

GERMANY

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Ad Hoc Information Report

Data protection: Redress mechanisms and their use

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German Institute for Human Rights

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Mapping of Redress mechanisms in the area of data protection

Redress Mechanism Number	Type of possible outcomes of procedure	First Instance	Total Number of times this procedure was initiated in 2009 (please provide source of information in footnote)	Total Number of times this procedure was initiated in 2010 (please provide source of information in footnote)	Total Number of times this procedure was initiated in 2011 (please provide source of information in footnote)
1	Formal objection	Data protection authorities	Federal DPA: 30 ¹		Not yet available.
			Bavaria: 9 ²	Bavaria: 17 ³	Bavaria: 26 ⁴
			Brandenburg : 3 ⁵	Brandenburg : 7 ⁶	Brandenburg : 12 ⁷
2	Access to data	For the public sector: the entity possessing the data/ in case of refusal or omission the administrative/ finance or social courts depending on the subject matter; For the private sector: the local civil courts	Not recorded.	Not recorded.	Not recorded.
3	Rectification/ Erasure/ Blocking	For the public sector: local administrative courts;	Not recorded.	Not recorded.	Not recorded.

¹ Germany, Federal Commissioner on Data Protection and Freedom of Information (*Bundesbeauftragter für den Datenschutz und die Informationsfreiheit, BfDI*), Annual Report 2009/10, Annex 3.

² Germany/Bavaria, Bavarian Commissioner on Data Protection (*Bayrischer Landesbeauftragter für den Datenschutz*), letter of 29 May 2012.

³ Ibid.

⁴ Ibid.

⁵ Germany/Brandenburg, Commissioner for Data Protection and the Freedom of Information (*Beauftragte für Datenschutz und Informationsfreiheit*), letter of 25 May 2012.

⁶ Ibid.

⁷ Ibid.

		for the private sector: local civil courts			
4	Compensation/ommission	Regional civil courts / Higher regional civil courts / Criminal courts in case that the violation is criminally prosecuted	Not recorded.	Not recorded.	Not recorded.
5	Administrative fines	Data protection authorities of the <i>Länder</i>	Berlin: 19 ⁸	Berlin: 21 ⁹	Berlin: 11 ¹⁰
			Hessen: 11 ¹¹	Hessen: 14 ¹²	Hessen: Not yet available.
			Saxony: 47 with regard to public authorities (reporting period 1 January 2009-31 March 2011) ¹³ ; 24 with regard to private entities (reporting period: 1 January 2009-31 December 2010) ¹⁴ .		Saxony: 18 ¹⁵
6	Criminal sanction: Imprisonment/ Penal Fine/ Warning	Local criminal courts / Higher regional criminal courts	See below under 1.	See below under 1.	See below under 1.
7	Prohibition	Data protection authorities	Not recorded.	Not recorded.	Not recorded.
8	Revocation of license/ permit/ aid	Authority issuing the permission or license	Not recorded.	Not recorded.	Not recorded.
9	Exclusion from public procurement	Authority competent for public procurement	Not recorded.	Not recorded.	Not recorded.

⁸ Germany/Berlin, Berlin Commissioner for Data Protection and the Freedom of Information (*Berliner Beauftragte für Datenschutz und Informationsfreiheit*), letter of 24 May 2012.

⁹ Ibid..

¹⁰ Ibid..

¹¹ Germany/Hesse, Commissioner on Data Protection in Hessen (*Datenschutzbeauftragter in Hessen*), letter of 22 May 2012.

¹² Ibid.

¹³ Germany/ Saxony, Saxon Commissioner on Data Protection (*Sächsischer Datenschutzbeauftragter*), Report on the public sector, No. 15, 220.

¹⁴ Germany/ Saxony, Saxon Commissioner on Data Protection (*Sächsischer Datenschutzbeauftragter*), Report on the private sector, No. 5, 147.

¹⁵ Germany/Saxony, Saxon Commissioner on Data Protection in Hessen (*Sächsischer Datenschutzbeauftragter*), letter of 22 May 2012.

	procedure				
10	Licensing	The employer; for the public sector the <i>Land</i> or the <i>Bund</i> represented by the authority/entity the person concerned works for	Not recorded.	Not recorded.	Not recorded.

Additional comments and references to the table:

1. Redress mechanism 1:

The use of formal objection varies widely along the *Länder*.¹⁶ Please, note that some data protection authorities like the Bavarian Commissioner for Data Protection and the federal DPA are competent for data protection violations of public entities only. Many other DPAs have gained additional competences for the private sector during the last two years only. For a detailed overview see Germany's Annual FRA Report 2011, 3.2.1.

