National Legislation within the Framework of the GDPR

Limits and Opportunities of Member State Data Protection Law

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After several years of deliberation, the European Union has adopted the General Data Protection Regulation. Considering that the Regulation is directly applicable in all Member States after coming into effect, the General Data Protection Regulation (GDPR) will have an enormous impact on national data protection legislation. However, this does not necessarily signal the end of national data protection law because unlike most other common European Regulations, the GDPR provides Member States with some latitude to enact national legislation. These opening clauses, however, give rise to questions of liberties and limitations of future national data protection legislation. In this article, we will examine some of the most important opening clauses and illustrate the different options available to Member States as set forth in the GDPR.

I. Introduction

The release of the European Commission's first proposal for the General Data Protection Regulation (GDPR) immediately gave rise to discussions and controversies about the harmonisation of national data protection standards. In June 2015, the Justice and Home Affairs Council agreed upon a general approach. Then in December 2015, the Council of the European Union, the European Parliament and the European Commission reached a settlement in an informal 'trialogue'. The GDPR finally was adopted in April 2016[1] and will become applicable from 25 May 2018.

Unlike the Data Protection *Directive* of 1995, the European Union (EU) chose to issue a *Regulation*. According to Article 288(2) of the Treaty on the Functioning of the European Union (TFEU) Regulations are binding in their entirety and directly applicable to all Member States. In other words, a Regulation does not require any enabling legislation by Member States and is therefore subject to direct effect. In this context, the question arises: Does the GDPR leave space – and if so, to what extent – for Member States to adopt genuine *national* data protection provisions?

In comparison to other Regulations, the GDPR has certain features which may imply that in fact national legislatures have some discretion. The first feature is that the EU used the term 'General [...] Regulation' instead of 'Regulation' as used in Article 288(2) TFEU. Second, the GDPR contains different opening clauses, which allow Member States to adopt their own legal data protection provisions. We will illustrate the discretions made available to Member States (Section II.). In the following discussion we will also examine whether Member States can maintain a coherent system of legal data protection provisions even if it will, in part, only repeat the provisions laid out in the GDPR (Section III.).

II. Opening Clauses in the GDPR and Discretion for Member State Legislation

Various provisions of the GDPR allow Member States to issue their own national data protection rules, how-

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1 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 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) [2016] OJ L119/1 (4 May 2016).

ever, the latitude for divergence of national provisions from the GDPR varies: Some provisions only allow Member States to maintain or introduce 'more specific provisions' and to determine 'more precisely' specific requirements for processing and other measures (eg, Article 6(2) GDPR). Other provisions allow more room for discretion, although such provisions simultaneously set out a higher standard of justification if Member States in fact want to exert them (eg, Article 23 GDPR). Finally, few provisions give Member States complete autonomy concerning national legislation, such as Article 80(2) GDPR, according to which Member States may provide that anybody, organisation or association independently of a data subject's mandate, has the right to lodge a complaint with the supervisory authority.

1. Article 6(2) GDPR – Sector Specific Data Protection Law

Article 6(2) GDPR addresses Member State legislation in the sector-specific area. While the provision was missing in the proposals of the Commission and Parliament, the proposal of the Council initially contained an identical provision. In that proposal, however, the provision was misleadingly located in Article 1(2)(a) GDPR. In the trialogue, Article 1(2)(a) GDPR was erased and – with insignificant changes in wording – reincorporated as Article 6(2) GDPR.

According to Article 6(2) GDPR, Member States may maintain or introduce more specific provisions to adapt the application of the rules of the Regulation with regard to the processing of personal data for compliance with Article 6(1)(c) and (e) GDPR by more precisely determining specific requirements for the processing and other measures to ensure lawful and fair processing, including for other specific processing situations as provided for in Chapter IX. By referring to Article 6(1)(c) and (e) GDPR, the power of Member States to maintain or introduce more specific provisions extends to processing, which is necessary for:

- compliance with a legal obligation to which the controller is subject (lit. c); or
- the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller (lit. e).

