

Guide

Ecclesiastical data protection law

– a brief introduction –



Katholisches
Datenschutzzentrum

Ecclesiastical data protection law

This guide aims to provide an insight into the implementation of ecclesiastical data protection in the archdioceses and dioceses of the Catholic Church in Germany. The Church can rely on its own ecclesiastical data protection Law. This Law and the own ecclesiastical data protection supervisory authority are made possible by the regulations of Art. 91 GDPR.

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The European General Data Protection Regulation (GDPR) provides for exceptions to its applicability for two constitutionally protected areas – the media, churches or religious communities. Article 85 of the GDPR allows member states to provide for derogations in the areas of freedom of expression and freedom of information for the processing of personal data for journalistic and other privileged purposes mentioned therein. Member States may also provide for separate supervisory structures in these areas. The second area specifically regulated in the GDPR are the data protection regulations of churches and religious communities in Art. 91 GDPR.¹

Constitutional and primary law foundations

The Grundgesetz (German Basic Law, or short GG²) protects freedom of religion in Article 4 GG. The content of this fundamental right has also found its way into the Charter of Fundamental Rights of the European Union (CFR) in Art. 10 (1) CFR.

The protection of religious freedom from Article 4 GG is complemented by Article 140 GG, which transfers the provisions of the regulations of Articles 136 to 139 and 141 of the Weimarer Reichsverfassung (German Constitution of 11 August 1919 – Weimar Constitution, or short WRV) into the Basic Law. This implements public entity status for some religious communities and enshrines a constitutional guarantee of freedom of religion

* This text is a revised and supplemented English version of the article in the journal *Datenschutznachrichten* (DANA), issue 3/2022, page 158 et seqq. (published by the Deutsche Vereinigung für Datenschutz e. V.).

¹ This article looks at the data protection laws enacted by the (arch)dioceses in Germany on the basis of the model draft of the *Kirchlichen Datenschutzgesetz* (Ecclesiastical Data Protection Act, or short KDG) as amended by the unanimous resolution of the plenary assembly of the Association of German Dioceses of 20 November 2017. This consideration is complemented by references to the Ecclesiastical Data Protection Act of the Protestant Church in Germany (EKD Data Protection Act – DSG-EKD) of 15 November 2017. Data protection regulations of other churches or religious communities in Germany or in other European countries are not considered in this article. References to other ecclesiastical data protection laws (without claiming to be complete) are collected, for example, by *Felix Neumann* in his blog: <https://artikel91.eu/rechtssammlung/>.

² The Grundgesetz is the constitutional law in Germany.

in the Basic Law,³ which, among other things, enables religious communities to organise and administer their affairs independently within the limits of the laws applicable to all (Art. 140 GG in conjunction with Art. 137 (3) WRV).

The General Data Protection Regulation (GDPR) takes up this legal framework on the basis of Art. 17 of the Treaty on the Functioning of the European Union (TFEU) and implements it in Art. 91 GDPR. Article 91 of the GDPR enables the churches to continue to apply their own existing data protection regulations, provided that these are brought into line with the provisions of the GDPR. Likewise, Art. 91 GDPR opens up the possibility of installing their own data protection supervisory authority, which must fulfil the requirements of Chapter VI of the GDPR. Thus, this regulation respects the individual's right to the protection of personal data and the status of religious societies under Art. 140 GG in conjunction with Art. 137 (3) WRV, equally (corporate religious freedom).⁴

Through the provision of Art. 91 of the GDPR, the European legislator makes it possible for the Church to continue to maintain its leeway under German state-church law despite the central European legal requirement. In this way, the European legislator complies with the requirements laid down in Art. 17 TFEU. According to this provision, the European Union shall respect and not prejudice the status of churches, religious associations or communities under national law in the Member States (Art. 17 (1) TFEU). The provision takes the fact into account, that European law has an increasingly strong impact on churches and can affect them particularly in their „*proprium*“.⁵

Art. 91 GDPR thus provides both the legal framework for the current Kirchliches Datenschutzgesetz (Ecclesiastical Data Protection Act, or short KDG) and for the establishment of the Catholic Church's own data protection supervisory authorities.