2. Redress Mechanism 5:

According to unofficial statistic made by the Federal Commissioner on Data Protection, administrative fines were imposed in 80 cases in 2009. Comparable data for 2010, 2011 are not available.¹⁷ The Federal Commissioner himself has no power to impose fines.

Please, note that not all *Länder* have the power to impose fines. In some *Länder* like Brandenburg the mandate was only recently extended to fines.

3. Redress mechanism 6:

There is no total number of cases pending before criminal courts. There are numbers on cases dealt with by the prosecution and there are numbers on convictions. These refer to violations of provisions enshrined in the German Criminal Code (*Strafgesetzbuch*) only. There are many more criminal law provisions outside the German Criminal Code, including in the data protection acts at the federal and local level.

Convicts	2009	2010	2011
Under general criminal procedure (<i>Strafgesetzbuch</i>)	524	533	Not available before October 2012.
Under the Juvenile Justice Act (<i>Jugendgerichtsgesetz</i>)	96	94	Not available before October 2012.

¹⁷ Germany, Federal Commissioner on Data Protection and Freedom of Information (*Bundesbeauftragter für den Datenschutz und die Informationsfreiheit*), letter of 12. September 2011 (pointing to the unofficial character of the data collection).

General Criminal Law (Procedure)

	2009	2010	2011
Sentenced	392	408	Not available before October 2012.
Imprisonment	52	39	Not available before October 2012.
Criminal fine	340	369	Not available before October 2012.
Warning and deferment	12	13	Not available before October 2012.
Confiscation, deprivation orders	35	42	Not available before October 2012.

All data derived from:

The Federal Office of Statistics (*Statistisches Bundesamt*) 2010, www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/StrafverfolgungVollzug/Strafverfolgung2100300107004.pdf?__blob=publicationFile, p. 32, 64, 162, 202-204, 250, 336.

The Federal Office of Statistics (*Statistisches Bundesamt*) 2009, www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/StrafverfolgungVollzug/Strafverfolgung2100300097004.pdf?__blob=publicationFile, p. 32, 96-97, 340.

Juvenile Justice Procedure

	2009	2010	2011
Convictions	52	57	Not available before October 2012.
Imprisonment	1	1	Not available before October 2012.

Germany, Federal Office for Statistics (*Statistisches Bundesamt*), www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/StrafverfolgungVollzug/Strafverfolgung2100300107004.pdf?__blob=publicationFile, p. 282-283.

Cases of alleged violation of data protection laws (federal and local) recorded by the police:

	2009	2010	2011
Total numbers	823	748	571
Cases related to the Federal Data Protection Act	515	517	357
Cases related to the local data protection acts	308	231	214

Germany, Federal Police Office (*Bundeskriminalamt, BKA*), Police Crime Statistic 2010 (Yearbook), www.bka.de/nm_193236/DE/Publikationen/PolizeilicheKriminalstatistik/pks_node.html?_nnn=true, p. 53.

Germany, Federal Police Office (*Bundeskriminalamt, BKA*), Police Crime Statistic 2010 (Summary Report), www.bka.de/nm_193236/DE/Publikationen/PolizeilicheKriminalstatistik/pks_node.html?_nnn=true, p. 63.

4. For the data not available see:

Germany, Federal Office of Statistics (*Statistisches Bundesamt*), letter of 16 May 2012.

Germany, Federal Commissioner on Data Protection and Freedom of Information (*Bundesbeauftragter für den Datenschutz und die Informationsfreiheit*), letter of 25 May 2012.

Germany/Baden Wuerttemberg, Commissioner on Data Protection in Baden Wuerttemberg (*Datenschutzbeauftragter in Baden-Württemberg*), letter of 30 May 2012.

Germany/Bavaria, Bavarian Commissioner on Data Protection (*Bayrischer Landesbeauftragter für den Datenschutz*), letter of 29 May 2012.

Germany/Berlin, Berlin Commissioner for Data Protection and the Freedom of Information (*Berliner Beauftragter für Datenschutz und Informationsfreiheit*), letter of 24 May 2012.

Germany/Brandenburg, Commissioner for Data Protection and the Freedom of Information (*Beauftragte für Datenschutz und Informationsfreiheit*), letter of 25 May 2012.

Germany/Hesse, Commissioner on Data Protection in Hessen (*Datenschutzbeauftragter in Hessen*), letter of 22 May 2012.

Germany/Saxony, Saxon Commissioner on Data Protection in Hessen (*Sächsischer Datenschutzbeauftragter*), letter of 22 May 2012.

Detailed information

Ad Redress Mechanism Number 1 (Formal objection):

- Range of possible outcomes

Not applicable.