As a result of this, within the sector-specific area Member States can only maintain or introduce more specific provisions when these provisions determine requirements for the processing and other measures *more precisely*. By using the comparative ('more specific', 'more precisely') the GDPR implies that only those matters can be subject to Member States legislation which are enumerated in the GDPR. In this manner, national legislation is strictly dependent on the regulatory density of the GDPR.

Recital No. 8 supports this interpretation according to which Member States may maintain or introduce national provisions regarding the processing of personal data if the processing is necessary for compliance with a legal obligation, for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. Furthermore, recital No. 9 explicitly refers to Directive 95/46/EC and thereby to the several sector-specific laws, which hence were introduced by Member States. In this area, the GDPR provides latitude for a Member State to specify its rules, including for the processing of sensitive data. To this extent, the GDPR does not exclude Member State law that defines the circumstances of specific processing situations, including determining more precisely the conditions under which processing of personal data is lawful.

The relationship between Article 6(2) GDPR and Article 6(3)(b) GDPR, however, remains unclear. Yielding to severe criticism by several Member States, the EU introduced Article 6(2) GDPR to cushion the rigorous applicability of the GDPR in the sector-specific area making it available for national legislation.[2] According to Article 6(2) GDPR, Member States may maintain or introduce more specific provisions for the types of processing addressed by Article 6(1)(c) and (e) GDPR. Other than the need for a 'specific provision', Article 6(2) GDPR admittedly contains no further requirements for the concrete national provision. Article 6(3) GDPR, however, sets out specific requirements that both EU law and Member State law must meet: First, the purpose of the processing must be determined in the legal basis, or as regards the processing referred to in point (e) of paragraph 1, be necessary for the performance of a task

2 cf Alexander Roßnagel and Steffen Kroschwald, 'Was wird aus der Datenschutzgrundverordnung? – Die Entschließung des Europäischen Parlaments über ein Verhandlungsdokument' (2014) ZD 495, 496; cf Clemens Koós, 'Das Vorhaben eines einheitlichen Datenschutzes in Europa, Aktueller Stand des europäischen Gesetzgebungsverfahrens' (2014) ZD 9, 13 et seq.

carried out in the public interest or in the exercise of official authority vested in the controller. Second, the legal basis may contain specific provisions to adapt the application of the GDPR rules, inter alia the general conditions governing the lawfulness of data processing by the controller; the type of data which are subject to the processing; the data subjects concerned; the entities to, and the purposes for which the data may be disclosed; the purpose of the limitation; storage periods, and processing operations, and processing procedures, including measures to ensure lawful and fair processing; and for other specific processing situations as provided for in Chapter IX. Finally, Member State law must meet an objective of public interest and be proportionate to the legitimate aim pursued.

Prima facie, Article 6(3)(b) GDPR appears to specify the (general) Article 6(2) GDPR – although there is no need for concretisation. Article 6(3)(b) GDPR could be another, and therefore in relation to Article 6(2) GDPR actually expendable, authorisation for Member States to adopt national provisions. The text of Article 6(3) GDPR indicates such an assumption because similar wording also exists in other provisions classified as opening clauses.[3] It seems more plausible, however, that in relation to Article 6(2) GDPR, Article 6(3)(b) GDPR functions as a limitation of the statutory exceptions. This is because, based on a strict interpretation, only Article 6(2) GDPR allows Member States to introduce or maintain specific provisions. In contrast, Article 6(3)(b) GDPR demands only *that* the legal basis must be laid down in Member State law, but does not delegate the same power as Article 6(2) GDPR. Moreover, Article 6(3) GDPR sets forth specific criteria Member State law must fulfil and therefore presumes the existence of a certain type of authorisation granted by the GDPR, which Article 6(2) GDPR ultimately contains. Such an interpretation is supported by the wording of Article 6(2) GDPR which relates to Article 6(1)(c) and (e) GDPR and to Article 6(2) GDPR.

