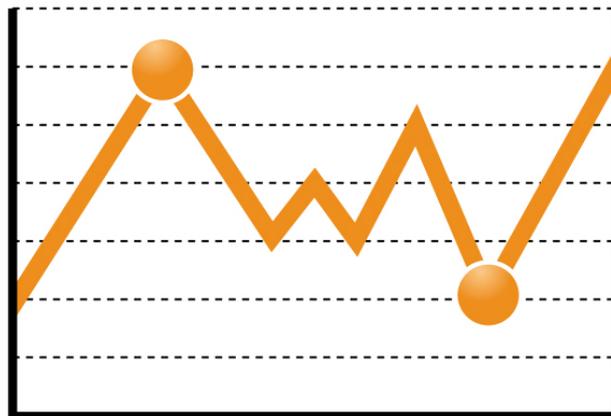




PRIVACY BAROMETER 2009

– (No) Privacy in Germany –

Executive Summary



Datenschutz

Barometer

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1 Introduction

Subsequently we describe the results of the Xamit Privacy Barometer¹ in compressed form. The present study analyses the current privacy protection level in Germany. Regarding methods and contents we build on our previous studies:

- Privacy in Web Statistics,²
- Handling of Contact Forms,³
- Privacy Barometer 2008,⁴
- (Political) Parties and Privacy.⁵

All of the four studies focus on personal data in the Internet and analyse to what extent operators of web pages disclose their visitors which data will be collected and what will happen to the data.

This year's study supplements the aforementioned studies by two further aspects: On the one hand we analyse how serious entrepreneurs are about privacy in their own companies by providing the register of data processing operations ("Verfahrensverzeichnis") as the legal basis of the company's privacy. On the other hand we analyse how the control of companies is carried out by the supervisory authorities.

2 Privacy Barometer

More than 1.6 million of German web pages out of 24,376 web sites were evaluated from September to November 2009. The study includes municipalities, political organisations, associations and enterprises from different branches of business. Thus, we have got a profound insight into the current privacy level in the Internet.

2.1 Web statistics – data collection is mostly concealed

According to the opinion of the Independent Privacy Center of Schleswig Holstein ("ULD"), operators of web sites who use Google Analytics (= GA) commit an administrative offence since the use of GA by operators of web sites is violating the German Privacy laws. This opinion was substantiated by general criteria of web statistics from the so called "Düsseldorfer Kreis", a coordinating committee consisting of all German authorities supervising the privacy of the private bodies.⁶

In § 8.1 of its terms of service Google requires operators not to tie the movement profiles of visitors with personal data and to record the use of Google Analytics prominently.⁷ Google regulates the wording of this information and reserves its own supervisory right.⁸

¹ Lepperhoff, Niels, Petersdorf, Björn (2009): Datenschutzbarometer 2009. (Kein) Datenschutz in Deutschland? URL: <http://www.xamitleistungen.de/studienundtests/index.php>.

² Lepperhoff, Niels, Petersdorf, Björn (2008): Datenschutz bei Webstatistiken. In: Datenschutz und Datensicherheit (DuD), Nr. 4, Jg. 2008, S. 266-269.

³ Lepperhoff, Niels, Petersdorf, Björn (2009): Umgang mit Datenschutzerklärungen im Internet. In: Datenschutz und Datensicherheit (DuD), Nr. 1, Jg. 2009, S. 15-19.

⁴ Lepperhoff, Niels, Petersdorf, Björn (2009): Datenschutz im Internet. In: Datenschutz und Datensicherheit (DuD), Nr. 10, 2009, S. 607-610.

⁵ Lepperhoff, Niels, Petersdorf, Björn (2009): Nur ein Vollzugsdefizit? – Parteien vernachlässigen den Datenschutz. FIF-Kommunikation 4/2009, S. 18-25.