- Legal basis:

Sect. 38 (5.1.) Federal Data Protection Act (*Bundesdatenschutzgesetz, BDSG*).

As to the data protection acts of the *Länder*: Baden Wuerttemberg: Sect. 30 (2); Bavaria: 31; Berlin: Sect. 26; Brandenburg: Sect. 25; Bremen: Sect. 23; Hamburg: Sect. 25; Hesse: Sect. 27; Mecklenburg-Western Pomerania: Sect. 32; Lower Saxony: Sect 23; North Rhine Westphalia: Sect. 24; Rhineland-Palatinate: Sect. 25; Saarland: Sect. 27; Saxony: Sect. 29; Saxony-Anhalt: Sect. 24; Schleswig Holstein: Sect. 42; Thuringia: Sect. 39.

- Type of procedure:

Procedure is initiated by the DPAs. There is no individual right to a formal objection.

- Possibilities of appeal: 2nd, 3rd and further instances

No.

- Burden of proof: please list what the complainant needs to prove

Lies with the DAPs.

- Available mechanism to lower the burden of proof:

None.

- Requirement of legal representation:

Not applicable.

- Is there free legal advice/representation available from a public body?

Not applicable.

- Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?

Not applicable.

- Cost of procedure: please provide information on the average cost of the procedure

Not recorded.

- Average duration of procedure: please provide available information

Not recorded.

- Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011

Not recorded.

Ad Redress Mechanism Number 2 (Access to data):

- Range of possible outcomes

Not applicable.

- Legal basis:

Sect. 19 Federal Data Protection Act.

As to the data protection acts of the *Länder*: Baden Wuerttemberg: Sect. 21; Bavaria: 10; Berlin: Sect. 20; Brandenburg: Sect. 18; Bremen: Sect. 21; Hamburg: Sect. 18; Hesse: Sect. 18; Mecklenburg-Western Pomerania: Sect. 24; Lower Saxony: Sect. 16; North Rhine Westphalia: Sect. 18; Rhineland-Palatinate: Sect. 18; Saarland: Sect. 20; Saxony: Sect. 18; Saxony-Anhalt: Sect. 15; Schleswig Holstein: Sect. 26; Thuringia: Sect. 13.

Moreover, there are uncountable provisions granting access to personal data in specific contexts, such as the Federal Intelligence Act (*Gesetz über den Bundesnachrichtendienst*), Sect. 7.

- Type of procedure:

Depends on whether a private or a public entity in exercise of its governmental function is the author of the violation. In the last case it is an administrative procedure; otherwise it is a civil law procedure. The procedure is initiated by the alleged victim.

- Possibilities of appeal:

Yes. There are no special rules applicable to data protection cases. The general rules apply.

In civil court procedure: As a general rule appeal on points on facts and law and appeal on points of law are admissible in cases of general interest or the court has declared an appeal admissible or in case of manifest errors. In civil law a second instance (appeal on points of law and facts) shall be admissible too if the value of the subject matter of the appeal is greater than €600 (Sect. 511, 546, 547 Civil Procedure Code).

In administrative court procedure an appeal on points of law and facts is admissible against administrative court judgments if serious doubts exist as to the correctness of the judgment or if the case has special factual or legal difficulties or if the case is of fundamental significance, or if the judgment derogates from a ruling of the Higher Administrative Court, of the Federal Administrative Court, of the Joint Panel of the supreme courts of the Federation or of the Federal Constitutional Court, and is based on this derogation, or if a procedural shortcoming subject to the judgment of the court of appeal on points of fact and law is claimed and applies on which the ruling can be based (Sect. 124 Administrative Court Procedure Code). The appeal on points of law shall only be admitted if the legal case is of fundamental significance, the judgment deviates from a ruling of the Federal Administrative Court, of the Joint Panel of the supreme courts of the Federation or of the Federal Constitutional Court and is based on this deviation, or a procedural shortcoming is asserted and applies on which the ruling can be based (Sect. 132).

As an exceptional remedy the constitutional courts (local and federal) may be seized if the plaintiff/claimant claims to be violated in his/her basic rights. As the right to data protection is protected under the constitution this way is generally open in cases where data protection rules were violated.

- Burden of proof:

Only a request is required.

- Available mechanism to lower the burden of proof:

None.

- Requirement of legal representation:

No. In the 2nd or 3rd instance only. In the 1st instance only before the higher regional courts.

- Is there free legal advice/representation available from a public body (please specify the public body)?

Free legal advice prior to courts proceedings can be obtained by the data protection commissioners (local and federal). They have no power to represent the claimant before the court. Free legal representation can be obtained in case of need in accordance with the general rules on legal aid.

- Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?

