former enjoys a wider protection than the latter (Lahuerta, 2018).

By analysing in what way the GDPR pays attention to equality and non-discrimination, including the articles and recitals that lay particular emphasis on the topic, it serves as a foundation for the following chapter. Since the following chapter investigates how the GDPR is transformed into national legislation, in particular with respect to equality and non-discrimination, knowing what to look for will ease this process.

²⁵ Opinion 1/15 of the Courts (Grand Chamber) on the 26 July 2017, EU:2017:592 paragraph 165, retrieved from: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CV0001\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CV0001(01)&from=EN)

CHAPTER 5

Germany and equality and non-discrimination in its data protection

Although the General Data Protection Regulation (GDPR) is directly applicable in the member states, it leaves some room to lay down additional rules. Since the national law is not identical to the GDPR, this chapter will investigate the German Bundesdatenschutzgesetz (BDSG) and how it adapted the EU regulation. Initially, this will be done in a broader sense to get an overview of the changes. The second part of this chapter will go into more detail and analyse what the BDSG does to ensure equality and prohibit discrimination by examining selected articles stating rights of the citizens. Further, a part is dedicated to elaborating the safeguards the BDSG installs to protect the rights of its citizens and residents.

5. I. How is the GDPR transferred into the BDSG?

The GDPR entered into force as an EU regulation, which gives member states two years to adapt their national laws to comply accordingly. Therefore, Germany updated BDSG in 2017 and introduced new rights and rules that offer a higher protection for citizens' data to fit both the GDPR as well as *'Directive 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data'* (Law Enforcement Directive - LED) in its third part. This directive aims at better data protection in processing through the police and other criminal justice authorities. Therefore, it is connected to the GDPR as part of the EU data protection reform package (EUR-lex, 2018). Compared

to the GDPR which applies for general processes, the LED lays down more specific requirements. Starting with the overall layout, the BDSG does not include any recitals proclaiming the aim of the legislative act and has fewer articles, so some are partly compressed into one or already included and implemented otherwise. The order of the BDSG diverges from the GDPR, for instance by dividing data subjects' rights into two parts which can be found in different chapters. Furthermore, the BDSG introduces additional exceptions and safeguards, which will be discussed in section two and three of this chapter. For the purpose of this paper, the third part of the BDSG will also be examined, even though it does not stem from the GDPR. The priority of this chapter is to investigate what additional possibilities or restrictions German citizens have with regard to the protection of their data and how it potentially affects the principles of equality and non-discrimination. Therefore, the relating aspects of the third part will nevertheless be included. Additionally, the different order leads to the fact that the rights and demands set forth in the GDPR and the LED are combined. Hence, for instance the data protection impact assessment listed in the GDPR is not included under the first two parts of the BDSG, but instead moved to the third part dealing with the implementation of the directive. As a result, a thorough investigation of how the GDPR is integrated in German law also requires a look at the part originally designated for the LED.

At this point it should be mentioned that Germany is unique in its position, because it does not have only one data protection act, but also includes sections on sector-specific data protection in its other legislation. As a result, the entry into force of the GDPR has led to multiple acts being adapted - not only the BDSG, but for instance also telemedia or communication acts. Further, the federal structure of Germany results in each of the *Länder* having their own data protection act as well as several other laws that refer to rules for the protection of data. The state of Saxony serves as a good illustration, since it had to implement changes in 45 different legislative acts to comply with the GDPR (SächsGVBl, 2018). A thorough analysis of all sixteen different acts and a comparison with the BDSG would extend the purpose of this paper, which is why only the main point will be briefly mentioned: the primary task of the Landesdatenschutzgesetze (LDSG, state data protection laws) is to regulate the public services of the *Länder* and how they process data (Intersoft Consulting Services, 2016). However, they also have the possibilities to add further special regulations, as long as they are not repeating the BDSG. Furthermore, the states can only modify rules that fall into their jurisdiction. So for instance the minimum age manifested in the Telemedia-Act cannot be changed, because it falls only within the competences of the federal legislator.

5. II. Equality and non-discrimination in the BDSG

As with the former German data protection act, the BDSG does not refer to the words equality and non-discrimination directly. However, it proclaims that basic rights and freedoms need to be upheld,

which includes the principles of equality and non-discrimination as well. The following paragraphs deal with the articles in the BDSG that voice rights which have an impact on these principles.

a) Equality and non-discrimination in Part 1/2 BDSG (corresponding to the GDPR)

Starting with §6 (5) BDSG, it is connected to the change that probably most people are aware of. It states that data subjects have the possibility to contact the data protection officer - either the one appointed by the (federal) government or the one in companies or other organisations. They can be approached “with all issues related to the processing of their personal data” (§6 (5) BDSG, 2018). Using this formulation, it expects the data protection officers to not only start acting when a misuse has occurred, but to be open for questions, to provide information if needed and to have an open ear. But what is important is not only the task of the data protection officer; the relevant aspect is that conversations – especially about possible violations - are bound by secrecy. This way, it enhances confidence to confront the data protection officer with issues and at the same time may promote equality and non-discrimination because matters will be discussed on a more general level. This addition responds to Art. 38 (4) GDPR and creates uniform rules for the federal administration (Paal & Pauly, 2018). By disregarding the complainant and mentioning the topic on a general level, it might lead to changes in the data protection policy without presenting a disadvantage for the person who initiated the conversation about the issue. Since it states that only the data subject can relieve the other from confidentiality, it gives powers to the complainant and strengthens the trust in such authorities because the *victim* sets the tone for how the matter is handled. The initiation of the data protection officers as such are now required in the GDPR, but they have been part of the German data protection law before. It is not a new innovation in Germany, because they already had roughly 700,000 data protection officers in place (Custers, 2018). Nevertheless, their competences are extended, although the core purpose is still the same (BfDI Info 6, 2017). The instalment of data protection officers will most likely not have a direct effect on equality and non-discrimination, but its initiation may still indirectly force companies to rethink their practices, if independent data protection officers are monitoring their processes.

If matters would develop further and a violation of said rights leads to the persecution of companies/institutions, the federal commissioner is allowed to testify in court in accordance with §13 (5) BDSG. However, this allowance is limited to the extent to which it would affect the security of Germany, one of the *Länder* or other countries. The fact that other countries are included shows that a certain level of cooperation between (member) states is expected, and that collaboration with other agencies is demanded to protect the citizens. One could even go so far as to suggest that this is a hint at increased international exchange if it is already explicitly mentioned in the BDSG. What is more relevant for this section however is the §13 (5) (2), in which a testimony is prohibited when it violates fundamental rights. As such, any fundamental right - including equality and non-discrimination - is

protected and could lead to the refusal of a testimony. The commissioner could also testify to support claims brought forward by others that the practices in question are indeed discriminatory. Therefore, this measure has no direct effect, but it can evolve into a supportive measure in which an independent and credible federal data protection officer is allowed to back claims of rights being violated. Hence, it might have an influence on the court's ruling and create similar effects that push for progress with regard to equality in data protection.