⁶ Düsseldorfer Kreis (2009): Beschluss zur Datenschutzkonformen Ausgestaltung von Analyseverfahren zur Reichweitenmessung bei Internet-Angeboten. URL: <http://www.datenschutz-mv.de/dschutz/beschlue/Analyse.pdf>. Letzter Zugriff: 2009-11-30.

⁷ Google (2009): Google Analytics Bedingungen. URL: <http://www.google.com/analytics/de-DE/tos/html>. Stand: 2009-10-23

⁸ Google (2009): Google Analytics Bedingungen. URL: <http://www.google.com/analytics/de-DE/tos.html>. Stand: 2009-10-23.

Data on 13% of the web sites are collected by using Google Analytics (2008: 10%). This is an increase of 31% compared to 2008. 4% of the web sites use other providers than Google.

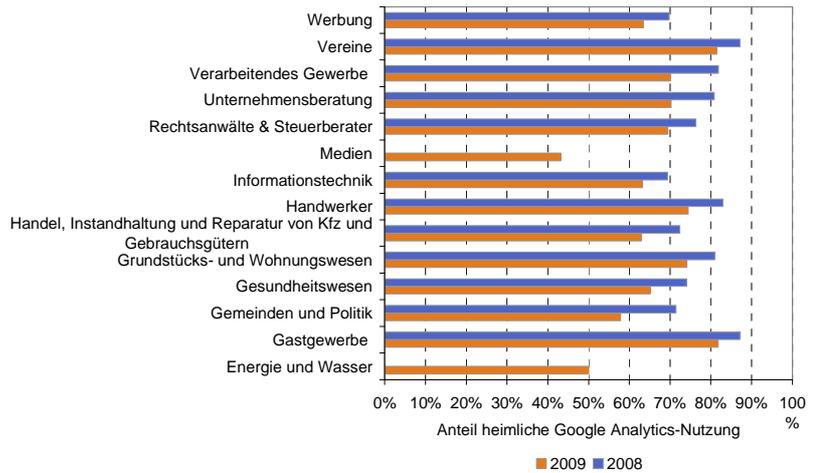


Figure 1: Secret use of Google Analytics split up by branches of business

The branches “Media” as well as “Power and Water” were added to the study. Hence there exist no data for 2008. With a share of 82% the associations and the hotel and restaurant industry focus almost completely on a secret collection of data and are very hesitant of using the passage of text offered by Google (figure 2). At present altogether 15% (2008:10%) of the operators use the passage of Google, 20% (2008: 19%) use another wording.

At present 65% of the web sites use Google Analytics secretly by infringing the terms of service of Google.

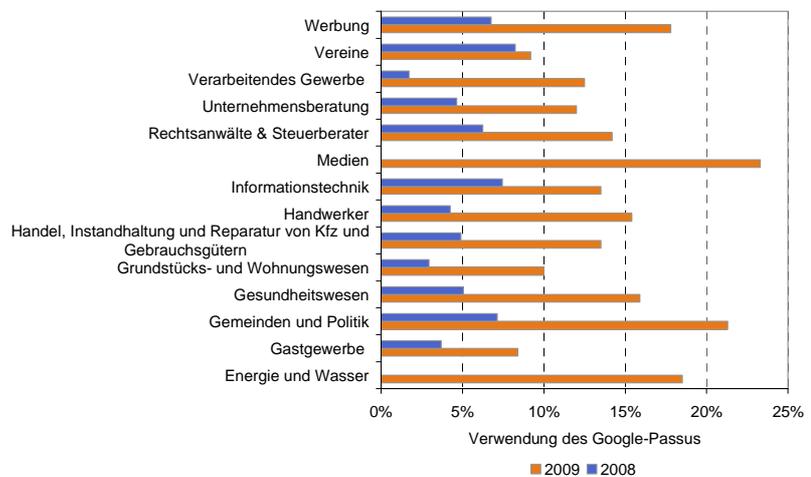


Figure 2: Use of the Google-passage split up by branches of business

A similar situation comes across when applying Google AdSense: While only 21% of the web sites using AdSense informed their visitors by privacy information in 2008, it were 32% in 2009. On the other hand 68% (2008: 79%) defy Google's terms of use and do not inform their visitors that Google places a cookie and that data - as for instance the IP-numbers - are transmitted to Google.