No. It is part of the current political discussion.

- Cost of procedure: please provide information on the average cost of the procedure

Access to data as such is free. For the federal level, see Sect. 19 (7) Federal Data Protection Act. As to the court procedure the general rules apply. Legal aid can be granted in case of need.

- Average duration of procedure:

Not recorded. As to the average duration of proceedings before civil courts and administrative courts in general, please see Germany's Annual FRA Report 2011 at para. 439-440.

- Outcomes:

Not recorded.

Ad Redress Mechanism Number 3 (Rectification, erasure, blocking)

- Range of possible outcomes:

Not applicable.

- Legal basis:

Sect. 20 Federal Data Protection Act.

As to the data protection acts of the *Länder*: Baden Wuerttemberg: Sect. 22-24; Bavaria: 11, 12; Berlin: Sect. 17; Brandenburg: Sect. 19; Bremen: Sect. 22; Hamburg: Sect. 19; Hesse: Sect. 19; Mecklenburg-Western Pomerania: Sect. 13; Lower Saxony: Sect 17; North Rhine Westphalia: Sect. 19; Rhineland-Palatinate: Sect. 19; Saarland: Sect. 21; Saxony: Sect. 19-21; Saxony-Anhalt: Sect. 16; Schleswig Holstein: Sect. 28; Thuringia: Sect. 14-16.

- Type of procedure:

Depends on whether a private entity or a public entity in exercise of public functions is the author of the alleged violation. In the latter case, it is an administrative procedure, otherwise a civil procedure. The procedure is initiated by the alleged victim.

- Possibilities of appeal: 2nd, 3rd and further instances

Yes. There are no special rules applicable to data protection cases. The general rules apply.

In civil court procedure: As a general rule appeal on points on facts and law and appeal on points of law are admissible in cases of general interest or the court has declared an appeal admissible or in case of manifest errors. In civil law a second instance (appeal on points of law and facts) shall be admissible too if the value of the subject matter of the appeal is greater than €600 (Sect. 511, 546, 547 Civil Procedure Code).

In administrative court procedure an appeal on points of law and facts is admissible against administrative court judgments if serious doubts exist as to the correctness of the judgment or if the case has special factual or legal difficulties or if the case is of fundamental significance, or if the judgment derogates from a ruling of the Higher Administrative Court, of the Federal Administrative Court, of the Joint Panel of the supreme courts of the Federation or of the Federal Constitutional Court, and is based on this derogation, or if a procedural shortcoming subject to the judgment of the court of appeal on points of fact and law is claimed and applies on which the ruling can be based (Sect. 124 Administrative Court Procedure Code). The appeal on points of law shall only be admitted if the legal case is of fundamental significance, the judgment deviates from a ruling of the Federal Administrative Court, of the Joint Panel of the supreme courts of the Federation or of the Federal Constitutional Court and is based on this deviation, or a procedural shortcoming is asserted and applies on which the ruling can be based (Sect. 132).

As an exceptional remedy the constitutional courts (local and federal) may be seized if the plaintiff/claimant claims to be violated in his/her basic rights. As the order to rectify, erase or the blocking of private websites regularly infringes on the general freedom of action and other basic rights this way is generally open in cases where data protection rules were violated.

- Burden of proof / Available mechanism to lower the burden of proof:

The data processing or recording authority / entity has to prove the accuracy of the data (Sect. 22 (4) Federal Data Protection Act).

- Requirement of legal representation:

No as to administrative and 1st instance court procedures before local administrative courts. In the 2nd or 3rd instance yes.

- Is there free legal advice/representation available from a public body?

Free legal advice prior to courts proceedings can be obtained by the data protection commissioners (local and federal). They have no power to represent the claimant before the court. Free legal representation can be obtained in case of need in accordance with the general rules on legal aid.

- Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?

No.

- Cost of procedure: please provide information on the average cost of the procedure

Not recorded.

- Average duration of procedure: please provide available information.

Not recorded. As to the average duration of proceedings before civil courts and administrative courts in general, please see Germany's Annual FRA Report at para. 439-440.

- Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011

Not recorded.

Ad Redress Mechanism Number 4 (Compensation/ omission):

- Range of possible outcomes:

In general, the outcome depends on the substantial damage inflicted. The compensation of immaterial damages is an exception which is granted in cases of a serious violation of the general right to privacy or where the law explicitly provides for such an exception (Sect. 253 (2) Civil Code (*Bürgerliches Gesetzbuch*)). Such an exception applies with regard to automated data processing by public bodies (Sect. 8 (2) Federal Data Protection Act (*Bundesdatenschutzgesetz, BDSG*)).