2. Article 80(2) GDPR – Rights of Organisations, Bodies and Associations

Article 80 GDPR determines the role of organisations, bodies and associations within data protection law. The provision gives Member States significant latitude to manoeuvre by providing them with an independent basis for decision-making. Article 80 GDPR thereby differentiates in several ways: First, the provision differentiates between the right to lodge a complaint with a supervisory authority and the right to bring actions before the courts. Second, Article 80 GDPR differentiates between the *right of the data subject* to mandate a body, organisation or association with the exercise of his rights (paragraph 1) and the opportunity for Member States to provide that a body, organisation or association *independently of a data subject's mandate* shall have in such Member State the right to exercise its rights (paragraph 2). In this way, the GDPR puts Member States at liberty to provide bodies, organisations and associations with the right to lodge a complaint with a supervisory authority and the opportunity to bring actions before the courts.

Directive 95/46/EC regulated the power of bodies, organisations and associations restrictively and rudimentarily. Article 28(4) Directive 95/46/EC only empowered bodies, organisations and associations to lodge a complaint with a supervisory authority when they were *mandated by a data subject*. Similarly, the preceding provision, Article 80(1) GDPR, provides bodies, organisations and associations only with a *dependent* right to lodge a complaint ('The data subject shall have the right to mandate a[n] [...] organisation [...] to lodge the complaint on his or her behalf [...]').

The European Commission and the European Parliament initially intended to provide bodies, organisations and associations with an *independent* right to lodge a complaint in the sense of Article 77(1) GDPR.[4] As a consequence, Member States would not have been able to dispose of the right to a complaint by national law, because the right would have been expressly provided by the GDPR. However, this approach was neither adopted by the European Council´s draft, nor has it found its way into the fi-

3 cf Alexander Roßnagel, Maxi Nebel and Philipp Richter, 'Was bleibt vom Europäischen Datenschutzrecht? – Überlegungen zum Ratsentwurf der DS-GVO' (2015) ZD 455, 456.

4 cf art 73(3) in the version of their drafts; not sufficiently differentiated Torsten Gerhard, 'Vereinbarkeit einer Verbandsklage im Datenschutzrecht mit Unionsrecht' (2015) CR 338, 344, because art 73(3) in the version of their drafts provided more rights for bodies, organisations and associations than art 28(4) Directive 95/46/EC by providing them with an *independent* right to lodge a complaint; cf Peter Gola, 'Beschäftigtendatenschutz und EU-Datenschutz-Grundverordnung' (2012) EuZW 332, 336.

nal version of the GDPR. Instead, according to Article 80(2) GDPR it is in the Member States' power to provide for an independent right to lodge a complaint. If the respecting Member State decides to remain idle, the GDPR has not directly strengthened the position of bodies, organisations and associations with regards to their rights of complaint in comparison to their position under Directive 95/46/EC.

However, this assumption does not apply for genuine rights of action of bodies, organisations and associations before the courts. While Directive 95/46/EC contained no such rights, Article 80 GDPR actually does; though at first sight – analogous to the right to a complaint – only as a right of action depending on a data subject's mandate (Article 80(1) GDPR).[5] Yet, the role of bodies, organisations and associations has received a new and crucial impulse by an initiative from the European Council, which in turn was triggered by the German government.[6] While both draft versions of the European Commission and the European Parliament did not include a right to take actions before the courts independently, the final version, by means of Article 80(2) GDPR, empowers Member States to provide bodies, organisations and associations with the right to take actions against both a decision of a supervisory authority and a controller or processor.

To our knowledge, it appears that only Germany intends to take advantage of the authority provided by Article 80(2) GDPR. If, however, the implementation of this type of instrument proves effective, other countries might follow Germany's lead.