2.2 61% of the web sites are objectionable

Altogether we found infringements or reasons for objections on 61 out of 100 investigated web sites. In 2008 this figure amounted to 55 including the use of Google Analytics. This is an increase of 11%.

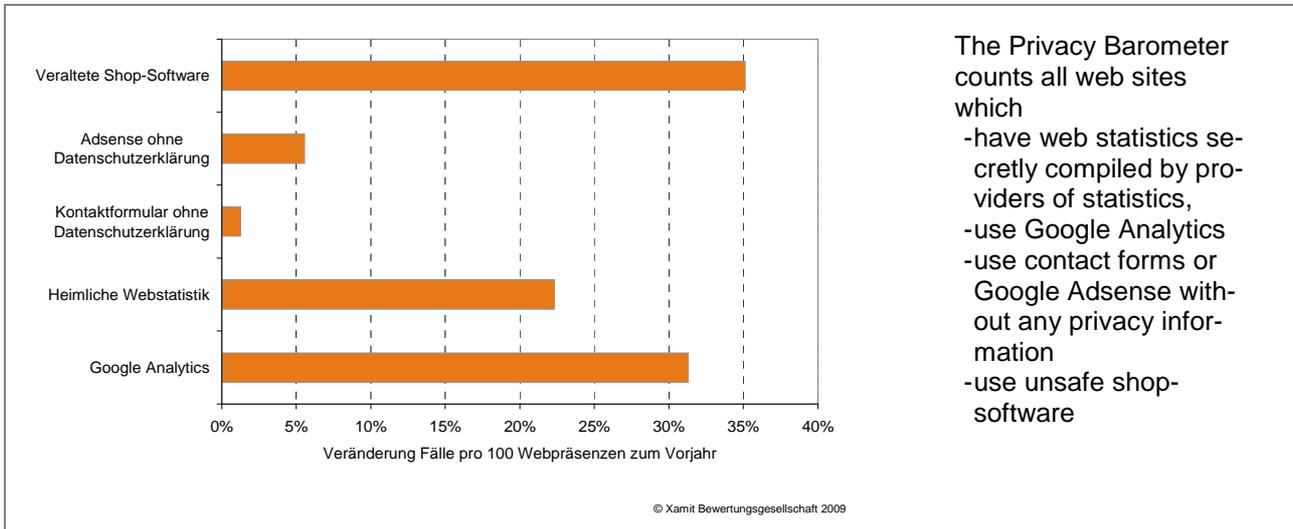


Figure 3: Development of infringements and objections

Top-ranked are – as already in 2008 – the privacy policy opinion formers with 77 infringements (2008: 52 infringements) per 100 web sites. Since many companies and organisations rely on the competence of advertising and IT experts when accessing the internet, the privacy awareness of these experts has an impact on many other companies. The upsurge of infringements by almost 50% at privacy policy opinion formers gives a vague idea of the future development of the trend particularly in the case of those companies.

3 Privacy: no task for companies?

The Federal Data Protection Act (=BDSG) determines as supervisory bodies at enterprise level a data protection official or the management. As working basis serves the register of data processing operations pursuant to § 4e BDSG which, amongst others, describes which data will be processed or transferred by whom and for which purpose.⁹ Where the register of data processing operations is missing there will be no overview of the processed personal data. Alterations of the purposes of data, missing erasures of data, security problems and further violations of privacy are immanent with it.

Out of the previously analysed websites, our testers asked by e-mail 378 organizations to submit the public register of data processing operations. 5% of them submitted a register of data processing operations either via post or electronically. 4% did not understand what we meant by our question and 1% responded with a counter question. The remaining 90% did not reply at all. Enterprises belonging to the media were not addressed by us.