There is no limit save for automated data processing by public bodies. Such claims shall be limited to a total of € 130,000. If compensation exceeding the maximum of € 130,000 is to be paid to more than one person due to the same incident, the compensation paid to each person shall be reduced in proportion to the maximum amount.

As to the regional data protection acts: The possible outcomes vary along the *Länder*. In Bremen, Baden Wuerttemberg and Mecklenburg-Western Pomerania the limit is identical with the federal level. In Hesse, Lower Saxony, North Rhine Westphalia, the outcome is limited to € 250,000, in Rhineland-Palatinate to € 128,000, in Brandenburg, Bavaria, Saarland, Saxony-Anhalt, Schleswig Holstein to € 125,000 In Berlin, Hamburg, Saxony and Thuringia there is no limit at all.

- Legal basis:

A specific legal basis for compensation for violations of data protection rules is laid down in the data protection laws at the local and federal level (e.g. Sect. 7, 8 BDSG) that can be invoked against public as well as private data processing authorities. These provisions transpose Council 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 (*Data Protection Directive*)¹⁸. There are plenty of other legal bases in data sensitive areas, such as social data, adoption, criminal procedure law which refer back to Sect. 7 Federal Data Protection Act. Moreover, compensation claims can be based on general norms governing compensation, such as Sect. 823, 839 Civil Code.

As to the data protection laws of the *Länder*: Baden Wuerttemberg: Sect. 25; Bavaria: 14; Berlin: Sect. 18; Brandenburg: Sect. 20; Bremen: Sect. 29; Hamburg: Sect. 20; Hesse: Sect. 20; Mecklenburg-Western Pomerania: Sect. 27; Lower Saxony: Sect 18; North Rhine Westphalia: Sect. 20; Rhineland-Palatinate: Sect. 21; Saarland: Sect. 24; Saxony: Sect. 23; Saxony-Anhalt: Sect. 18; Schleswig Holstein: Sect. 30; Thuringia: Sect. 18.

- Type of procedure:

Civil court procedure with regard to compensation. Administrative procedure with regard to actions for injunctions directed again public entities in exercise of governmental functions. The procedure is initiated by the victim.

- Possibilities of appeal:

Yes. There are no special rules applicable to data protection cases. The general rules apply.

In civil court procedure: As a general rule appeal on points on facts and law and appeal on points of law are admissible in cases of general interest or the court has declared an appeal admissible or in case of manifest errors. In civil law a second instance (appeal on points of law and facts) shall be admissible too if the value of the subject matter of the appeal is greater than €600 (Sect. 511, 546, 547 Civil Procedure Code).

¹⁸ Council Directive 95/46/EC, OJ 31 L 281.

In administrative court procedure an appeal on points of law and facts is admissible against administrative court judgments if serious doubts exist as to the correctness of the judgment or if the case has special factual or legal difficulties or if the case is of fundamental significance, or if the judgment derogates from a ruling of the Higher Administrative Court, of the Federal Administrative Court, of the Joint Panel of the supreme courts of the Federation or of the Federal Constitutional Court, and is based on this derogation, or if a procedural shortcoming subject to the judgment of the court of appeal on points of fact and law is claimed and applies on which the ruling can be based (Sect. 124 Administrative Court Procedure Code). The appeal on points of law shall only be admitted if the legal case is of fundamental significance, the judgment deviates from a ruling of the Federal Administrative Court, of the Joint Panel of the supreme courts of the Federation or of the Federal Constitutional Court and is based on this deviation, or a procedural shortcoming is asserted and applies on which the ruling can be based (Sect. 132).

As an exceptional remedy the constitutional courts (local and federal) may be seized if the plaintiff/claimant claims to be violated in his/her basic rights. As the order to omit or to pay compensation infringes on basic rights (such as the general freedom of action, property rights) way is generally open in cases where data protection rules were violated.

- Burden of proof:

This depends on the legal basis. The following explanations are confined to the Sect. 7, 8 Federal Data Protection Act.

- Collection, possessing or use of personal data;
- damage suffered,
- the causal link between the unlawful / improper collection, possessing or use of personal data,
- the foreseeability of the damage.

- Available mechanism to lower the burden of proof:

As can be derived from Sect. 7.2 Federal Data Protection Act, the complainant needs not to prove the unlawful or improper collection, possessing or use of personal data. The controller must prove that he exercised due diligence in dealing with the personal data.

The complainant must not prove that the controller or the public body is at default (Sect. 8 (1) Federal Data Protection Act).

If, in the case of automated processing, more than one body is authorized to record data and the injured person is unable to determine which body recorded his/her data, then each body shall be liable, Sect. 8 (4) Federal Data Protection Act.

