

Data protection in corporate transactions

Duty to inform pursuant to Art. 13 et seq. GDPR in a due diligence

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Abstract

This study analyses the effects of the recast legal framework of European data protection law (General Data Protection Regulation, GDPR) for the area of corporate transactions. In this context, it focuses specifically on the duty to inform pursuant to Art. 13 et seq. GDPR during the due diligence process. The duty to inform is a core aspect of the rights of the data subject and aims to ensure transparency in the processing of personal data. Generally, data subjects should at all times be fully informed about who processes their data for what purpose. The GDPR significantly expanded the extent of transparency requirements as compared with the Data Protection Directive. Accordingly, since 25 May 2018, data subjects must no longer be informed of the specific circumstances only once when their data is collected, but now also before any further processing of the data that changes the purpose. These are cases in which the controller intends to process the data for a purpose which the data subjects have not yet been informed about.

The study examines the occasions when the controller of the data processing is obliged to inform the data subject during the data transfer between the target company, the seller and the potential buyer. Regardless of whether the seller (vendor due diligence), the potential buyer (purchaser due diligence) or cumulatively both actors carry out a due diligence, the target company is requested to provide data. Usually, the data requested contains a reference to employees or customers of the target company. The processing of this personal data falls within the scope of the GDPR. When the target company retrieves this data from its databases to make it available to the seller or the potential buyer, it changes the purpose of this data. Originally, the data was obtained for employment-related purposes or handling of customer relationships. Now, it is processed for the purpose of evaluating the target company. According to Article 13 (3) GDPR, the controller is obliged to inform the data subjects about various circumstances of the processing before an intended change of purpose.

This obligation has the effect that when preparing for a transaction, the employees and customers of a target company to be sold in principle have to be informed about the intention to sell prior to the due diligence. In particular cases this even includes information about the potential buyer's identity. However, the provision of this information conflicts with the confidentiality interests of the parties involved. The possibility of confidential preparation is a cornerstone of the success of a corporate transaction. In contrast to



comparable cases such as Art. 14 (4) GDPR or the capital market regulations on insider information, neither the GDPR nor the regulations of the German Federal Data Protection Act (BDSG) provide for an exception from the duty to inform in favour of an overriding interest in confidentiality. The study therefore analyses various options to avoid the duty to inform regarding their legal compatibility with the GDPR as well as their practical implementation. The options being considered include the possibility of an information about the purpose at hand when the controller first obtains the data to avoid a change of purpose later on, to only process data anonymously, to redirect the data transfer through the target company's own advisors and the possibility to develop the current law in such a way that there is no duty to inform in the case of an overriding interest in confidentiality.