³ See also Hense, Art. 91 of the General Data Protection Regulation and the Church's Right to Self-Determination, in Pau (ed.), Kirchlicher Datenschutz – gewachsener Baustein kirchlicher Selbstverwaltung, Katholisches Datenschutzzentrum, Dortmund 2021, p. 35 et seqq. (available online in the Infothek at www.katholisches-datenschutzzentrum.de).

⁴ Hense in Sydow, Europäische Datenschutzgrundverordnung, 2nd ed. 2018, Art. 91, marginal no. 1 with further explanations.

⁵ Cf. Streinz in Streinz, EUV/AEUV, 3rd ed. 2018, Art. 17 TFEU, para. 7 et seq. and 12.

Article 91 GDPR as the starting point of today's ecclesiastical data protection

Art. 91 (1) GDPR provides that a church or a religious association or community which applies comprehensive rules in a Member State for the protection of individuals with regard to the processing of their data at the time of the entry into force of the GDPR may continue to apply those rules, provided that those rules are brought in line with the GDPR.

These conditions are fulfilled by the data protection regulations of the Catholic Church in Germany.⁶

The German (arch)dioceses had already created their own ecclesiastical data protection laws at the end of the 1970s with the Anordnung über den kirchlichen Datenschutz (Directive about the ecclesiastical data protection, or short KDO).⁷ As a result, they can look back on a comparably long application of data protection regulations, equal to the legislator of the Federal Data Protection Act.

The data protection laws of both the Catholic Church and the Protestant Church in Germany (EKD) have been repeatedly adapted in response to the developments of the Federal Data Protection Act over the years. Therefore, the Catholic Church and the EKD were able to draw on comprehensive data protection regulations when the GDPR came into force in May 2016.⁸

⁶ This also applies to the regulations of the Protestant Church in Germany (EKD) on data protection.

⁷ On the development of ecclesiastical data protection law, cf. *Pau*, Kirchlicher Datenschutz von den Anfängen bis zum KDG, in *Pau* (ed.), Kirchlicher Datenschutz – gewachsener Baustein kirchlicher Selbstverwaltung, Katholisches Datenschutzzentrum, Dortmund 2021, p. 51 et seqq. (available online in the Infothek at www.katholisches-datenschutzzentrum.de). The data protection law of the EKD has taken a comparable development.

⁸ *Hense* in *Sydow*, Europäische Datenschutzgrundverordnung, 2nd ed. 2018, Art. 91, marginal no. 19; *Jacob* in *Auernhammer*, DSGVO BDSG, 7th ed. 2020, Art. 91, marginal no. 12.

Before May 2018, both the Catholic Church and the Protestant Church recognized the need to adapt their own existing data protection regulations, so that the requirement of Article 91 (1) of the GDPR, which necessitates that the regulations must be brought into line with the GDPR, was also met.⁹

The Ecclesiastical Data Protection Act (KDG)

In the Catholic Church, the legislative power for ecclesiastical laws lies with the individual (arch)bishops for their respective (arch)dioceses.¹⁰ For regulations that are applied to the Church internationally, legislative power lies with the Holy See in Rome.

The Ecclesiastical Data Protection Act (KDG) was therefore enacted as a law by the 27 diocesan bishops for their respective (arch)diocese and published in the corresponding official church journal. This was done on the basis of a model version drawn up by the Association of German Dioceses – the legal body of the German Bishops' Conference – in order to achieve uniform implementation of the data protection regulations.¹¹ In addition to the KDG, an ordinance regulating the implementation of the KDG (KDG-DVO) was also issued by the individual (arch)dioceses, which contains specific explanations for the provisions of the KDG.¹²

A look at the table of contents of the KDG (as well as the DSGVO-EKD) shows that the law is somewhat shorter than the GDPR. The ecclesiastical legislator has not adopted the parts of the GDPR that were not relevant to its area of regulation. For example, the chapter on the European Data Protection Board and the cooperation of data protection supervisory authorities at the European level is missing, as this was not to be regulated by the church legislator – not even in the sense of bringing the regulation in line with the GDPR.

⁹ *Herbst* in Kühling/Buchner, DS-GVO BDSG, 3rd ed. 2020, Art. 91, marginal no. 15a; *Jacob* in Auernhammer, DSGVO BDSG, 7th ed. 2020, Art. 91 marginal no. 13.

¹⁰ Some special features – e.g. for religious congregations under papal law – will not be discussed in detail here.