- Requirement of legal representation: can the complainant initiate/be active in a procedure on his own?

Civil procedure: No, as long as the local civil or administrative court is competent. Should the compensation against exceed 5.000 a legal representative (lawyer or law professor) must appear before the court, Sect. 23 (1), 71 Justice Court Act (*Gerichtsverfassungsgesetz*).

Administrative procedure: Only before higher administrative courts and courts of appeal and Federal court of appeal legal representation is required.

- Is there free legal advice/representation available from a public body (please specify the public body)?

Free legal advice prior to courts proceedings can be obtained by the data protection commissioners (local and federal). They cannot represent the claimant before the court. Free legal representation can be obtained in case of need in accordance with the general rules on legal aid.

- Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?

No. Locus standi in compensation cases is part of the current political discussion.

- Cost of procedure:

Not recorded.

- Average duration of procedure:

No specific data are available. As to the average duration of proceedings before civil courts and administrative courts in general, please see Germany's Annual FRA Report at para. 439-440.

- Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011

Not data available.

Ad Redress Mechanism Number 5 (Administrative fine):

- Range of possible outcomes:

According to Sect. 43 (3) Federal Data Protection Act an administrative offence may be punished by a fine of up to € 50,000, and a fine of up to € 300,000 in severe cases (e.g. collection or processing personal data which are not generally accessible without authorization, making available personal data which are not generally accessible by means of automated retrieval without authorization, obtaining transfer of personal data which are not generally accessible by providing false information). The fine should exceed the financial benefit to the perpetrator derived from the administrative offence. If the amounts mentioned in the first sentence are not sufficient to do so, they may be increased.

For the data protection acts of the *Länder* see the comprehensive overview submitted to the FRA in 2009 in Annex 5 to the Thematic Legal Study on Assessment of Data Protection Measures and Relevant Institutions. In the following *Länder* the maximum outcome has been increased: Bavaria up to € 30,000 and Hesse, Mecklenburg-Western Pomerania, Lower Saxony, Thuringia up to € 50,000.

- Legal basis:

Sect. 43 (3) Federal Data Protection Law.

For the data protection laws of the *Länder* see Annex 5 to the Thematic Legal Study on Assessment of Data Protection Measures and Relevant Institutions of Germany from 2009. Thuringia has introduced a new provision on fining in its data protection law: Sect. 43 (1).

Beyond these provisions there are numerous provisions on fining in laws dealing with specific types of data, such as the Stasi Records Act (*Stasi-Unterlagen-Gesetz*), Sect. 43.

- Type of procedure:

Local DPAs. In Baden-Württemberg it is the Central Fine Authority. Legal remedies are available before criminal courts (Sect. 62 (1) Act on Regulatory Offences (*Gesetz über Ordnungswidrigkeiten*)). There is no individual right of the victim that a fine is imposed.

- Possibilities of appeal:

There are no special rules. The general rules apply. Objections against the fine might be raised before local courts (Sect. 67 s. Act on Regulatory Offences). Where a regulatory fine has been imposed, an appeal on fact and law shall be admissible only if accepted for adjudication (Sect. 313 (1) Criminal Procedure Code). An appeal on points of law shall be admissible only a limited number of cases enshrined in Sect. 337, 338 Criminal Procedure Code (*Strafprozeßordnung*). As an exceptional remedy the constitutional courts (local and federal) may be seized if the plaintiff/ claimant claims to be violated in his/her basic rights.

Fining regularly infringes on constitutional rights.

- Burden of proof:

The DPAs; the prosecutor.

- Available mechanism to lower the burden of proof:

None.

- Requirement of legal representation:

The defendant requires a legal representative only before the Higher Regional Courts or the Criminal Court of Appeal.

- Is there free legal advice/representation available from a public body

No.

- Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?

Not applicable.

- Cost of procedure: please provide information on the average cost of the procedure

Not recorded.

- Average duration of procedure: please provide available information.

Not recorded.

- Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011

Not recorded.

Ad Redress Mechanism Number 6 (Criminal sanction: criminal fine or imprisonment, warning with deferment):

- Range of possible outcomes:

Warning to imprisonment up to 2 years.

- Legal basis:

Sect. 44 Federal Data Protection Law.

For the data protection laws of the *Länder* see study submitted to the FRA in 2009 in Annex 5 to the Thematic Legal Study on Assessment of Data Protection Measures and Relevant Institutions.

In addition, there are numerous criminal law provisions in laws applicable to specific contexts, such as the Stasi-Record-Act, Sect. 44.

Moreover, the Criminal Code criminalizes the violation of privacy in its Sect. 201-206.