3. Article 85 GDPR – Processing and Freedom of Expression and Information

According to Article 85 GDPR, Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including the processing of personal data for journalistic purposes and for the purposes of academic, artistic or literary expression. In this manner, Article 85 GDPR appears to be a regulatory task for the Member States, rather than an opening clause. To this extent, the provision pre-sets the outcome of Member State legislation in relation to the standard of the GDPR and Member States are free to choose the concrete choice of means. Article 85(2) GDPR specifically allows Member States to provide for exemptions or derogations from the provisions in Chapters I-VII and IX within national law if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information. Member States must, however, notify to the Commission those provisions of their law which they have adopted and, without delay, any subsequent amendment law or amendment affecting them (Article 85(3) GDPR).

4. Article 88 et seqq GDPR – Processing in the Context of Employment

Furthermore, the GDPR provides room for manoeuver to Member States concerning processing in the employment context (Article 88 et seqq). In principle, the EU endorsed a general opening clause in the employment context, because area-specific regulations tend to be more effective.[7] However, the drafts of the European Commission, the Parliament and the Council differed widely: According to the Commission´s draft, national legislation was to be 'within the limits' of the GDPR. According to the Parliament´s draft, national legal provisions were to be 'in accordance with the rules' of the GDPR. Finally, the Council´s draft, which also carried through to the final version, stipulated that Member States might provide for *more specific rules* concerning processing in the employment context (Article 88(1) GDPR). Accordingly, the EU ensured a consistent terminology within most of the opening clauses. Therefore, the question remains which limits the GDPR sets to national legal provisions in the employment context.[8]

Before the final version was agreed upon, the drafts of the Commission and the Parliament had included an authorisation for the Commission to adopt

5 cf Carola Elbrecht and Michaela Schröder, 'Verbandsklagebefugnisse bei Datenschutzverstößen für Verbraucherverbände' (2015) K&R 361, 366; Gerhard (n 3) 344.

6 cf Thomas Kranig, 'Stellungnahme zum Entwurf eines „Gesetzes zur Verbesserung der zivilrechtlichen Durchsetzung von verbraucherschützenden Vorschriften des Datenschutzrechts"', 8.

7 Marita Körner, 'Die Reform des EU-Datenschutzes: Der Entwurf einer EU-Datenschutzgrundverordnung, Teil 2' (2013) ZESAR 153; Tim Wybitul and Armin Fladung, 'EU-Datenschutz-Grundverordnung - Überblick und arbeitsrechtliche Betrachtung des Entwurfs' (2012) BB 509, 514.

8 cf Körner (n 6) 154 et seq; Wybitul and Fladung (n 6) 514.

delegated acts in the employment context (Article 82(3) of both drafts). The Commission would thereby have been authorised to adopt delegated acts 'for the purpose of further specifying the criteria and requirements for the safeguards for the processing of personal data for the purposes referred to in paragraph 1'. This type of authorisation, however, drew severe criticism and did not pass the trialogue procedure. As a result, compared to what the Commission had intended in its own proposal, it will now have significantly less influence on national legislation.[9] In contrast, the European Council´s draft provided Member States with wider latitude by authorising them to determine by law the conditions under which personal data in the employment context may be processed based on the employee´s consent (Article 82(3) of the draft). This provision was included in the final version of the GDPR. Thus, the demand by some legal scholars[10] to leave extension of possible consents within the employment context to national legislation was not adopted.

The reason for limiting the opening clause in the final version remains unclear. Admittedly, the reconnection of national provisions to the minimum and maximum standards of the GDPR generally fits into the system of opening clauses. Other provisions, however, provide for substantially wider latitude to manoeuvre, eg Article 85 GDPR and Article 80(2) GDPR. Without doubt, the Council´s draft version of Article 82(3) would also have fitted coherently into the system.[11] It is probable that the wording of the final version of the GDPR will emphasize the GDPR's effect of full harmonisation.