⁹ The register of data processing operations specifies the purpose of the data processing, its statutory basis, the persons who process the data, the kind of data which are processed, the persons whose data are processed and the place to which the data are transferred. On the one hand the public register of data processing operations has to be made available to any person upon request (§ 4g, para 2, sent.2 BDSG). On the other hand each private body which processes personal data has to operate such a register irrespective of the number of persons who are concerned with the data.

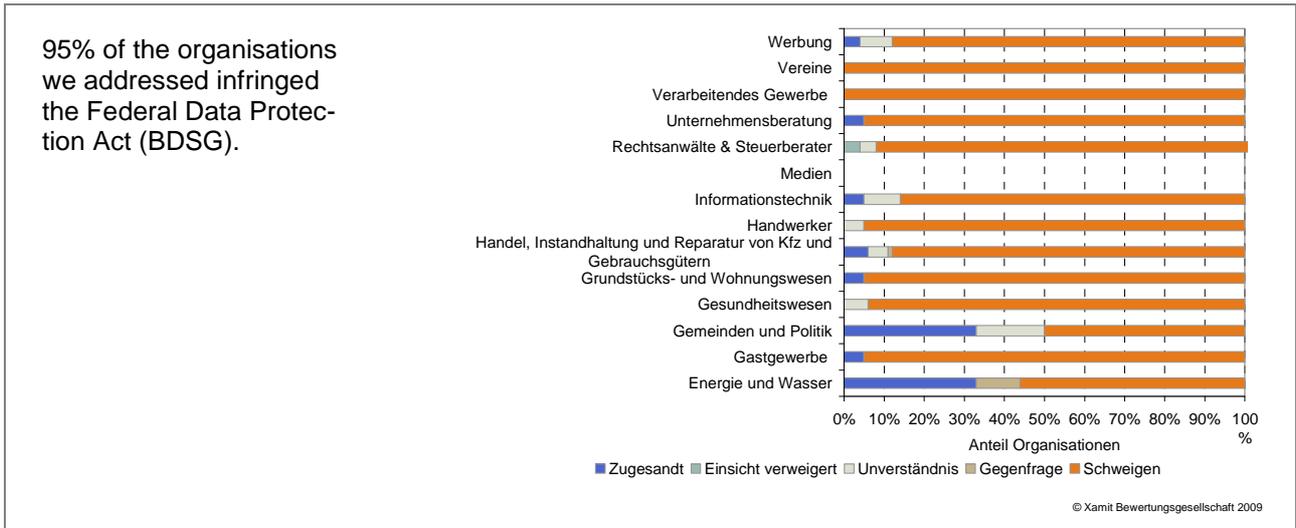


Figure 4: Reactions on our request for sending the register of data processing operations split up by branches of business

4 Supervision without manpower

In view of the large quantity of uncovered violations (of the BDSG) we wanted to know how the public supervision is faring. Therefore, we asked all of the privacy supervisory authorities subordinated to the 23 Federal States to submit the number of their employees in terms of full time units. 70% of the authorities replied.

Between 2007 and 2009 the permanent staff increased in most supervisory authorities. For the states of Saarland, Schleswig-Holstein and Thüringen the work force remained unchanged. North Rhine-Westphalia reduced its staff (Figure 5).