¹¹ The model version can be downloaded as part of Working Aid No. 320 on the website <https://www.dbk.de/themen/kirche-staat-und-recht/datenschutz-faq> of the German Bishops' Conference.

¹² The sample text of the KDG-DVO is also included in the German Bishops' Conference's working aid no. 320 (see fn. 11).

A second look at the ecclesiastical law shows that the structure of the law is similar to the GDPR and that many provisions have been adopted from the GDPR with identical content. This is where the advantages of the consistency of the Church's regulations with the GDPR become apparent for the legal user. The legal user finds many familiar regulations and can, therefore, also use the commentary literature on the GDPR in many places.¹³ A look at the law also reveals that the ecclesiastical legislator has also taken the implementation of the European provisions of the GDPR which were adapted in national data protection law, namely the new version of the Federal Data Protection Act, into account. Therefore, fragments of regulations of the new Federal Data Protection Act can also be found in the ecclesiastical law.

However, since Art. 91 of the GDPR doesn't require a complete adoption of the GDPR, there are also differences to the GDPR which were inserted due to specific church peculiarities.

There are provisions where the reason for the church-specific regulation is immediately obvious, such as the regulation in § 2 (3) KDG, which reminds us that the preservation of the secrecy of confession and pastoral care and other duties of confidentiality mentioned there remain unaffected, or § 14 KDG-DVO, which additionally regulates the handling of personal data that are subject to the secrecy of confession or pastoral care. The definition of „special categories of personal data“ in § 4 no. 2 KDG also shows a difference. Membership of a church or religious community does not fall into the group of special categories of personal data in the Ecclesiastical Data Protection Act (cf. § 4 no. 2 sentence 2 KDG), as this is a datum that inevitably arises in many processing operations of personal data in the ecclesiastical sphere (e.g. entry into the baptismal register).

In the case of other regulations, the special ecclesiastical feature that necessitates a deviation from the wording of the GDPR may not always be immediately apparent. In some cases, the content of the regulations was taken over from the preceding law, the Anordnung über den kirchlichen Datenschutz (KDO), or an attempt was made – within the bounds of Art. 91 GDPR – to emphasize ecclesiastical features or to make linguistic adjustments.

¹³ There is also a separate commentary for the KDG: Sydow, Kirchliches Datenschutzrecht, Baden-Baden 2021. A commentary on the DSG-EKD is in preparation.

The KDG, with its written form requirement in § 8 (2) KDG, appears stricter than the GDPR, which stipulates in Art. 7 (1) GDPR that the controller must be able to prove consent. It is questionable, to which extent this provides for major differences in the day to day handling of consent. On one hand, § 8 (2) KDG itself provides for „another form“ of consent due to special circumstances. On the other hand, the obligation to provide proof in Art. 7 (1) GDPR also leads to a textual or written version of consent in many cases.

Scope of application of the KDG

Section 3 of the KDG includes all ecclesiastical bodies in the scope of the KDG, regardless of whether they are public institutions (e.g. dioceses or parishes) or Caritas institutions. Other bodies of the Church, foundations, establishments, workshops, institutions and other church legal entities regardless of their legal form are also included in the scope of application. This makes it clear that all ecclesiastical institutions, not only the ecclesiastical „core area“ of the constitutionally guaranteed church, fall within the scope of the KDG. Therefore, ecclesiastical hospitals, ecclesiastical care facilities, ecclesiastical schools or ecclesiastical day-care centres are also among the institutions that apply the KDG.

Data protection officers

For the area of the constitutional church (i.e. the (arch)dioceses and the parishes or their associations at the middle administrative level), the KDG requires the appointment of data protection officers (cf. § 36 (1) KDG). The other ecclesiastical bodies must appoint one pursuant to § 36 (2) KDG if either at least ten persons¹⁴ are permanently engaged in the processing of personal data, or the core activity of the controller consists in the performance of processing operations which require extensive regular and systematic monitoring of the data subjects, or the core activity consists in the extensive processing of special categories of personal data, or of data relating to criminal convictions and offences pursuant to § 12 KDG.

¹⁴ The ecclesiastical legislator has not yet implemented the amendment to § 38 (1) BDSG which raises the threshold for the mandatory appointment of a company data protection officer to 20 persons. It is not yet known whether this will be considered as part of the current evaluation of the church law.

