

THE DANISH ADAPTATION OF THE GDPR



By Tenna Overby

Head of Section, POLITI, Danish National Police, Police Directorate, Data Protection Unit

I-INTRODUCTION

After several months of work, the Ministry of Justice finally presented the draft of the new Data Protection Act, which after three readings in Parliament was adopted with a majority on 17 May 2018. No members of Parliament voted against it. It entered into force on 25 May 2018 and replaced the existing Act on Processing of Personal Data and adapt the GDPR.

The purpose of this paper is to introduce the main content of the Data Protection Act. The paper briefly introduces the origin of the Danish data protection legislation, presents the Data Protection Act project and summarises key provisions and comments on the most interesting use of opening clauses in the Data Protection Act.

II-LEGAL FRAMEWORK BEFORE THE GDPR

The first Danish data protection laws, the Public Authorities' Registries Act and the Private Registry Act¹, were adopted in 1979. With this legislation Denmark was one of the first countries in Europe, together with West Germany, Sweden, Norway and France, which implemented a regular data protection law.

In 2000, the Registries Acts were repealed with the adoption of the Act on Processing of Personal Data (hereinafter the Privacy Act),² which implemented Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.³ In the implementation process, it was decided to codify the two pre-existing

1 Public Authorities' Registers Act, law no. 294 of 8 June 1978 and Private Registers Act, law no. 293 of 8 June 1978.

2 <https://www.datatilsynet.dk/english/the-act-on-processing-of-personal-data/read-the-act-on-processing-of-personal-data/compiled-version-of-the-act-on-processing-of-personal-data/> (English)

3 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 <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A31995L0046> (English)

data protection laws into one consolidated law that included both public authorities and private actors, as this was deemed more accessible for the data subjects.

In the past 18 years, the Privacy Act has with its continuous amendments provided the framework for data protection law.

III-THE DATA PROTECTION ACT PROJECT AND THE MAIN CONTENT

The Data Protection Act was drafted by Ministry of Justice's Data Protection Office. The Data Protection Act is based on a recommendation report from the Ministry of Justice published on 24 May 2017 containing an analysis on existing data protection regulation and the GDPR, including the possibility of using opening clauses.⁴ The first draft of the Data Protection Act was published for public consultation on 7 July 2017, and finally, with a few amendments the draft was presented for the Parliament on 25 October 2017 for its first of three readings.

The Data Protection Act supplements the GDPR and consists of 48 articles distributed in seven sections. The seven sections are dedicated, respectively, to 1) introductory provisions, 2) processing of personal data, 3) rights of the data subject, 4) additional provisions to Chapter IV of the GDPR, 5) prior consultation, 6) independent supervisory authorities, 7) remedies, liability, penalties and concluding remarks.

The Data Protection Act introduces provisions referring to the GDPR and provides provisions developing the GDPR opening clauses. Further the Data Protection Act continues several provisions and principles carried over from the Privacy Act.

Several provisions in the Data Protection Act repeat the language of the GDPR, which makes for a case of

4 *Recommendation no. 1565 on GDPR and the legal framework for Danish legislation.* (24 May 2017). <http://www.justitsministeriet.dk/nyt-og-presse/pressemeddelelser/2017/nye-regler-styrker-beskyttelsen-af-persondata-i-europa> (Danish)

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double regulation. The rationale behind is to avoid any misinterpretations between the GDPR and the national data protection law. However, this might result in a complex legal position, since two legal texts must be consulted and compared before deciding what the legal position in an area is. It shall be interesting to see, whether this becomes an issue after 25 May 2018.

IV-MATERIAL SCOPE AND GEOGRAPHICAL SCOPE

The material scope of the Data Protection Act is broader than the material scope of the GDPR as the Data Protection Act includes areas that today are covered by the Privacy Act. This includes manual disclosure of personal data between public authorities, processing of company data if the processing is preformed for credit agencies, and all processing of personal data in connection with television surveillance. Further, it includes processing of personal data of deceased persons in up until 10 years after their death.⁵ The Data Protection Act states that the GDPR applies to all areas set out in the Data Protection Act.