Article 9 GDPR states that the processing of sensitive personal data is prohibited, but lists some exceptions under which it would be lawful. The BDSG creates §22 to make use of the opening clause of Article 9 GDPR and adjoins further exceptions, namely if the processing is in the interest of the person, if there is no apparent reason not to, or if they need to be checked because there is substantial doubt of their correctness. Alternatively, it can be allowed if it is necessary to prevent serious disadvantages, danger to public/national security, to prevent limiting another person's rights or to process them in the context of supervisory authorities or for persecution. According to Paal and Pauly, this rule does not change the fact that the data has particular characteristics, which can constitute the identity of the data subject or can offer a potential to discriminate or harm the subjects, hence they have to be processed with special care (Paal & Pauly, 2018). Another aspect that is discussed more elaborately is the processing of data regarding the health (status) of data subjects (§22 (1) (1b) BDSG, 2018). This allows for easier transitions of patient data when several specialists need to be consulted in order to form a diagnosis, which is an important aspect - especially when time is of the essence. Interestingly, the public interest or threats allow both public and private bodies to process data. Public bodies are given exclusive powers for matters regarding public security outside of health, and for reasons of public interest, threats to public security or otherwise substantially harming actions according to §22 (1) (2) BDSG. This is important because it prohibits the employment of private contractors from processing data in emergencies. Instead, it assures citizens that even though an urgent situation is at hand; their data will still only be processed by national authorities and not passed on to private contractors, which the public trusts less than the government. The formulation itself seems promising, but when taking a closer look at the paragraph it becomes apparent that the formulation is not very clear and raises a lot of questions. Scholars claim that considering the high standard of data protection the GDPR strives to achieve, employers or medical institutions should not rely on this paragraph if they want to fulfil those (Paal & Pauly, 2018). The authors instead suggest that an assembly of current legislative rules laid down in German law would have been more helpful for this matter. Therefore, it seems to directly limit the possibilities for discrimination and to promote equality. When taking a closer look, this direct effect seems to decrease, because the controllers seem to be able to combine other categories of data for achieving the same result.

Similarly to §22 BDSG, §23 (5) BDSG also lists exceptions that exclusively allow public bodies to process data that was collected for another purpose. One exception states that it is allowed if

“processing is necessary to prevent serious harm to rights of another person” (§23 (5) (5) BDSG, 2018). With this, it protects citizens from having their rights infringed due to the misbehaviour of another individual. While it limits the rights of one person, it probably cannot be done without substantial evidence that an invasion of someone's privacy like that is justified. It proclaims that there needs to be the possibility of serious harm, which suggests that evidence of the intent is not a requirement. Furthermore, §23 allows for additional grounds or exceptions as long as the safeguarding conditions laid down are met. On the one hand, it ensures that the law does not have to be updated to include future reasons that may not be apparent yet, on the other hand it seems to leave an open door for other reasons as long as it is justified within the given exceptions. In general, the formulation of exceptions might be necessary to fit the national requirements or the national way of handling disruptions. But more irregularities also allow for more possibilities to implement proportionate restrictions and hence to potentially allow for discrimination. What is important is that the article distinguishes between powers delegated to public and private bodies and the ones granted explicitly to public bodies that do not work for profit. However, since §23 is designed to only grant public bodies access to data and allows them to process it, the fact that they are also the ones who define the public interest can create a conflict of interest. According to Paal and Pauly, this sovereignty of interpretation results in a bias, because §23 (1) BDSG allows the judging public body itself further processing (Paal & Pauly, 2018). It can therefore be employed to prevent individuals from being discriminated, if this is to be considered as seriously harmful and hence has a direct effect on the promotion of equality and non-discrimination. However, it does not appear to constitute a general measure to prohibit unequal treatment on a larger scale and in that regard only has an indirect effect.

Moving on to §27, this article deals particularly with the rules for processing sensitive categories of personal data and in essence could have discriminatory effects or stand in the midst of the independence of research/statistics and the individual's right to self-determination (Paal & Pauly, 2018). It allows for the use of data for scientific, historical or statistical purposes²⁶. As such, it gives particular freedoms and privileges to researchers, which reduces their dealings with bureaucracy. It refers to §22 (2) (2) BDSG, because the research needs to install safeguards protecting the rights and freedoms of the data subjects, i.e. through guaranteeing an ex post evaluation of when and by whom data were changed or deleted. Complying with appropriate safeguards, sensitive data can be processed without additional requirements. §27 (3) BDSG lists another safeguard for special categories of data by demanding that data processed for scientific, historical or statistical purposes needs to be anonymised as soon as possible. Until then, data identifying individuals should be processed separately. The only exception from this anonymisation can stem from the data subjects themselves, but no other source can determine whether it should be publicly accessible with the inclusion of their name. Once the data is anonymised, Art. 4 (48) GDPR requires that the person can no longer be

²⁶ see appendix for a quote

identified in any case. Furthermore, research purposes limit the data subjects' rights to receiving information on how their data is processed, etc., by utilising the opening clause of Art. 89 GDPR. It privileges research purposes over the rights of the data subjects (Paul & Richter, 2017), but the question is whether this restriction refers only to the rights stated in the GDPR like the right to erasure, or if it also includes the rights to equality and non-discrimination. What further evokes interest is the processing for archival purposes, because it is not elaborated in more detail what exactly this entails, so it could refer to public and private ones. A clear indication of how this information is stored or archived would be helpful, because if they are accessible in public archives and not anonymised or otherwise protected, it could limit the protection of personal data - particularly when there is no consent needed. It should be explained what general storage entails to prevent any misconduct, even though a general ban with a reservation for permission is employed in German law and the GDPR (Gierschmann, 2018). Lastly, the fourth paragraphs allows for publication either "if the data subject has provided consent or if doing so is indispensable for the presentation of research findings" (§27 (4) BDSG, 2018). What could potentially lead to a discrimination in this part is that fact that the formulation of 'or' is chosen and present a sufficient condition, where only one of them has to be fulfilled. If a researcher can claim that it is essential for his/her research, then the data subject's consent is not necessary. As a researchers desire is or should only be to gain new knowledge, it might be that potential side effects of publishing sensitive personal data are not or cannot be foreseen. Research concerning sensitive information should always be anonymous or employ pseudonyms. However, since the BDSG mentions such measures in other articles, including them as a safeguard for this purpose as well would have been helpful. One point of research is to discover inequalities. The researchers therefore should have the power to collect data and analyse them objectively, even if it is about sensitive information. When they uphold ethical standards and e.g. process sensitive categories of data to prove that certain forms of discrimination exist, they can have a direct effect on the legislation or court rulings, because it produces evidence of wrongdoing. However, with great power comes great responsibility, which is why a swift anonymisation of the information is key.

b) Equality and non-discrimination in Part 3 BDSG (corresponding to the LED)