5. Article 23 GDPR – Competence to Deviate from the Data Subjects' Rights and the Processors' Duties

According to Article 23(1) GDPR, Member States may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 12 to 22, Article 34 and Article 5, provided they meet further conditions.

The enumerated Articles from which national provisions may deviate include almost all of the data subjects' rights provided for in the GDPR. They regulate the processors' duties of notification, information, disclosure, rectification and deletion as well as the data subjects' rights to object. Article 23 therefore authorises the Member States to deviate from core contents of the GDPR.

This wide margin of manoeuvre comes with equally high requirements, as stipulated in Article 23(1) and (2) GDPR: When Member States make use of the opening clause, a respective restriction must respect the essence of the fundamental rights and freedoms and must be a necessary and proportionate measure in a democratic society to safeguard one of the objectives set forth in Article 23(1) GDPR. Such objectives include e.g. national security; the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security; and the enforcement of civil law claims.

According to Article 23(2) GDPR, any legislative measure by Member States referred to in Article 23(1) GDPR must contain specific provisions, where relevant, as to eg the purposes of the processing, the scope of the restrictions introduced and the safeguards to prevent abuse or unlawful access or transfer. Article 23 GDPR was highly controversial from the beginning, which is evident in the numerous changes to the wording.

6. Conclusion: Latitude to Manoeuvre for Member States within the GDPR

Although most opening clauses authorise Member States to provide only for *specific rules*, there are a few provisions that go far beyond that standard. Considering Articles 6(2), 23, 88 and 80(2) GDPR in particular, the GDPR provides Member States with significant space for manoeuvre, which is atypical for European regulations.

III. Possibilities for National Legislation in the Scope of the GDPR

The opening clauses of the GDPR allow national legislation for the protection of data. But each of the

9 cf Gola (n 3) 336; Körner (n 6) 153 et seq; Gerrit Hornung, 'Eine Datenschutz-Grundverordnung für Europa?' (2012) ZD 99, 105.

10 cf Gola (n 3) 335; Wybitul and Fladung (n 6) 514 et seq.

11 Körner (n 6) 153.

opening clauses concedes the national legislators only a small margin for the modification of the Regulation. At first glance, the GDPR fails to answer the question to what extent a coherent and complete framework of national data protection rules could be established, based upon these opening clauses.

There is a need to clarify whether provisions of the Regulation may be incorporated in national law (see sub-section 1. below) and to what extent cross references from national law to the GDPR are possible (see sub-section 2. below).

1. Lawfulness of National Legislation with Repetitive Content

To establish a coherent system of data protection rules on the national level it is necessary to repeat or incorporate at least parts of the GDPR.

a. Case Law of the European Court of Justice

According to the settled case law of the European Court of Justice (ECJ), national legislation which only reiterates provisions of European Regulations is contrary to the Treaties of the EU.[12] This jurisprudence is based on Article 288(2) TFEU, which declares that a regulation shall have general application and shall be directly applicable without any implementing measures in all Member States. According to the ECJ, the national incorporation or repetition of a Regulation brings into question both the legal nature of the applicable provisions and the date of their coming into force, thereby creating an obstacle to the direct effect of the Regulation and jeopardising the simultaneous and uniform application in the whole of the EU.[13]

At first glance, it appears that this case law prevents the establishment of a national data protection regime, because such a national system must be fragmentary in order to protect the direct applicability of the GDPR. But even the ECJ allowed in later judgments exceptions to that principle insofar as the purpose of Article 288(2) TFEU is not impeded.