Both Greenland and the Faroe Islands are part of the Danish Kingdom but are considered third countries with regards to EU-law as neither are members of the EU. This status has resulted in some fairly complex legal issues over the years. Not only in regard to data protection law but across numerous of other legal areas regulated by EU-law. However, Greenland and the Faroe Islands were not considered to be Danish territory under the Privacy Act and are not considered Danish territory under the Data Protection Act § 48.

V-USE OF OPENING CLAUSES

Due to its direct applicability in national law, the GDPR leaves no possibility for derogating national legislation of the EU member states except when explicitly allowed for it by the GDPR.⁶ The GDPR's opening clauses have allowed the Ministry of Justice, pursuant to the specific terms of each provision, to replace, complement or further specify the provisions of the GDPR. As a result the Data Protection Act contains a significant number of provisions that either modify or derogate from the GDPR. These modifications and derogations are largely used for the purpose of giving public authorities a wider access to process personal data and to limit data subject rights. To some extent, this undermines the harmonisation objectivities in regard to harmonisation between the public- and private sector. Further, the use of opening clauses limits the objectivities in regard

to data subjects rights. Nonetheless, it follows from the GDPR that the right to protection of personal data is not an absolute right but must be balanced against other fundamental rights and must be considered in relation to its function in society.⁷ It seems that the latter has had an especially big impact in the drafting process of the Danish Data Protection Act.

a) Extension of public authorities' right to process person data

Under Article 5, para 1 (b) of the GDPR personal data shall only be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes. However, change of the data processing purpose after the data has been collected can be lawful under certain conditions set out in Article 6, para 4 GDPR, including if the change of purpose is based on member state law that constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives laid down in Article 23 GDPR. On this basis, the Data Protection Act empowers any minister under its relevant political area to issue executive orders, in negotiation with the Minister of Justice, and legislate on when personal data can be used for other purposes than they initially were collected for.⁸ The provision constitutes an extension of public authorities' right to process personal data, which may include the right to re-use personal data and to disclose personal data to other public authorities. In comparison to the pre-existing Privacy Act, the provision gives the relevant minister more legislative power than previous, whereas certain processing of personal data for other purposes than they initially were collected for, must rely on legislation adopted in the Parliament.

b) Restrictions of data subject rights

According to Article 23 GDPR, member states are allowed to restrict the scope of the data subject rights and corresponding obligations when such restrictions respect the essence of the fundamental rights and freedoms and are a necessary and proportionate measure in a democratic society to safeguard certain objectives that are enumerated in the provision. Based on this provision, member states can introduce legislation that limits subject rights to a rather large extent, particularly under the objective "other important objectives of general public interest".⁹ In a Danish context this provision has been used to restrict the data subject's right with regard

⁵ Recital 27 GDPR.

⁶ P. Voigt, A. von dem Bussche, *The EU General Data Protection Regulation (GDPR)*, (2017) 219-223.

⁷ Recital 4 GDPR.

⁸ The Data Protection Act § 5, para 3.

⁹ Article 23, para 1 (e) GDPR.

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to the information obligation of the controller prior to processing. This implies that public authorities are exempted from giving information to the data subject when the authorities are processing personal data for purposes other than for which it was initially collected. As a consequence, the data subject will not be informed if his or her personal data is disclosed to another public authority. This restriction was criticised during the public consultation stage of enacting the Data Protection Act.¹⁰ However, the Ministry of Justice did not revoke or change the provision. According to the general remarks set out in the Data Protection Act regarding the provision, the Ministry of Justice stated that from a data controller's point of view, the information obligation would be too administratively burdensome. Furthermore, the remarks state that it is questionable whether the information obligation of the controller posed by the GDPR actually provides for legal certainty for the data subjects when public authorities are changing the purpose of data processing.