The following section will deal with the third part of the BDSG, which implements Directive 2016/680. In §71 BDSG, it states that the controller should take appropriate measures while data are processed and hence connects to the data protection impact assessment of §67 BDSG. There are various data protection principles which were briefly mentioned in the first chapter. More elaborately, the principles serve as further guidelines for how data should be handled. Data minimisation is given as an example and aims at controllers only demanding and processing the data that is necessary for fulfilling the contract both parties entered. This way the controller is supposed to takes technological advances as well as the scope of processing into account. Additionally, the BDSG requires the algorithms or programmes that are employed to be designed for compliance with the data protection

principles and tailored to fit the aim of the processing. They should therefore comply with the principle of *privacy by design* (§71 (1) BDSG, 2018). What is striking is the formulation of ‘appropriate measures’ that is utilised to issue guidelines for controllers. The BDSG does not give a clearer indication of what these measures are, which is why the interpretation by companies could be rather lenient. In the second part, it refers to the principle of *privacy by default*, which demands that automated assessments always need to be supervised or checked by a human being (Paal & Pauly, 2018). So even though it does not directly address the two principles, it nevertheless has an effect on them. That is because the programmes need to be designed in a way that avoids risking an infringement of rights, such as allowing for discrimination. Furthermore, the aspect of privacy by default requires the responsible human being to control the processing and prevent violations like unequal treatment from happening.

Continuing with the analysis of §78 (2) BDSG in order to assess whether it protects German citizens from discrimination, it can be said that it tries to formalise the transfer of personal data and prohibits it if compliance with the law cannot be fully ensured. More importantly, the article stresses that processing also needs to uphold “fundamental human rights in the area of responsibility of the recipient” (§78 (2) BDSG, 2018). Whilst doing so, controllers/recipients need to respect the principles of equality and non-discrimination. The article further stresses that appropriate protection of the transferred data in individual cases needs to be guaranteed and interpreted in a strict sense (§78 (2) BDSG, 2018). Even if sharing with a third country had previously been permitted, special circumstances in individual cases where the other interests are predominant can still lead to a hold of the transfer (Paal & Pauly, 2018). Additionally, it serves as a prerequisite for §80 BDSG, which elaborates on data sharing without any suitable guarantees. It states that transfers should further be allowed when they serve the protection of vital interests, safeguards legitimate interests of the data subjects or prevent immediate threats to public security (§80 (1) BDSG, 2018). Whilst probably not referring to equality and non-discrimination directly, but to other rights that are threatened, it aims at protecting the citizens from possible dangers. §80 (2) BDSG implements a duty to control whether the transfer limits the fundamental rights of the subject or the public interest. Vital interests can potentially also include the demand not to be discriminated or to be treated equally. More importantly, the second paragraph states that fundamental rights can override the public interest and in such cases, the data should not be transferred. As such, this aspect is relevant because it protects citizens and connects to the principle of data minimisation. Take for example belonging to an ethnic minority which corresponds with a certain religion. In the EU, freedom of religion is a fundamental right, but even though other countries might have signed this provision, they could choose not to honour this principle in practice. If a data subject’s information including the religion would be transferred to a third country, his or her religion could be used to discriminate or even incriminate. Hence, it is important that the individual’s rights can override the public interest in specific cases. Consequently, this article does not specifically refer to equality and non-discrimination, but its implications that fundamental

rights can override the public interest indirectly foster the principles by stating that the public interest does not always weigh heavier.

5. III. How are the rights safeguarded?

a) Safeguards implemented in Part 1/2 BDSG (corresponding to the GDPR)

While the last part dealt with equality and non-discrimination in general, this section will elaborate on what safeguards are installed to protect the fundamental rights. The GDPR defines special categories of data as very risk-prone (Voigt & von dem Bussche, 2017), which means that extra safeguards need to be installed. The GDPR as well as the BDSG frequently mention that appropriate safeguards need to be introduced, so they will be subject to a closer analysis in this part. Starting with §22 (2) BDSG, it states that “appropriate and specific measures shall be taken to safeguard the interests of the data subject” (§22 (2) BDSG, 2018), before it continues with a ten-item list of such safeguards. This paper will elaborate on some of the items and explain their relevance for promoting equality and non-discrimination. Firstly, the safeguards need to show compliance with the technical measures that are laid down in the GDPR. Next to that, safeguarding measures include restricting the access to data within the controllers and processors (§22 (2) (5) BDSG, 2018). This safeguard results either in limiting access to data in general, or reducing the number of personnel that deal with data on a daily basis. Theoretically speaking, fewer people processing data makes it more difficult to be abused, because access is monitored more strictly. This in turn would also reduce the possibility to process data in a way that is potentially discriminating. The next two safeguards - pseudonymisation and encryption - are particularly useful for limiting or preventing discrimination of a natural person, if it cannot be easily found out who the natural person actually is whilst the data is being processed. Furthermore, safeguards also include measures controlling the systems. It is essential to make sure that the systems employed are resilient and able to maintain confidentiality of the data. A way to support that would be for instance to invest in cyber security and install measures that prevent the programmes from being hacked and the data being purloined from the institutions storing them. For this part, encryption and pseudonymisation become relevant yet again, because if the key to identifying which data belongs to whom is stored separately, only the data may not be useable if the intruders did not get a hold of the key. If the data is encrypted or otherwise modified, individuals can no longer be discriminated through the processing of such data. Therefore, creating a key and storing it separately is a safeguard that prevents the individuals from being identified and accordingly protects them from discrimination. The existence of such a key is another one of the safeguards, as it is necessary to be able to establish by whom data was processed and what was changed. Protocols that document modifications allow for a thorough clarification and for finding the ones responsible for possible misconduct. This way especially sensitive personal data is still protected, cannot be used to expose

individuals or as a result possibly discriminate them based on the revelations obtained. Additionally, processors or controllers should create a method with which “the effectiveness of technical and organisational measures for ensuring the security of processing [is regularly tested, assessed and evaluated]” (§22(2) (9) BDSG, 2018). The frequency is not otherwise specified, but it requires a constant evaluation of some sort and ensures that outdated technologies should not be employed, but instead updated at some point, as it should represent the state of the art. It leaves it open for the individual companies to decide how they evaluate, but assuming that they all need to install an independent data protection officer, the evaluation should be taken seriously and possible gaps that allow for discrimination closed. Hence, it has a direct effect on the elimination of discrimination in the programmes that process personal data. Other additional safeguards include for instance increasing awareness among staff members about data protection or the designation of the aforementioned data protection officer. A heightened awareness among the staff can also affect the perception of the employees of possible unequal treatment, which can then be corrected.