The purpose of Article 288(2) TFEU was concretised in the judgment *Fratelli Variola S.p.A. v Amministrazione italiana delle Finanze*:[14] Italy incorporated some Community provisions in its national legislation. The ECJ was asked whether that incorporation changed the matter of the disputed provisions and thereby affected the jurisdiction of the Court. The ECJ ruled that the 'Member States are under an obligation not to introduce any measures which might affect the jurisdiction of the Court to pronounce on any question involving the interpretation of Community law', 'which means that no [national] procedure is permissible whereby the Community nature of a legal rule is concealed from those subject to it'.[15]

This purpose was supplemented by an ECJ judgment rendered in 1978. In order to guarantee the direct effect of European regulations and their simultaneous and uniform application throughout the European Union, the ECJ stated that the Member States may not adopt national measures 'by which the Community nature of a legal rule and the consequences which arise from it are concealed from the persons concerned'.[16] The ECJ furthermore granted Member States the competence to adopt detailed rules of interpretation in the event of any difficulties of interpretation, but only in so far as those national rules of interpretation have no legally binding effect.

These early ECJ judgments show that national legislation which repeats parts of a European Regulation is not forbidden in its entirety, but only as far as the general application of the Regulation would be affected. It follows from the case law of the Court that two requirements must be fulfilled. First, national measures must not lead to a lack of legal certainty. The legal nature and the origin of a European provision must be clear to the addressees. Second, the jurisdiction of the ECJ over the European provisions must be maintained, even if these European rules have been integrated into national law.

These requirements were reaffirmed by a judgement rendered in 1985. The ECJ ruled again that 'Member States are not allowed to create a situation in which the direct effect of a Community Regulation is compromised'. However, the ECJ acknowledged the possibility of national repetitive measures in cases where neither the European law nor the na-

12 cf Case 39/72 *Commission v Italian Republic – Premiums for slaughtering cows* [1973] ECR 101, para 17.

13 ibid.

14 Case 34/73 *Fratelli Variola S.p.A. v Amministrazione italiana delle Finanze* [1973] ECR 981.

15 ibid para 11.

16 ibid para 26.

tional law could be executed on its own. Special circumstances like the necessary combination of a number of provisions of European and national level could allow, 'for the sake of coherence and in order to make them comprehensible to persons to whom they apply', for the repetition of some elements of European Regulations on a national level.[17]

b. Application of the Case Law to the GDPR

In principle, ECJ case law allows national measures with repetitive content. Therefore, it must be clarified whether Member State provisions with repetitive content in the scope of the GDPR comply with the requirements of the ECJ judgments.

The utilisation of the GDPR opening clauses by Member States leads to a complex system of legal provisions. In order to execute the provisions, both of national and European law, the addressees must have a deep understanding of the relationship between European and national law. This could hardly be expected even from small and medium-sized enterprises. Therefore, the combination of the GDPR and national measures in the scope of the GDPR will constitute a sufficiently intricate system within the meaning of the 1985 ECJ judgement.

However, in order to be compatible with European Union law, the phrasing of the national measures must comply with Article 288 TFEU and the ECJ judgments rendered in 1973 and 1978: Member States must clearly label the parts of the national measures with repetitive content as such in order to clarify their European origin. This clarification should occur directly in the official wording of the national law so that the addressees can take notice of their special legal nature without effort. It also must be made clear that the application of those measures with European content is not dependent upon the legal validity of the national act but upon the European GDPR.

In addition, such a national repetition of parts of the GDPR must not affect the jurisdiction of the ECJ regarding these segments of EU law. To maintain the jurisdiction of the ECJ over EU law, Article 267 TFEU sets up the mechanism of preliminary ruling of the ECJ concerning the validity and interpretation of legislative acts of the Union. The courts of the Member States may bring all matters before the ECJ when such a question of EU law is raised. But in order to function properly, this mechanism requires the recognition of EU law even when it has been transposed to national legislation. Hence, the national provisions with European origin must be identified as such with reference to the European act.

In compliance with these requirements, national provisions with repetitive content could be put in place.

c. Special Considerations with Regard to the GDPR

The GDPR is a special Regulation among the other EU Regulations. First, it is not only labelled the 'Data Protection Regulation', but the '*General* Data Protection Regulation' (emphasis added). Second, the GDPR itself has several provisions which allow Member States to put in place national provisions (see above). Third, this possibility is expressly referred to in recital 8 of the Regulation.

aa. The Labelling of the GDPR as a General Regulation

The Labelling of the Data Protection Regulation as a General Regulation is a peculiarity among European Regulations: Article 288 TFEU only mentions 'Regulations' without any differentiation. This raises the question whether the labelling of the GDPR implies national rule making powers within the scope of application of the regulation.