Additionally, the Data Protection Act provides that the subject's right to information and to access to information can be restricted with regard to processing of personal data by the courts, processing of data for scientific research purposes and processing of personal data in criminal investigation as compliance with such rights may be damaging to public interest or too burdensome on the respective processor.

c) Processing for scientific research purposes

Danish data protection legislation has always provided a fairly wide legal framework for processing of personal data for scientific research purposes based on personal data included in various registries. This includes registries as for example the Civil Registration System (CPR), containing basic personal data on all who have a civil registration number¹¹ or the Danish Neonatal Screening Biobank (DNSB) that has been collecting blood sample material from all newborns who have been tested for serious congenital disorders¹²

10 The IT Political Association of Denmark's remarks on the Data Protection Act. <https://itpol.dk/hoerings svar/databeskyttelseslov> (Danish)

11 The CPR register contains data on civil reg. no., name, address, birth registration, citizenship, church membership, parentage, marital status as well as information on the status of the individual registration. The CPR register was established in 1968; however, there have been civil registrations in Denmark since 1924 in municipal registers. <https://www.cpr.dk/english/>. (English).

12 If a person does not wish the sample to be retained in the biobank, he or she can request the Department of Congenital Disorders, Center for Neonatal Screening for deletion. <https://www.ssi.dk/~media/Indhold/DK%20-%20dansk/Diagnostik/Klinisk%20information/Blodprøve%20fra%20nyfoedte/The%20Danish%20>

since 1982. In February of this year, a new draft law to amend the Danish Health Act was tabled in Parliament. The draft law contains a legal basis for establishing a National Genome Center whose main objective is to analyse genetic data for the purpose of research and for the purpose of customising future medicine and treatments that match the individual patient.¹³

Under the negotiations leading up to the GDPR, processing for scientific research purposes was a sensitive issue from a Danish perspective. In Denmark scientific research – namely health research – is common and widely accepted as it is considered reasonable to use these data for the purpose of scientific research.¹⁴ The pre-existing Privacy Act provided that processing for scientific research was allowed without consent from the data subject.¹⁵ This is not considered to be a violation of the personal integrity of the data subject if the research result is not published in a way that can identify the data subject. Conversely, it is almost considered as indefensible not to re-use collected personal data for legitimate purposes for scientific research. While this may not be widespread in other EU member states, the prospect of maintaining the legal basis for such processing was of major concern for Denmark under the negotiations of GDPR.¹⁶ As a result, one of the most important Danish imprints on the GDPR is found in Article 89.

Article 89 GDPR provides the legal basis for processing activities for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes and lays down minimum standards applicable for such processing. Article 89, para 2 and 3 GDPR contain opening clauses enabling member states to introduce legislation that provides for derogations from the data subjects rights insofar as such rights are likely to render impossible or seriously impair the achievement of the specific purpose and such derogations are necessary for the fulfilment of those purposes.

On the basis of Article 9, para 2 (j) and Article 89 GDPR, the Data Protection Act provides a legal basis for processing of personal data for archiving purposes

[Neonatal%20Screening%20Biobank%2007082015.ashx](https://www.genomedenmark.dk/english/)

13 <http://www.genomedenmark.dk/english/> (English). The draft has not yet been passed in Parliament.

14 P. Blume, *Den nye persondataret, Forordning 2016/679 om personbeskyttelse* (2016) 190-192 (Danish data protection literature).

15 The Privacy Act § 10.

16 P. Blume, *Den nye persondataret, Forordning 2016/679 om personbeskyttelse* (2016) 190-192 (Danish data protection literature).