The above-mentioned safeguards are for personal data in general, which is why §48 BDSG installs safeguards for the processing of special categories of personal data. There is some overlap, such as measures to inform and create awareness. Others include the pseudonymisation or anonymisation of said special categories of data. As mentioned before, special categories are such that are revealing for instance ethnic origin, religious affiliation or sexual orientation. For those categories, particular requirements are demanded for the data security installed. Data in general should be protected, but when more harm can be caused if things go wrong, more must be done to protect it. Different time limits before relevance and erasure are reviewed (§48 (2) BDSG) or a separate processing should ensure that the controllers obligation to only use data for the negotiated purposes and time is fulfilled. A separate processing should ensure that sensitive categories are not mixed with other data. If the categories should be mixed, the special treatment of the sensitive data can no longer be guaranteed and the promises issued to the consumers are violated. Potential consequences of that could be of a discriminatory nature. Moreover, controllers only have restricted access to personal data, which serves a similar goal. The fewer controllers interfere with the data, the smaller the chances that data are misplaced, misused or modified in a way that cannot be undone. In addition to having fewer people processing the data, the ones that do also need to abide by specific codes of conduct. The purpose of these codes is to “ensure lawful processing in case of transfer or processing for other purposes” (§48 (2)(8) BDSG, 2018). It clarifies that the responsible controller/processor needs to make an informed decision which instruments should be used and how they should be employed to ensure an appropriate level of protection. Its open formulation is due to the sovereignty of organisations, which allows them to formulate their own specific rules, with the BDSG creating the framework. Although it does not mention the principles of equality and non-discrimination, it can be seen as an indirect measure that promotes them nonetheless. When sensitive categories of data need to be processed, storing them

separately and not combining them with other categories ensures the strict treatment they require and aims at minimising the risks for the data subject.

Lastly, §44 BDSG installs remedies for laying down guidelines and circumstances under which individuals are able to initiate court proceedings for violations of the rules laid down in the GDPR. Due to these rules, individuals are for instance allowed to firstly bring their claims to a supervisory authority before seeking a lawsuit. Furthermore, individuals do not need to sue the controllers themselves, but can ask for support through non-profit organisations or associations. As the BDSG is not supposed to simply copy what the GDPR has written down, these remedies are not directly mentioned. Therefore, the remedies indirectly promote equality and non-discrimination, because they ensure data subjects have some countermeasures when they are discriminated.

b) Safeguards implemented in Part 3 BDSG (corresponding to the LED)

In §67 BDSG, for processes that could result in “a substantial risk to the legally protected interests of data subjects, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the data subjects” (§67 BDSG, 2017). The impact assessment of §67 (1) BDSG is also laid down in Article 35 of the GDPR, but not otherwise mentioned in the first two parts of the BDSG that should implement it. Origins of the impact assessment can stem from new technologies or also the context, nature or purposes of the data processing that should be executed. The impact assessment serves the purpose of ensuring that a possible infringement of rights is prevented. It functions as a safeguard for the rights of data subjects and investigates in all directions. In doing so, it includes the protection of the principles of equality and non-discrimination and can result in measures being installed to safeguard them. Continuing with the fourth paragraph, it states that the rights of data subjects are to be taken into account when the impact is assessed. In order to ensure that, the impact assessment need to comply with at least four different requirements. The impact assessment needs to start with a systematic description of the envisaged operations (§67(4) (1) BDSG, 2017). By laying down what is actually done, it can be compared to the requests posed to the data subjects. Connecting this to the principle of data minimisation, it could result in changing the requirements, for instance that less information is demanded from data subjects. So if less information is collected, the chances of discrimination based on those decrease. Next is an assessment of necessity and proportionality (§67 (4) (2) BDSG, 2017). Proportionality defined by the FRA means that the “advantages resulting from the limitations should outweigh the disadvantages the latter causes on the fundamental rights” (FRA, 2018). This assessment respects the data protection principles and asks the accessor to reflect on what data is really required. The third and fourth sentences are the most relevant for this section, because they relate to the rights of data subjects. The third demands an assessment that connects with assessing the risks to the protected interests of the data subject. This part is important,

because it requires the controller to take into consideration all rights of the data subject, not just the right to data protection - and this makes it relevant because it indirectly refers to equality and non-discrimination. The fourth sentence requires the assessors not only to identify risks, but to establish measures combating the risks and ensuring compliance with the law and a sufficient protection of the data. Through this measure, it should be ensured that data protection is implemented in the core of the system (BfDI, 2017a). They could include for instance the pseudonymisation of data subjects or measures that ensure that (sensitive) personal data is handled with care. All these aspects have an indirect impact on the protection of data subjects with regards to the two principles. As briefly mentioned above, if organisations are mandated to constantly check their systems for flaws and eliminate those, it is very likely that discriminatory processes are also reduced.

5. IV. Conclusion

This chapter aimed to analyse how the GDPR is implemented in the German BDSG and how it promotes equality and non-discrimination in the national law. The BDSG does not mention the principles explicitly, but talks about rights in general. Most noticeably are the safeguards that protect the personal data and the rights that are intertwined with it. Especially §22 BDSG and §48 BDSG are relevant, because they define the safeguards for the processing and transferring of (sensitive) personal data. As such, they lay the foundation for ensuring that the data subjects' rights are respected and that an environment of equality and non-discrimination is created. Through the safeguards, it fulfils the task of the GDPR (rechtstipp24, 2018), but there are still some parts that could be specified further. Because measures like the data protection officers were already part of German data protection law, this new, ground-breaking measure bindingly initiated through the GDPR is not very recent and does not demonstrate advancement on a national scale. As the BDSG does not mention particular articles regarding equality and non-discrimination, the effect on the promotion of these principles is mainly indirect and not necessarily advancement compared to the former version of the German act. Because the DPD was only a directive, it granted the member states more freedom to develop strict rules, which is what the German legislators did. Now that the GDPR is introduced as directly binding legislation, but mainly states slightly updated versions of the directive, the German standard does not seem to increase. If a tendency had to be described, scholars would probably attest the opposite of advancement (see for instance Gierschmann, 2018; Gola, 2018 or Paul & Richter, 2017). Having established how the GDPR is transferred into German data protection law, the next chapter will discuss the extent to which the GDPR promotes equality and non-discrimination in data processing.

CHAPTER 6

Conclusion

The purpose of this paper was to investigate the following main research question:

To what extent does the GDPR promote equality and non-discrimination in data processing?

This concluding chapter will summarise the findings of the previous chapters and hence elaborate once more the answers to the sub questions, before reaching an overall conclusion. Lastly, it will elaborate the future implications this could have for equality and non-discrimination in the data protection landscape.

a) Review of previous chapters

The first issue analysed in chapter two, has shown that equality and non-discrimination are well-protected in human rights legislation through various documents. Next to the human rights declarations, conventions and charters, the case example Germany has included more explicit rules in sector-specific legislation. Chapter three has continued by analysing prior data protection legislation, namely the EU Data Protection Directive (DPD) and the former German Data Protection Act. They include indirect measures to prohibit or reduce discrimination, such as the instalment of data protection officers, but otherwise do not give rise to the assumption that practices with data could be discriminating. The fourth chapter fasts forward to the moment the GDPR was adapted, but not many changes can be found with regard to the principles. More remedies are provided for data subjects that promote the status of data protection in accordance with Article 16 TFEU, but they could be more specific to promote other right as well. The same is valid for the German data protection law (BDSG).