The GDPR is not the first European act to be labelled a General Regulation. In recent European legal terminology, the term General Regulation was merely used to describe a European act that enables the adoption of implementing acts on the European level: For example, the now expired Regulation 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty[18] was even it its own title abbreviated as the '*General* block exemption *Regulation*' (emphasis added).

However, the term 'General Regulation' appears to be too new to refer to a specific legal concept. This

17 Case 272/83 *Commission of the European Communities v Italian Republic – Agricultural producer groups* [1985] ECR 147, para 27.

18 Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) [2008] OJ L214/3 (9 August 2008).

illustrates the different translation of the labellings of European acts in other European languages which are authentic in all the languages of the Member States: The GDPR is referred to in German as *Grundverordnung*, whereas the Regulation 800/2008 is referred to as *allgemeine Verordnung*. Vice versa, Article 1(b) of the Regulation 874/2009[19] refers to the Regulation 2100/94[20] as 'the basic Regulation' in English, *Grundverordnung* in German and *règlement de base* in French. Hence, the French and the English term are the same as in the GDPR though the English term differs.

Even within the GDPR, the term General Regulation could be interpreted not only as a hint at the possibility of national measures in the scope of application of the GDPR but it could also signify that it is necessary to clarify the GDPR's provisions through other acts on the European Level:[21] The GDPR not only delegates legislative power to the Member States, but also to the European Commission in order to regulate details in connection with the Regulation and to respond to further changes in technology.[22]

Overall, the mere labelling of the GDPR as a 'General Regulation' does not presuppose the existence of a regulatory margin or the possibility of repetitive measures on Member State level.

bb. Opening Clauses of the GDPR

In contrast, the different opening clauses of the GDPR which allow national legislation are a strong indication for the legality of Member State acts with repetitive content.

The GDPR is intended to be a comprehensive legislative act for the protection of data throughout the European Union. As a Regulation, and in contrast to a Directive, the GDPR is meant to be directly and uniformly applicable in all Member States. Insofar as provisions of the GDPR are modified by national measures in the scope of application of the GDPR's opening clauses, a complex multi-level system arises. This has far-reaching consequences for legal clarity, because those applying the law must examine each national provision to determine whether it falls within the scope of application of the opening clauses of the GDPR or is preempted by directly applicable European laws. Furthermore, they have to evaluate the exact coverage of the national act and which part of the GDPR should remain applicable. Such a task is virtually impossible for any addressee without legal expertise and therefore could not be expected of the average addressee.

In order to restore legal clarity in this multi-level system, it must be possible for the national legislator to repeat at least parts of the European Regulation in its national acts to clarify to what extent the national measures replace the European Regulation and to what extent the European Regulation remains applicable.

In this special constellation national repetitive measures must comply with the ECJ case law. As mentioned above, the ECJ has already explicitly acknowledged the possibility of such national legislation insofar as neither the European law nor the national law could be executed on its own.

Moreover, the wording of the opening clauses of the GDPR resembles the authorisations granted to Member States by other European Regulations with the intent of allowing the adoption of national implementing measures.[23] These opening clauses are directed towards the Member States as the addressees in contrast to the usual provisions of EU Regulations which are directed immediately towards private actors. Hence, such European Regulations with opening clauses and other authorisation clauses resemble European Directives which are always directed only to the Member States which have to implement them on national level.[24]

The legality of repeating EU Directive provisions in national legislative acts is acknowledged in ECJ case law.[25] Because of this similarity of EU Directives and EU Regulations containing opening clauses, this

19 Commission Regulation (EC) No 874/2009 of 17 September 2009 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office [2009] OJ L251/3 (24 August 2009).