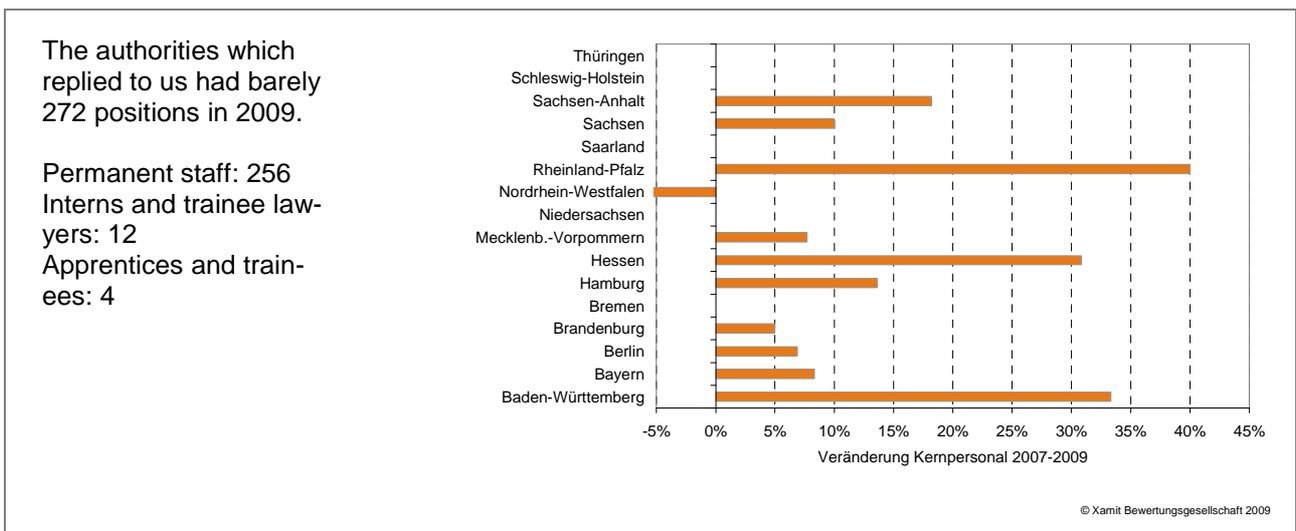


Figure 5: Changes in the number of positions 2007-2009

In order to compare the number of employees with some key figures, the employees in the public sector (e.g. authorities) and in the private sector (e.g. enterprises, associations, parties) are viewed

separately. A key figure for describing the size of an enterprise or of an authority is the number of employees subject to social insurance contribution.¹⁰ We therefore compare

- the positions in the supervisory authorities for public bodies with the number of employees in the public sector (Federal Government¹¹, Federal States and municipalities).
- the positions in the supervisory authorities for the private bodies with the number of employees in the private sector.