The company data protection officers support the management of the institutions in fulfilling their duties to adhere with data protection regulations and work towards their compliance. In order for the data protection officers to be able to fulfil their duties, they must be integrated into the operational processes and information flows. The data protection officer shall enjoy protection against dismissal in accordance with § 37 (4) KDG, unless extraordinary dismissal is considered.

Data subject rights

The KDG regulates the rights of data subjects to obtain information about their own data in more detail than before. The right to information in § 17 KDG enables the person to obtain detailed information about the data processed about him or her. The right to information is complemented by the right to rectification of the data stored about one's person by the data controller, § 18 KDG.

The data subject can assert his or her right to have data deleted in accordance with § 19 KDG. However, the conditions and exceptions to this right must be observed. The right to data portability under § 22 KDG is intended to ensure that a data subject has the possibility to transfer his or her data, which he or she has provided to the controller, to another controller. To also bear in mind is the right of the data subject to object to the processing of his or her data under certain conditions, § 23 KDG.

The rights of the data subject are further complemented by the obligation of the data controller to inform the data subject of the contents set out in §§ 15 and 16 KDG at the time of collection of personal data.

Ecclesiastical data protection supervisory authorities

Due to the comprehensive data protection regulations of the KDG and the DSGVO-EKD in accordance with Art. 91 (1) DSGVO, both churches also have the possibility to establish their own ecclesiastical data protection supervisory authorities in accordance with Art. 91 (2) GDPR. On the Catholic side, the Diocesan Data Protection Commissioners have been appointed in the individual (arch)dioceses as heads of the data protection supervisory authorities (§§ 42 KDG et seq.). Several (arch)dioceses have made use of

the possibility to appoint a joint diocesan data protection commissioner as data protection supervisory authority for their respective (arch)dioceses. For example, the (arch)dioceses of North Rhine-Westphalia have appointed a joint data protection commissioner who is the head of the Catholic Data Protection Centre, which was created as a public institution.¹⁵

Just as ecclesiastical data protection law precedes over the GDPR under the conditions of Art. 91 (1) GDPR, the ecclesiastical data protection commissioners take the place of the state data protection commissioners for the ecclesiastical institutions subject to ecclesiastical data protection under the conditions of Art. 91 (2) GDPR. In doing so, they perform – just like the state data protection commissioners – the broad range of tasks of a data protection supervisory authority. Since all German (arch)dioceses have taken advantage of the opportunity to install their own data protection supervisory authorities, the diocesan data protection commissioners are the responsible authorities when it comes to data protection complaints against ecclesiastical institutions, for example.

In order to achieve the most uniform possible interpretation of the ecclesiastical regulations on data protection by the ecclesiastical supervisory authorities, the diocesan data protection commissioners agree on central issues, pass joint resolutions, and formulate common positions in the Conference of Diocesan Data Protection Commissioners.¹⁶ In addition, there is a close exchange with the data protection supervisory authorities of the Protestant Church and the state data protection supervisory authorities.

¹⁵ The 27 (arch)dioceses have appointed five joint data protection commissioners with offices in Bremen, Schönebeck, Dortmund, Frankfurt am Main and Munich. In addition, there is a joint data protection supervisory authority for the religious congregations under papal law in Germany. The EKD has established a data protection supervisory authority in the form of the Commissioner for Data Protection with its headquarters in Hanover and four branch offices, which the vast majority of the regional churches and diaconal organisations have joined.

¹⁶ The resolutions are available on the websites of the ecclesiastical data protection supervisory authorities, e.g. at www.katholisches-datenschutzzentrum.de under the heading Infothek.

Ecclesiastical data protection courts

The GDPR provides that effective legal remedies must exist against decisions of the data protection supervisory authority as well as against the data controllers or processors directly (cf. Art. 78, 79 GDPR). This requirement has been transposed into church law in § 49 KDG and § 47 DSG-EKD.¹⁷

In the non-ecclesiastical area, the administrative courts are responsible for these legal remedies according to the GDPR. Within the scope of the DSG-EKD, these disputes are assigned to the ecclesiastical administrative courts of the EKD (cf. § 47 DSG-EKD).

Since there is no ecclesiastical administrative jurisdiction in the area of the German Bishops' Conference, the Conference has, parallel to the entry into force of the KDG, created an ecclesiastical court which is specifically assigned to handle the aforementioned disputes.