Similarly to the GDPR, the attention there is paid to equality and non-discrimination in the context of fundamental rights in general and measures that indirectly affect the principles are laid down.

b) Main conclusion

In the GDPR, equality and non-discrimination are not directly mentioned, but instead they are referred to in the context of all fundamental rights. Very few passages talk about discrimination directly, but it nevertheless seems to be included implicitly. Therefore, one could assume that these principles play a smaller role in data protection, at least in comparison to for instance freedom of expression. The only exception to that is in recitals 75 and 85, which refer to discrimination directly. According to Gierschmann, “the fact that a prohibition of discrimination is not stated in the part of the articles, but only mentioned in the recital is apparently supposed to mean that it is not a strict rule that has to be applied to every singly automated decision” (Gierschmann, 2018). Instead, paying attention to the prohibition of discrimination can merely be seen as a measure to ensure that safeguards are appropriate (risk-based approach, cf. Art. 24 (68) GDPR in Gierschmann, 2018).

With this in mind, the GDPR live up to its potential to promote fundamental rights. It writes about protecting them and installs safeguards and remedies, but it does not use it power enough to close the existing gaps - merely, it seems to fulfil the task of installing safeguards to protect them. The rights are also promoted through the instalment of remedies, which may not directly allow for prevention of crimes, but enable a persecution. The aim with regard to data protection is reached, but it could do more within the already existing possibilities to promote non-discrimination in the respective field. Some scholars claim that the GDPR looks a lot like its predecessor the DPD and only offers few innovations (Gierschmann, 2018; Paal & Pauly, 2018). Keeping in mind that the DPD also does not include direct measures or referrals to discrimination, the promotion of the principles in the GDPR is limited. Furthermore, the LED shows that there are indeed more possibilities for the lawmakers to include clauses preventing non-discrimination. In its largely applied black and white mindset, it seems to disregard the fact that data are not processed completely separately, but different categories can be combined (Paal & Pauly, 2018). To get back to the societal relevance of this paper, not more than a few Facebook likes on supposedly completely disconnected topics are needed to find out about the political preferences of a person. Keeping that in mind, it appears as if a prohibition of the direct collection of these sensitive data categories does not mean that the information cannot be retrieved very easily through the combination of other information they can collect. Even if the collection or processing is prohibited in some circumstances, it does not necessarily contribute to eliminating discrimination or inequality. Furthermore, the largest amount of companies in the data economy has the benefit of being a monopoly with no viable alternative, so consumers cannot employ other services. And these companies will often know ways around the current legislation to retrieve the

information from their clients that they need. Therefore, stricter rules for big companies would have supported the promotion of the principles.

The GDPR is supposed to strengthen the rights of data subjects and it does - when it comes to the right to data protection. It is supposed to bring several innovations and restrict the powers of companies. But since the latter part is relatively difficult, what it does is granting the citizens additional rights, such as the right to erasure, data portability, etc., whereas it does not do much to restrict companies. Installing buttons that companies need to send data subjects all the information they have does not automatically limit the amount they process - and that should be the goal. If data subjects choose to make use of certain services, they often do not have a choice what data they share. It is mainly a decision between using the services and sharing the data or simply not employing the services at all. Therefore its character seems to be more similar to the DPD than expected - especially considering the number of advancements in the field of technology. Moving on to the primary goal of the GDPR, harmonizing the data protection landscape in the EU is very difficult considering the number of opening clauses and exceptions that can be laid down in national law across all EU member states. It could also be argued that introducing 28 much nuanced versions of the same law only harmonises to a very limited amount. Large multinational companies with well-equipped legal departments are probably still able to manage the various requirements, but small or medium-sized enterprises will have greater difficulties to comply with the different standards.

The GDPR does not appear to be wide-reaching enough to have a significant impact on promoting equality and non-discrimination in data processing. It only fosters them indirectly, but maybe does not consider the technical possibilities and the opportunities that exist to find ways around the prohibitions. As the harm data can do depends not only on the categories that are directly collected, but also on the combination of different categories and the context, the simple prohibitions and safeguards the GDPR has installed will not change much in this regard. What can have an impact are the remedies that it initiates, but their influence on the promotion of the principles will probably be rather small. For the fear of lawsuits to change the practices of companies and create non-discriminatory policies more specific measures would be useful. The individuals will firstly need to notice the fact that they are treated unequally and bring action to the court before the institutions will be asked to reflect on their procedures. In that case, a lawsuit may not force companies to eliminate wrong practices and adapt their systems to promote equality. Considering the high complexity of such programmes, the practices that discriminate are hard to delete. The GDPR takes a step in this direction by stating that automated processing needs to include a human component - but who is to say that the human being notices the discrimination or will be able to modify the programme? The principle of *privacy by default* means that entire systems needs to be evaluated starting at the core. In theory, this would also result in the detection of discrimination and unequal treatment through programmes, for

instance algorithmic biases. In practice, if the same team that created the programmes/systems are the ones who evaluate it, they will be blind to their own biases and unable to discover them, because one is simply not aware of intrinsic biases. It could be a start to help combat discrimination if the evaluation is done by independent authorities, but in principle it only seems to limit the consequences.

c) Further suggestions

Gola introduces the idea that something of a blacklist is missing, in which individuals can generally prohibit certain procedures from being completed with their own information. Germany has a similar instrument through its “Robinson-List”, where individuals can state that they do not want to receive advertising through direct marketing. However, respecting this list is a voluntary measure and companies are not demanded to oblige. If some measure like this could be introduced as binding and for instance prohibit the use of commercial purposes, it would give data subjects back more control. Furthermore, it could have effects for individuals if their data is not passed on to other controllers or information from different companies cannot be combined to send out more tailored advertising.

As the analysis and the tables visualise, there are various gaps in the data protection law. One suggestion could be to change the phrasing of prohibiting sensitive personal data to also include data that in combination with others categories could lead to similar effects or to prohibit the possibility to merge the information given. Naturally, it would also hinder discrimination if there is a concrete article in the legislation promoting equality and non-discrimination next to just mentioning them in the (non-binding) recitals. In that regard, it will also be interesting to see the role of data protection officers evolve and whether they will i.e. issue guidelines and recommendations to close the gaps. In that case, they question will also be how their power is exercised, how serious their recommendations will be taken and whether they can substitute for the insufficient address of some topics.

Considering the dangers big data and other technological advances can bring - some of which are already known yet - it comes as a surprise that discrimination is only mentioned in the context of fundamental rights in general. If combating discrimination is one of its goals, it should be mentioned more explicitly in the articles. There are so many ways to discriminate with the data that is collected by companies and institutions, which is why it deserves more attention. Future research can deepen this discussion by investigating how these rights and safeguards are actually put into practice and whether the implementation is able to fulfil all the requirements. Especially the data protection impact assessment offers a lot of possibilities for further research by investigating how companies will choose to conduct those and whether it can live up to the expectations.