20 Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights [1994] OJ L227/1 (1 September 1994).

21 cf Gola (n 4) 332, 333.

22 see arts 12(8), 43(8) and 92 GDPR.

23 cf art 7 et seq of Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 [2013] OJ L347/549 (20 December 2013).

24 Ines Härtel, *Handbuch Europäische Rechtsetzung* (Springer 2006) 174-176.

25 see Case C-190/90 *Commission of the European Communities v Kingdom of the Netherlands* (1992) CJEU, para 17.

ECJ jurisprudence regarding the repetition of EU Directives is likely to be transferable to the repetition of EU Regulations with opening clauses.

cc. Recital 8 of the GDPR

This argument is supported by recital No. 8 of the GDPR. According to this recital, 'Member States may, as far as necessary for coherence and for making the national provisions comprehensible to the persons to whom they apply, incorporate elements of this Regulation into their national law'.

In general, those recitals are an integral part of the respective legal act. They do not only provide legislative background but they also influence the interpretation of the provisions set out in the act. By explicitly allowing the repetition of provisions of the GDPR in national law, recital 8 underlines the special character of the GDPR in comparison to other European Regulations. It is also noteworthy that the wording of recital No. 8 appears to be inspired by the case law of the ECJ mentioned above, which underlines that this ECJ case law is applicable to the GDPR.

d. Summary: Possibilities and Limits for National Provisions with Repetitive Content

In summary, the GDPR allows Member State provisions with repetitive content. This follows from the wording of the opening clauses of the GDPR, the case law of the ECJ, and recital 8 of the GDPR.

This possibility of national repetitive measures, however, is not unlimited. Only the repetition of individual provisions is allowed by the opening clauses, the GDPR as a whole must not be transferred into a national act. Thus, the possibility for a repetition of GDPR provisions is restricted to the overlap of national and EU law in order to ensure the coherence and the comprehensibility of the legal framework for the protection of data. Therefore, the scope of the opening clauses of the GDPR limits the possibility for national measures with repetitive content.

2. Lawfulness of National Provisions with Declaratory Content

Nevertheless, Member States have another possibility of establishing a coherent data protection regime on a national level - they could also implement national provisions which only refer to EU law.

In contrast to national provisions with repetitive content, provisions with declaratory referrals are possible without any restriction because such national provisions do not affect the direct applicability of the European Regulations. On the contrary, such references to EU law enhance the visibility of the applicable provisions to those who apply the law.

Such declaratory referrals to EU law are quite common in Member State law. In Germany, for example, a footnote indicates that a German legislative act supports the implementation of an EU Directive.[26] The same applies to French legislative acts.[27]

In order to clarify the legal situation and the relationship between the GDPR and the national measures, such declaratory referrals should be used in national law. In contrast to the referrals made by previous national provisions to EU law which were vague, the referrals to the GDPR should label the particular articles and provisions of the GDPR to explicitly indicate which parts of the GDPR remain unaffected by national law.

IV. Outlook

The new Data Protection Act of the EU, which was passed as a Regulation, appears to terminate Member State data protection legislation because of its direct applicability. Upon closer examination, however, it is apparent that the GDPR does provide latitude for national data protection acts via the opening clauses. However, current Member State legislation, adopted as a complete and self-contained set of rules, must be edited substantially in order to comply with the new GDPR, which only allows the repetition of individual provisions of the GDPR in national laws.

The national law must be adjusted to the GDPR until 2018. Member States wanting to take advantage of the latitude provided by the opening clauses have challenging work ahead of them.

26 eg, see *Bundesdatenschutzgesetz* [2003] BGBl I 3/66.

27 eg Loi n° 2004-801 du 6 août 2004 relative à la protection des personnes physiques à l'égard des traitements de données à caractère personnel et modifiant la loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés [2004] JORF 182/14063.