- Type of procedure:

Criminal procedure. The procedure is initiated by the state. A victim has the right to compel public proceedings according to Sect. 172 Criminal Procedure Code.

- Possibilities of appeal: 2nd, 3rd and further instances

Yes. Appeal on points of law and facts is admissible, Sect. 313 Criminal Procedure Code. An appeal on points of law shall be admissible only a limited number of cases enshrined in Sect. 337, 338 Criminal Procedure Code. As an exceptional remedy the constitutional courts (local and federal) may be seized if the plaintiff/ claimant claims to be violated in his/her basic rights.

- Burden of proof:

The prosecutor (principle of official investigation).

- Available mechanism to lower the burden of proof:

None.

- Requirement of legal representation:

As a matter of exception in specially defined cases (Sect. 140 Criminal Procedure Code) and before the higher regional courts and the court of appeal.

- Is there free legal advice/representation available from a public body?

No. Only in cases of mandatory defence for defendant.

- Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?

No.

- Cost of procedure: please provide information on the average cost of the procedure

Not recorded.

- Average duration of procedure:

Not recorded. The average duration of proceedings before local criminal courts is 3, 8 months.¹⁹

- Outcomes for 2009, 2010, 2011

See explanation to Annex 1.

¹⁹ Germany/ Federal Office of Statistics (*Statistisches Bundesamt*),
www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Strafgerichte2100230107004.pdf?__blob=publicationFile

Ad Redress Mechanism Number 7 (Prohibition):

- Range of possible outcomes:

Not applicable.

- Legal basis:

Sect. 38 (5.2.) Federal Data Protection Law.

- Type of procedure:

Local DPAs. There is no individual right of the victim that the DPA prohibits the collection, processing or use, or the use of particular procedures.

- Possibilities of appeal:

Yes. There are no special rules applicable to data protection cases. The general rules apply.

In civil court procedure: As a general rule appeal on points on facts and law and appeal on points of law are admissible in cases of general interest or the court has declared an appeal admissible or in case of manifest errors. In civil law a second instance (appeal on points of law and facts) shall be admissible too if the value of the subject matter of the appeal is greater than €600 (Sect. 511, 546, 547 Civil Procedure Code).

As an exceptional remedy the constitutional courts (local and federal) may be seized if the plaintiff/claimant claims to be violated in his/her basic rights.

- Burden of proof:

The DPAs.

- Available mechanism to lower the burden of proof:

None.

- Requirement of legal representation:

No, as long as the local civil or administrative court is competent. Otherwise, yes.

- Is there free legal advice/representation available from a public body

No.

- Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?

Not applicable.

- Cost of procedure: please provide information on the average cost of the procedure

Not recorded.

- Average duration of procedure: please provide available information.

Not recorded.

- Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011

Not recorded.

Ad Redress Mechanism Number 8 (Revocation of license or permit)

- Range of possible outcomes:

Partial to total/ temporary to permanent revocation.

- Legal basis:

There is no specific legal basis for data protection violations. There are, however, multiple legal bases presupposing the reliability of the holder of a licence or permit. If a lack of reliability can be established as result of a violation of data protection laws, the permit or the licence can be revoked, e.g. Sect. 35 Trade Licencing Act.

- Type of procedure:

Administrative procedure. There is no individual right of the victim that a permit or license is being revoked from the author of a violation of data protection law.

- Possibilities of appeal:

In administrative court procedure an appeal on points of law and facts is admissible against administrative court judgments if serious doubts exist as to the correctness of the judgment or if the case has special factual or legal difficulties or if the case is of fundamental significance, or if the judgment derogates from a ruling of the Higher Administrative Court, of the Federal Administrative Court, of the Joint Panel of the supreme courts of the Federation or of the Federal Constitutional Court, and is based on this derogation, or if a procedural shortcoming subject to the judgment of the court of appeal on points of fact and law is claimed and applies on which the ruling can be based (Sect. 124 Administrative Court Procedure Code). The appeal on points of law shall only be admitted if the legal case is of fundamental significance, the judgment deviates from a ruling of the Federal Administrative Court, of the Joint Panel of the supreme courts of the Federation or of the Federal Constitutional Court and is based on this deviation, or a procedural shortcoming is asserted and applies on which the ruling can be based (Sect. 132).

As an exceptional remedy the constitutional courts (local and federal) may be seized if the plaintiff/ claimant claims to be violated in his/her basic rights.

- Burden of proof:

Lies with the administrative body revoking the licence.

- Available mechanism to lower the burden of proof:

None.

- Requirement of legal representation:

No, as long as the local administrative court is competent. Before the higher administrative courts and the court of appeal: yes.

- Is there free legal advice/representation available from a public body?

In case of need legal aid can be requested.

- Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?

No.

- Cost of procedure: please provide information on the average cost of the procedure

Not recorded.

- Average duration of procedure: please provide available information

Not recorded. As to the average duration of proceedings before administrative courts in general, please see Germany's Annual Report at para. 439-440.

- Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011

Not recorded.

Ad Redress Mechanism Number 9 (Exclusion from public procurement procedure)

- Range of possible outcomes:

Partial to total exclusion.

- Legal basis:

There is no specific legal basis for data protection violations. There is also no uniform law on public procurement. Rules are contained in legal acts below the statutory level. It is common that the participation in public procurement procedure presupposes reliability, e.g. §§ 2 (1), 6 (5) c Contract Awards for Public Supplies and Services (*Vergabe- und Vertragsordnung für Leistungen*). If as a result of a violation of data protection laws the reliability of a person is put into question, this person can be excluded from public procurement procedure.

- Type of procedure:

There is a special mechanism, the public procurement tribunal, competent for disputes arising out of public procurement procedures. This mechanism resembles a court, but is part of the administration, Sect. 102 Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*). There is no individual right of the victim that a potential tenderer is excluded on grounds of data protection violations.

- Possibilities of appeal:

Decisions of this mechanism can be challenged before the Higher Regional Courts, Sect. 116-124 Act against Restraints of Competition.

As an exceptional remedy the constitutional courts (local and federal) may be seized if the plaintiff/claimant claims to be violated in his/her basic rights.

- Burden of proof: please list what the complainant needs to prove

The body excluding the tenderer.

- Available mechanism to lower the burden of proof:

None.

- Requirement of legal representation:

Not before the tribunal, only before the court.

- Is there free legal advice/representation available from a public body?

No.

- Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?

No.

- Cost of procedure: please provide information on the average cost of the procedure

Not available.

- Average duration of procedure: please provide available information.

Not recorded.

- Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011

Not recorded.

Ad Redress Mechanism Number 10 (Licensing)

- Range of possible outcomes

Not applicable.

- Legal basis:

There is no specific legal basis for data protection violations. There are, however, multiple legal bases that may apply with regard to contraventions against data protection laws too. For the civil servants the Federal Civil Service Act (*Bundesbeamtengesetz*), Sect. 30-37, or the civil service acts of the *Länder*.

In case of private employees, save special provisions in the contract, the rules of the Civil Code apply, Sect. 626, 627.

- Type of procedure:

Civil (labor court) procedure or, in case of civil servants, administrative procedure. There is no individual right of the victim of a data protection violation that the employee or civil servant who has committed the violation is licenced.

- Possibilities of appeal:

There are no special rules. The general rules apply.

In administrative court procedure an appeal on points of law and facts is admissible against administrative court judgments if serious doubts exist as to the correctness of the judgment or if the case has special factual or legal difficulties or if the case is of fundamental significance, or if the judgment derogates from a ruling of the Higher Administrative Court, of the Federal Administrative Court, of the Joint Panel of the supreme courts of the Federation or of the Federal Constitutional Court, and is based on this derogation, or if a procedural shortcoming subject to the judgment of the court of appeal on points of fact and law is claimed and applies on which the ruling can be based (Sect. 124 Administrative Court Procedure Code). The appeal on points of law shall only be admitted if the legal case is of fundamental significance, the judgment deviates from a ruling of the Federal Administrative Court, of the Joint Panel of the supreme courts of the Federation or of the Federal Constitutional Court and is based on this deviation, or a procedural shortcoming is asserted and applies on which the ruling can be based (Sect. 132).

In labor law, an appeal on points of law and facts is always admissible in case of licensing (Sect. 64 (2) c Labour Court Act (*Arbeitsgerichtsgesetz*)). An additional appeal on points of law is admissible if or if the case is of fundamental significance, or if the judgment derogates from a ruling of the Higher Labor Court, of the Federal Labor Court, or the labor court of the *Länder*, or in case of manifest error (Sect. 72 (2) Labour Court Act).

As an exceptional remedy the constitutional courts (local and federal) may be seized if the plaintiff/claimant claims to be violated in his/her basic rights.

- Burden of proof:

In labour law, the burden of proof lies with the employer; in civil service law with the state (*Bund* or the *Länder*).

- Available mechanism to lower the burden of proof:

None.

- Requirement of legal representation:

Only before the higher regional courts and the court of appeal.

- Is there free legal advice/representation available from a public body (please specify the public body)?

No.

- Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?

No.

- Cost of procedure: please provide information on the average cost of the procedure

Not recorded.

- Average duration of procedure:

The duration of licencing procedures on grounds of data protection is not recorded.

- Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011

Not recorded.