CHAPTER 7

Literature

Websites

Bundeszentrale für politische Bildung (2018). *Der Weg zum Grundgesetz*. Retrieved from: http://www.bpb.de/themen/S2EPM0,0,0,Der_Weg_zum_Grundgesetz.html (Last viewed: 01.05.2018)

Bundeszentrale für politische Bildung (2017). *Vor 30 Jahren: Proteste gegen Volkszählung*. Retrieved from: <https://www.bpb.de/politik/hintergrund-aktuell/248750/volkszaehlung-1987-22-05-2017> (Last viewed: 15.05.2018)

Council of Europe (2018). *The Convention in 1950*. Retrieved from: <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=> (Last viewed: 01.05.2018)

Council of Europe (2018). *Landmark judgements*. Retrieved from: <https://www.coe.int/en/web/human-rights-convention/landmark-judgments> (Last viewed: 01.05.2018)

Datenschutz-Wiki (2018). *Änderungen des Bundesdatenschutzgesetzes seit 1990*. Retrieved from: https://www.datenschutz-wiki.de/BDSG_%C3%84nderungen_seit_1990 (Last viewed: 17.05.2018)

Dot Magazine (2017). *Germany: Land of Data Protection and Security- but why?*. Retrieved from: <https://www.dotmagazine.online/issues/security/germany-land-of-data-protection-and-security-but-why> (Last viewed 24.03.2018)

EUR-lex (2018). *Protecting personal data when being used by police and criminal justice authorities*. Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1529063036281&uri=LEGISSUM:310401_3 (Last viewed: 15.06.2018)

European Commission (2018a). *How is data on my religious beliefs/sexual orientation/health/political views protected?*. Retrieved from: https://ec.europa.eu/info/law/law-topic/data-protection/reform/rights-citizens/how-my-personal-data-protected/how-data-my-religious-beliefs-sexual-orientation-health-political-views-protected_en (Last viewed: 18.03.2018)

European Commission (2018b). *What constitutes data processing?*. Retrieved from: https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-constitutes-data-processing_en (Last viewed: 18.03.2018)

European Court of Human Rights (2018). *European Convention on Human Rights- Protocols to the Convention*. Retrieved from: <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c> (Last viewed: 01.05.2018)

European Union (2018). *The Court of Justice of the European Union*. Retrieved from: https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en (Last viewed: 02.05.2018)

Federal Anti-Discrimination Agency (2018). *Das Allgemeine Gleichbehandlungsgesetz (AGG)*. Retrieved from: http://www.antidiskriminierungsstelle.de/DE/ThemenUndForschung/Recht_und_gesetz/DasGesetz/dasGesetz_node.html (Last viewed: 17.05.2018)

Freude, A. & Freude, T. (2016). *Echoes of History: Understanding German Data Protection*. Bertelsmann Foundation. Retrieved from: <http://www.bfna.org/research/echos-of-history-understanding-german-data-protection/> (Last viewed: 14.05.2018)

Huber, E. (2018). *Handgranaten für die Polizei? Der Faktencheck zum PAG*. Bayrischer Rundfunk. Retrieved from: <https://www.br.de/nachrichten/faktencheck/handgranaten-fuer-die-polizei-der-faktencheck-zum-pag-100.html> (Last viewed: 17.06.2018)

Intersoft Consulting Services (2016). BDSG oder LDSG- Welches Recht gilt? Retrieved from: <https://www.datenschutzbeauftragter-info.de/bdsg-oder-ldsg-welches-recht-gilt/> (last viewed: 30.05.2016)

Lutz, T. (2016). *Stasi=Gestapo?*. Bundeszentrale für politische Bildung. Retrieved from: <http://www.bpb.de/geschichte/deutsche-geschichte/stasi/224017/stasi-gestapo?p=all> (Last viewed: 15.05.2018)

Momsen, C., Weichert, T. (2018). *From DNA Tracing to DNA Phenotyping – Open Legal Issues and Risks in the new Bavarian Police Task Act (PAG) and beyond*. Retrieved from: <https://verfassungsblog.de/from-dna-tracing-to-dna-phenotyping-open-legal-issues-and-risks-in-the-new-bavarian-police-task-act-pag-and-beyond/> (Last viewed: 17.06.2018)

Planet Wissen (2018). *Das Grundgesetz*. Retrieved from: https://www.planet-wissen.de/geschichte/menschenrechte/geschichte_der_verfassung_in_deutschland/pwiedasgrundgesetz_100.html (Last viewed: 01.05.2018)

Rechtstipp24 (2018). *BDSG Kommentar*. Retrieved from: Rechtstipp 24 commentary <https://rechtstipp24.de/bundesdatenschutzgesetz-bdsg-2018/> (last viewed: 04.06.2018)

Rose, M. (2018). *Everything that isn't forbidden is allowed*. British Council. Retrieved from: <https://www.britishcouncil.org/organisation/policy-insight-research/insight/everything-that-isnt-forbidden> (Last viewed: 14.05.2018)

UN (2018a). *The History of the document*. Retrieved from: <http://www.un.org/en/sections/universal-declaration/history-document/index.html> (Last viewed 30.04.2018)

UN (2018b). *Universal Declaration of Human Rights*. Retrieved from: <http://www.un.org/en/universal-declaration-human-rights/index.html> (Last viewed. 30.04.2018)

UN (2018c). *The Foundation of International Human Rights Law*. Retrieved from: <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (Last viewed: 30.04.2018)

Werry, N., Kirschbaum, B., Koch, J.-M. (2017). *The Privacy, Data Protection and Cybersecurity Law Review- Edition 4*. Retrieved from: <https://thelawreviews.co.uk/edition/the-privacy-data-protection-and-cybersecurity-law-review-edition-4/1151282/germany> (Last viewed: 14.05.2018)

Policy documents and legislation

Bundesbeauftragte für den Datenschutz (2017a). *Info 1: Bundesdatenschutzgesetz- Text und Erläuterung*.

Bundesbeauftragte für den Datenschutz (2017b). *Info 6: Datenschutz-Grundverordnung- jetzt mit dem neuen BDSG*. 5. Auflage.

Bundesministerium der Justiz und für Verbraucherschutz (2013). *German Criminal Code*. Retrieved from: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.pdf (Last viewed: 15.05.2018)

Bundesministerium der Justiz und für Verbraucherschutz (1998). *German Telecommunications Act (TKG)*. Retrieved from: <https://germanlawarchive.iuscomp.org/?p=692#XI> (Last viewed: 15.05.2018)

Bundesministerium der Justiz und für Verbraucherschutz (2013). *German Civil Code*. Retrieved from: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf (Last viewed: 15.05.2018)

Bundesministerium der Justiz und für Verbraucherschutz (2007). *German Telemedia Act (TMG)*. Retrieved from: <https://www.gesetze-im-internet.de/tmg/TMG.pdf> (last viewed: 15.05.2018)

Council of Europe (1950). *European Charter of Fundamental Rights*.