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in the public interest, scientific or historical research purposes or statistical purposes.¹⁷ The provision is basically a continuation of the pre-existing legal basis for such processing as set out in the Privacy Act. However, the provision in the Data Protection Act includes a legal basis for the Minister of Health, in negotiations with the Minister of Justice, to issue specific rules in compliance with Article 9, para 2 (j) and Article 89 GDPR on processing for other purposes than for scientific or statistical research purposes when a such processing is necessary to protecting vital interests of the data subject.¹⁸

d) Minors' consent in relation to information society services

Processing based on consent was one of the lawful bases in the pre-existing Privacy Act and is now carried over to the Data Protection Act referring to Article 6, para 1 (a-f) GDPR. Regarding the specific protection in Article 8 GDPR on children's consent in relation to information society services, the Ministry of Justice have made use of the opening clause in Article 8 GDPR and set a minimum age of 13 years for valid consent to be obtained directly from a minor. The decision on adapting the minimum age level under that of the GDPR is based on considerations to the amount of experience Danish children have with regards to using online media¹⁹ and their participation in online activities has both an educational and social impact on children. In this regard the Ministry of Justice considered that a higher age for legal consent could pose a risk in that children would be excluded from online activities if the holder of parental responsibility over the child refuse to consent, which might result in children pretending to be older than they are. Further the Ministry of Justice considered that the GDPR provides robust protection for children regardless of consent from the holder of parental responsibility over the child.

VI-OTHER KEY PROVISIONS

a) Data Protection Officer

The obligation to designate a Data Protection Officer (DPO) is a new requirement in Danish data protection law. Pursuant to Article 38, para 5 GDPR the Data Protection Act contains a provision on the duty of confidentiality whereby the DPO may not pass on

information that acquired in the role of DPO. However, this provision only applies for DPOs in the private sector as confidentiality for public employees is regulated in the Public Administration Act and the Criminal Code. Data Protection Act does not extend the scope for when private actors should designate a DPO, which was an option under the GDPR.²⁰

b) Independent Supervisory Authorities

The Chapter on Supervisory Authorities in the Data Protection Act is mainly a continuation of previous law in the Privacy Act. The two supervisory authorities are the Data Protection Agency and the Court Administration.²¹ Both authorities are organisationally under the purview of the Ministry of Justice, however, as independent organs. The Data Protection Authority has supervisory competence in all areas of Danish jurisdiction covered by the GDPR and within the scope of the Data Protection Act including areas subject to Danish special regulation established in accordance with the GDPR. However, the Data Protection Authority has no supervisory competence on the courts' processing of data, which are subject to the supervisory power of the Court Administration.

Decision of the supervisory authorities cannot be brought before another administrative authority. However, this does not affect the possibility of bringing a decision before the Danish Parliamentary Ombudsman or the ability to bring the decision before the national courts.²²

c) Penalties

The GDPR regime on administrative fines is in conflict with the fundamental principle in the legal system of Denmark, whereby only the national courts can impose fines that constitute a criminal penalty. This principle is based on the threefold division of power as set out in Constitutional Act of Denmark, whereby the legislative authority is vested in the Government and the Parliament conjointly, the executive authority is vested in the Government and the judicial authority is vested in the courts of justice.²³ As a consequence the Data

²⁰ Article 37, para 4 GDPR.

²¹ The Danish Business Authority is supervisory authority for data protection in regard to the ePrivacy Directive. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32002L0058> (English), and will presumably be the supervisory authority under the Regulation on Privacy and Electronic Communications <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017PC0010> (English).

²² According to Article 78 GDPR and the Constitutional Act of Denmark § 63, the courts of justice shall be empowered to decide any question relating to the scope of the executive's authority. http://www.stm.dk/_p_10992.html (English)

²³ Article 3 Constitutional Act of Denmark. <http://www.stm>

¹⁷ The Data Protection Act § 10.

¹⁸ The Data Protection Act § 10, para 5.

¹⁹ A survey from The National Council for Children from 2014 shows that 97 % of all 13 year old children in Denmark are active on one or more social medias. <https://www.boerneraadet.dk/nyheder/nyheder-2014/97-procent-af-13-aarige-bruger-sociale-medier> (Danish).