The Kirchliche Datenschutzgerichtsordnung (Ecclesiastical Data Protection Court Rules, or short KDSGO) regulate the establishment of ecclesiastical courts specifically for disputes arising from § 49 KDG. The KDSGO provides for an original and appellate court. The Interdiözesane Datenschutzgericht (Interdiocesan Data Protection Court, or short IDSG) has the original jurisdiction. An appeal against the decisions of the IDSG can then be made to the Datenschutzgericht der Deutschen Bischofskonferenz (Data Protection Court of the German Bishops' Conference, or short DSG-DBK).

¹⁷ While § 47 DSG-EKD still requires a preliminary procedure, at least in part, the KDG does not require a preliminary procedure.

Professors, judges and other experts with many years of experience in data protection have been recruited as judges for both courts, ensuring a high quality of the courts' work. Decisions of the courts are partly published on the website of the German Bishops' Conference.¹⁸

Conclusion

The Catholic Church in Germany – just like the Protestant Church in Germany – has fulfilled the requirements of Art. 91 GDPR with the update of the Ecclesiastical Data Protection Act before 25 May 2018 and has established its own data protection supervisory authorities for this purpose, which fulfill the conditions laid down in Chapter VI of the GDPR. Judicial review is carried out by the data protection courts specifically established for this purpose at the level of the German Bishops' Conference.

¹⁸ Further information on both courts, including the decisions, can be found at <https://www.dbk.de/themen/kirche-staat-und-recht/kirchliche-gerichte-in-datenschutzangelegenheiten/>. An initial look at the work of the court is contained in *Sydow*, Die Datenschutzgerichte der katholischen Kirche – erste Erfahrungen und Perspektiven, in Pau (ed.), Ein Jahr Gesetz über den Kirchlichen Datenschutz (KDG) – Rückblick und Ausblick, Katholisches Datenschutzzentrum, Dortmund 2020, p. 53 et seqq. (available online in the Infothek at www.katholisches-datenschutzzentrum.de). An overview of the first published decisions is contained in the article by *Joachimski/Melzow*, Die kirchliche Datenschutzgerichtsbarkeit, in Pau (ed.), Kirchlicher Datenschutz – gewachsener Baustein kirchlicher Selbstverwaltung, Katholisches Datenschutzzentrum, Dortmund 2021, p. 91 et seqq. (available online in the Infothek at www.katholisches-datenschutzzentrum.de).

Appendix

The ecclesiastical data protection supervisory authorities of the (arch)dioceses in Germany



Ecclesiastical Data Protection Act (KDG): Sources in official journals¹⁹

(Arch-)Diocese	Official Journal of	page
Aachen	1 March 2018	78
Augsburg	9 April 2018	378
Bamberg	15 March 2018	162
Berlin	1 March 2018	24
Dresden-Meißen	9 March 2018	103
Eichstätt	17 April 2018	193
Erfurt	20 March 2018	2
Essen	19 January 2018	33
Freiburg	23 March 2018	185
Fulda	8 May 2018	49
Görlitz	8 May 2018	1
Hamburg	23 January 2018	2
Hildesheim	23 April 2018	98
Köln	31 January 2018	13
Limburg	15 January 2018	295

¹⁹ Content taken from Working Aid No. 320 of the German Bishops' Conference; Appendix I pages 187–188 (<https://www.dbk-shop.de/de/publikationen/arbeitshilfen/kirchliches-datenschutzrecht.html>)

(Arch-)Diocese	Official Journal of	page
Magdeburg	1 February 2018	Appendix
Mainz	26 February 2018	21
München und Freising	30 April 2018	
Münster	1 February 2018	56
Offizialat Vechta	15 May 2018	166
Osnabrück	19 April 2018	100
Paderborn	6 February 2018	48
Passau	16 April 2018	99
Regensburg	30 January 2018 ²⁰	17
Rottenburg-Stuttgart	5 March 2018	69
Speyer	22 March 2018	746
Trier	1 April 2018	118
Würzburg	28 March 2018	255
VDD Official Journal of Mün- chen und Freising	31 May 2018	434

The KDG was put into force in all (arch)dioceses on 24.05.2018.

²⁰ Supplemented by the official journal of 10 May 2019, p. 58 and entered into fore 1 July 2019.