European Commission (2016). *Directive 2016/679: Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)*. Official Journal of the European Union.

European Community (1995). *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data*. Official Journal of the European Communities No 1.281/31.

European Community (2000). *Directive 2000/43/EC: implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*. Official Journal of the European Communities.

European Community (2000). *Charter of Fundamental Rights of the European Union*. Official Journal of the European Communities.

European Union (2018). *Regulations, Directives and other acts*. Retrieved from: https://europa.eu/european-union/eu-law/legal-acts_en (Last viewed: 24.04.2018)

Landtag Sachsen (2018). *Gesetz zur Anpassung landesrechtlicher Vorschriften an die Verordnung (EU) 2016/679 des Europäischen Parlaments und des Rates vom 27. April 2016 zum Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten, zum freien Datenverkehr und*

zur Aufhebung der Richtlinie 95/46/EG. Retrieved from:
<https://www.revosax.sachsen.de/vorschrift/17646> (last viewed: 30.05.2018)

(1980). *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*. Retrieved from:
<http://www.oecd.org/sti/ieconomy/oecdguidelinesontheProtectionofPrivacyandTransborderFlowsOfPersonalData.htm>. (Last viewed: 24.03.2018)

United Nations (1948). *Universal Declaration of Human Rights*.

Publications

Deutsches Institut für Menschenrechte (2013). „*Racial Profiling*“ –Menschenrechtswidrige Personenkontrollen nach § 22 Abs. 1 a Bundespolizeigesetz.

European Commission (2017). *EU Report on Equality based on Racial and Ethnic origin*.

European Commission (2015). *Special Eurobarometer 437- Discrimination in the EU in 2015*.

European Data Protection Supervisor (2012). *Factsheet 1 - Your personal information and the EU administration: What are your rights?*

European Union Agency for Fundamental Rights (2011). *Handbook on Non-Discrimination Law*.

European Union Agency for Fundamental Rights (2010). *Data Protection in the European Union: the role of National Data Protection Authorities*.

European Union Agency for Fundamental Rights (2014). *Handbook on European data protection law*.

European Union Agency for Fundamental Rights (2018). *Handbook on European data protection law- Edition 2018*.

European Union Agency for Fundamental Rights (2017a). *Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU*.

European Parliament (2017b). *Report on fundamental rights implications of big data: privacy, data protection, non-discrimination, security and law-enforcement (2016/2225(INI))*.

Federal Anti-Discrimination Agency (2010). *Guide to the General Equal Treatment Act*.

Anderson, D., Murphy, C.C. (2011). *The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe*. European University Institute- Department of Law. Retrieved from:
http://cadmus.eui.eu/bitstream/handle/1814/17597/LAW_2011_08.pdf?sequence=1&isAllowed=y
(Last viewed: 01.05.2018)

Deppermann, L.J.F. (2013). *Increasing the ICJ's influence as a Court of Human Rights: The Muslim Rohingya as a case study*. Chicago Journal of International Law: Vol. 14, No.1, Article 9

Gierschmann, S., Schlender, K., Strenzel, R., Veil, W. (2018). *Kommentar Datenschutz-Grundverordnung*. Bundesanzeiger Verlag.

- Gola, P.(2018). *DS-GVO: Datenschutz-Grundverordnung VO (EU) 2016/679- Kommentar*. C.H.Beck.
- Kuner, C. (2018). *Case Law: International agreements, data protection and EU fundamental rights on the international stage: Opinion 1/15, EU-Canada PNR*. Common Market Law Review 55: 857-882.
- Lahuerta, S.B. (2018). *Enforcing Equality Law through Collective Redress: Lagging Behind?* Common Market Law Review 55: 783-818.
- Matera, C. (2016). *Writing a paper or thesis in law at university*.
- Paal, B.P., Pauly, D.A. (2018). *Datenschutz-Grundverordnung, Bundesdatenschutzgesetz*. C.H. Beck: 2 Edition.
- Stainback, K. and Tomaskovic- Devey, D. (2012). *Research: Your firm probably isn't an Equal Opportunity Employer*. Harvard Business Review
- Streintz, R. (2013). *The Role of German Federal Constitutional Court*. Retrieved from: <http://www.ritsumei.ac.jp/acd/cg/law/lex/rlr31/09streinz.pdf> (Last viewed: 01.05.2018)
- Reaume, D.G. (2003). *Discrimination and Dignity*. Louisiana Law Review. Retrieved from: <https://www.law.utoronto.ca/documents/Reaume/DiscriminationandDignity.pdf> (Last viewed: 22.05.2018)
- Voigt, P., von dem Bussche, A. (2017). *The EU General Data Protection Guideline- A practical guide*. Springer. Retrieved from: <https://de.scribd.com/document/369822426/The-EU-GDPR-A-Practical-Guide-Paul-Voigt> (last viewed: 21.05.2018)

Newspaper articles

- Naughton, J. (20.08.2017). *Data-Hucksters beware- online privacy is making a comeback*. The Guardian. Retrieved from: <https://www.theguardian.com/commentisfree/2017/aug/20/data-hucksters-beware-online-privacy-eu-general-data-protection-regulation> (Last viewed: 24.03.2018)
- Cadwalladr, C., Graham-Harrison, E. (17.03.2018). *How Cambridge Analytica turned Facebook 'likes' into a lucrative political tool*. The Guardian. Retrieved from: <https://www.theguardian.com/technology/2018/mar/17/facebook-cambridge-analytica-kogan-data-algorithm>. (Last viewed. 24.03.2018)
- Gardner, R.N. (1988). *Eleanor Roosevelt's Legacy: Human Rights*. New York Times. Retrieved from: <https://www.nytimes.com/1988/12/10/opinion/eleanor-roosevelt-s-legacy-human-rights.html> (Last viewed: 30.04.2018)

CHAPTER 8

Appendix

Overview of the articles relevant for the thesis (in order of reference)

Article 2 UDHR: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”

Article 9(g) GDPR: “processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific to safeguard the fundamental rights and the interests of the data subject”

Article 2 UDHR: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”

Article 7 UDHR: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination“

Article 30 UDHR: “Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein” (Article 30, UDHR, 1948).

Article 14 ECHR: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or

other opinion, national or social origin, association with a national minority, property, birth or other status”

Article 17 ECHR: “Nothing in this Convention may be interpreted as implying for any State, group or person any rights to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth in herein or at their limitation to a greater extent than is provided for in the Convention”

Article 54 CFREU: “Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.”

Article 3(3) GG: “No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. No person shall be disfavoured because of disability”

Article 2 GG: “1. Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional or moral law.

2. Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.”

Article 12 UDHR: “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

Article 16 TFEU: “1. Everyone has the right to the protection of personal data concerning them.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.”

Recital 12 GDPR: “Article 16 (2) TFEU mandates the European Parliament and the Council to lay down the rules relation to the protection of natural persons with regard to the processing of personal data and the rules relation to the movement of personal data”

Recital 108 GDPR“ensure compliance with data protection requirements and the rights of the data subjects, [...] including the availability of enforceable data subject rights and effective legal remedies.

Recital 75 GPDR: “could lead to [...] discrimination and [...] data subjects might be deprived of their rights and freedoms or prevented from exercising control over their personal data [or] where personal

data are processed which reveal racial or ethnic origin, political opinions, religion or philosophical beliefs, trade union membership, and the processing of genetic data, data concerning health or data concerning sex life or criminal conviction” (rec 75 GDPR, 2016).

Article 22 (1) GDPR: “the data subject shall have the right not be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her”

Recital 71 GDPR: “discriminatory effects on natural persons on the basis of racial or ethnic origin, political opinion, religion or beliefs, trade union membership, genetic or health status or sexual orientation, or that result in measures having such an effect.”

§27 (1) BDSG: “scientific or historical research purposes or statistical purposes, if such processing is necessary for these purposes and the interests of the controller in processing substantially outweigh those of the data subject in not processing the data”

Table 1- Comparing the variety of instruments listed in data protection legislation

instruments	DPD	DPA	GDPR	BDSG	protection from direct discrimination	protection from indirect discrimination
Rights						
clause about complying with fundamental rights	yes	yes	yes	yes	yes	no
specific clause about non-discrimination	no	no	(yes) ²⁷	(yes) ²⁸	yes	(yes)
right to erasure	no	no	yes	yes	no	no
right to data portability	no	no	yes	yes	no	no
right to access	no	no	yes	yes	no	no
safeguards						
data protection officer	yes	yes	yes	yes	(yes)	(yes)
clause prohibiting processing of data revealing ethnic origin, etc.	yes	yes	yes	yes	(yes)	(yes)
clause listing potential safeguards	yes	yes	(no)	yes	yes	(no)
storage guidelines	no	yes	(yes)		no	no
clause about data protection impact assessment	yes	no	yes	yes	(yes)	(yes)
remedies						
finances for violations	(yes) ²⁹	yes	yes	yes	no	no
citizens can sue individually	yes	yes	yes	yes	no	no
citizens can sue through non-profit organisations	no	no	yes	yes	no	no

²⁷ since the GDPR is a regulation, the CFREU needs to be respected automatically

²⁸ since the GDPR is a regulation, the CFREU needs to be respected automatically

²⁹ Article 24 DPD states that member states shall adopt sanctions to make sure the directive is fully implemented

Table 2- Overview of the articles listed in Chapter 3-5

DPD	
Art. 1	Prior checking
Art. 8	Processing of special categories of data
Art. 20	Prior checking
DPA	
§1	Purpose and scope of the law
§3	Further definitions
§4	Legality of collecting, processing and using data
§23	Position of the Federal Commissioner for Data Protection and Freedom of Information
GDPR	
Art. 1	Subject-matter and objectives
Art. 4	Definitions
Art. 9	Processing of special categories of data
Art. 15	Right of access by the data subject
Art. 17	Right to erasure
Art. 20	Right to data portability
Art. 21	Right to object
Art. 22	Automated individual decision-making, including profiling
Art. 23	Restrictions
Art. 24	Responsibility of the controller
Art. 25	Data protection by design and default
Art. 34	Communication of a personal data breach to the data subjects
Art. 35	Data Protection Impact Assessment
Art. 38	Position of the data protection officer
Art. 45	Transfers on the basis of an adequacy decision
Art. 77	Right to lodge a complaint with a supervisory authority
Art. 78	Right to an effective judicial remedy against a supervisory authority
Art. 79	Right to an effective judicial remedy against a controller or processor
Art. 80	Representation of data subjects
Art. 81	Suspension of proceedings
Art. 82	Right to compensation and liability
Art. 83	General conditions for imposing administrative fines
Art. 84	Penalties
BDSG	
§6	Data Protection Officers of public bodies- Position
§13	Federal Commissioner for Data Protection and Freedom of Information- rights and obligations
§22	Processing of special categories of data
§23	Processing for other purposes by public bodies
§27	Data Protection for purposes of statistical or historical research and for statistical purposes
§48	Processing of special categories of data- legal basis
§67	Conduction Data Protection Impact Assessment
§71	Data Protection by design and by default
§78	General requirements for transfers to third countries
§80	Data transfers without appropriate safeguards

Table 3- List of articles that pose potential risk to equality and non-discrimination and the corresponding gaps

Article	Gap	Suggestions
Art. 8 DPD Processing of special categories of data	The prohibition of processing does not prohibit the categories from being retrieved otherwise	Be more explicit about the fact that the information are also not allowed to be retrieved through combination of any sort
Art. 9 GDPR Processing of special categories of data	The prohibition of processing does not prohibit the categories from being retrieved otherwise	Be more explicit about the fact that the information are also not allowed to be retrieved through combination of any sort
Art. 22 GDPR Automated individual decision-making, including profiling	Automatic decisions pose a risk for systematic discrimination, because programmes are used and conduct the processing unnoticed	It would help if the systems are reviewed by an independent authority and non by the company themselves
Art. 25 GDPR Data protection by design and by default	Data protection by default suggests a review of the core programme, but it can be done by the company itself	It would help if the company would not be allowed to be the singular entity to review the processing. An involvement of an independent supervisory authority or the internal DPO would have a strong involvement
Art. 88 GDPR Processing in the context of employment	Employers have the right to process more sensitive data for the purpose of the employment, but if not guarded properly the data could be exploited	Make sure that more safeguards are installed, for instance a review of the data with a fixed rhythm – like every quartile
§22 BDSG Processing of special categories of data	The prohibition of processing does not prohibit the categories from being retrieved otherwise	Be more explicit about the fact that the information are also not allowed to be retrieved through combination of any sort
§48 BDSG Processing of special categories of data-legal basis	The prohibition of processing does not prohibit the categories from being retrieved otherwise	Be more explicit about the fact that the information are also not allowed to be retrieved through combination of any sort
§71 BDSG Data Protection-by design and by default	Data protection by default suggests a review of the core programme, but it can be done by the company itself	It would help if the company would not be allowed to be the singular entity to review the processing. An involvement of an independent supervisory authority or the internal DPO would have a strong involvement
§80 BDSG Data transfer without appropriate safeguards	The apparent fact that no safeguards are installed	Make sure that safeguards are installed in any case, and that the occasions where it is not possible are strictly limited
§78 BDSG General requirements for transfers to third countries	Due to the diverging fundamental rights application in the Union, it is unclear which standards will be applied.	A clearer indication of the standards that will be implied in practice