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Protection Agency cannot impose any administrative fines for infringements of data protection legislation. The Data Protection Agency must instead turn in a police report if it finds it necessary. However, in practice, the usual reaction to suspected infringements of the pre-existing Privacy Act was for the Data Protection Agency to pronounce commands or prohibitions for the entity in question. If such commands or prohibitions were not followed the next step for the Data Protection Agency was to turn in a police report in preparation for the national courts to sentence a fine.

This approach is continued under the GDPR due to recital 151, which recognises that fines that constitute a criminal penalty can only be sanctioned by the national courts. Therefore, the Data Protection Agency is obliged to submit a police report in case of infringements of the GDPR and the Data Protection Act. However, as a new provision, the Data Protection Act provides that the Data Protection Agency can impose minor administrative fines extra-judicially if the case is uncomplicated, without evidentiary disputes and the processor subject to the fine accepts.²⁴

One of the main topics discussed with regards to the adaption of the GDPR to the Danish legal system was whether or not public authorities should be subject to fines.²⁵ The Ministry of Justice had not decided on this in the first draft of the Data Protection Act that was published for public consultation. However, just before the first parliamentary reading the Ministry of Justice added a section in § 41 of the Data Protection Act that provides that public authorities can be sanctioned with fines as well as private actors. Under the first reading in Parliament, the Minister of Justice, Søren Pape Poulsen, stated that the government found it reasonable and fair to sanction public authorities as well as for private actors for infringements of the Data Protection Act and the GDPR.²⁶

As Article 83, para 4-6 GDPR contains a detailed regulation on which actions and omissions constitute an infringement of the GDPR, the Data Protection Act also provides for which actions and omissions may result in a penalty. This provides a secure legal basis for the Danish Data Protection Agency as well as providing guidance for the data subjects and processors. Pursuant to recital 151, national courts should take into account the recommendation by the supervisory authority initiating the fine. In any event,

the fines imposed should be effective, proportionate and dissuasive. A review of annual reports from year 2008-2010, compiled by the Data Protection Agency, shows that the level of fines imposed varied from 270 euro to the maximum of 3,355 euro depending on the degree of the infringement.²⁷ Due to the regime on administrative fines in the GDPR, a change in the existing legal precedents on the level of fines imposed after 25 May 2018 is very likely.

VII-AFTER 25 MAY

The purpose of this working paper was to give an introduction to the Danish adaption of the GDPR and to give an insight to key provisions in the Data Protection Act and to comment on the most interesting use of opening clauses. The developing of opening clauses in the Data Protection Act has given public authorities a wider access to process personal data and have in some areas restricted data subjects rights. This may be undermine the main objectives of the GDPR, however, the right to data protection is not an absolute right, but must be considered in relation to its function in society and in this connection the Danish adaption of the GDPR has balanced data subjects right against the effectiveness for public authorities to process personal data. This has resulted in some provisions that gives ministers more legislative power than previous. After 25 May it shall be interesting to see to which extend the ministers will make use of this empowerment to issue specific rules on certain areas as provided for on the Data Protection Act. This might potentially restrict the data subjects right even further.²⁸

Finally it shall be interesting to see how the GDPR and the Data Protection Act will be interpreted and if the double regulation will be subject to any issues in regard to deciding the legal position.

[dk/ p_10992.html](#) (English).

²⁴ The Data Protection Act § 42, para 2.

²⁵ Article 83, para 7 GDPR.

²⁶ First reading of the Data Protection Act in Parliament. <http://www.ft.dk/samling/20171/lovforslag/L68/BEH1-20/forhandling.htm> (Danish).

²⁷ Numbers from *the Recommendation no. 1565 on GDPR and the legal framework for Danish legislation* (24 May 2017) 919.

²⁸ The Data Protection Act § 5, para 3 and § 10, para 5.