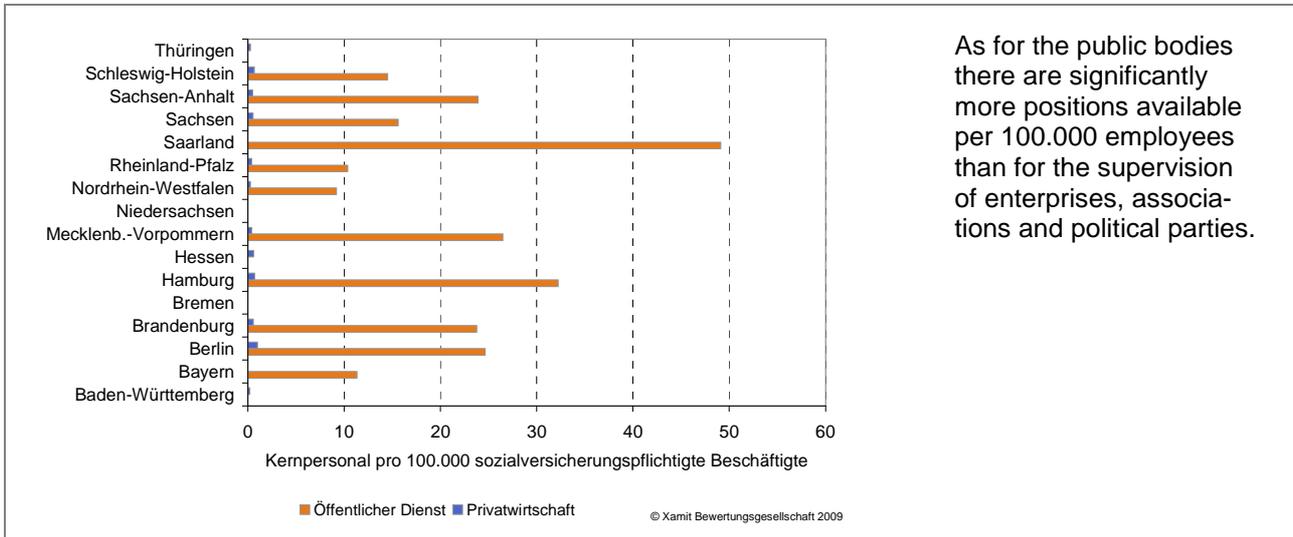


Figure 6: Staffing in relation to the number of employees subject to social insurance contribution

In relation to the number of enterprises there are 2.2 positions (=supervisory positions) per 100,000 enterprises available throughout the Federal Republic of Germany. For comparison: The work force of the fiscal authorities in the Federal Government, the Federal States and the municipalities amounted to 244,600 persons in 2008.¹² That are 6,888 employees per 100,000 enterprises. Thus, tax collection is 3,131 times more important than the protection of a fundamental right.

4.1 One control every 39,400 years

In the supervisory authorities of Baden Württemberg seven employees were available for the private body in 2008.¹³ Based on our own calculations the supervisory authority can invest no more than 21 out of 1,498 man-days per year to inspect businesses. The Ministry of the Interior of Baden Württemberg in its part as supervisory authority for the private body had controlled only 12 local enterprises.¹⁴ That corresponds to 0.0025% of all enterprises of this Federal State.

In the light of this control-frequency an enterprise will statistically have to wait for a privacy control more than 39,400 years.

¹⁰ Bundesagentur für Arbeit (2009): Arbeitsmarkt in Zahlen – Beschäftigungsstatistik. Dezember 2008.

¹¹ Die Bundesbehörden gehören nicht zum Aufgabenbereich der hier betrachteten Aufsichtsbehörden. Deshalb zeichnen unsere Berechnungen ein zu optimistisches Bild.

¹² Statistisches Bundesamt Deutschland (2009): <http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Content/Statistiken/FinanzenSteuern/OeffentlicherDienst/PersonalOeffentlicherDienst/Tabellen/Content75/GebietskoerperschaftenAufgabenbereiche,templateId=renderPrint.psmI>. Letzter Zugriff: 2009-10-21.

¹³ Landtag von Baden Württemberg (2009): Antwort des Innenministeriums zum Antrag der Landtagsfraktion der SPD. Drucksache 14/4478 vom 13. 05. 2009.

¹⁴ Landtag von Baden Württemberg 2009, S. 6.

If a violation of the Federal Data Protection Act is found during a control, the authorities use their influence to prevent such violations from happening again in the future. It might be that a conversation is held with the controller.¹⁵ Administrative fines are imposed rarely. Within one year only 2.75 administrative orders imposing a fine were notified per Federal State.¹⁶

As long as the advantages of violations exceed the disadvantages of punishment, infringements of privacy will continue to be a part of the daily routine: Privacy infringements will be budgeted as a part of the business risk.

5 Conclusion

Whether web statistics, web shop, contact form or advertising are concerned, the overwhelming majority of enterprises and institutions leaves the visitors of their web sites in the dark about what is going to happen with the user data generated via the Internet. Compared to last year, the number of violations increased in 2009 by 11%. Moreover, 95% of the enterprises infringe data privacy regulations.

A paradigm shift is long overdue. When contemplating the trend of the results shown in the “Privacy Barometer” and the currently published news about data thefts and data misuses it is to be feared that our society will continue to worry about its most private data. The loss of confidence associated with this means reduced sales¹⁷ and leads to a reduction of jobs particularly in branches of business operating in Internet markets.

For detaining this loss of confidence it will be absolutely essential to increase the control density. For this to be realised the supervisory authorities must be staffed appropriately as well as effective control mechanisms have to be established. The implementation of a second monitoring level as a “watchdog” could be helpful in this case.

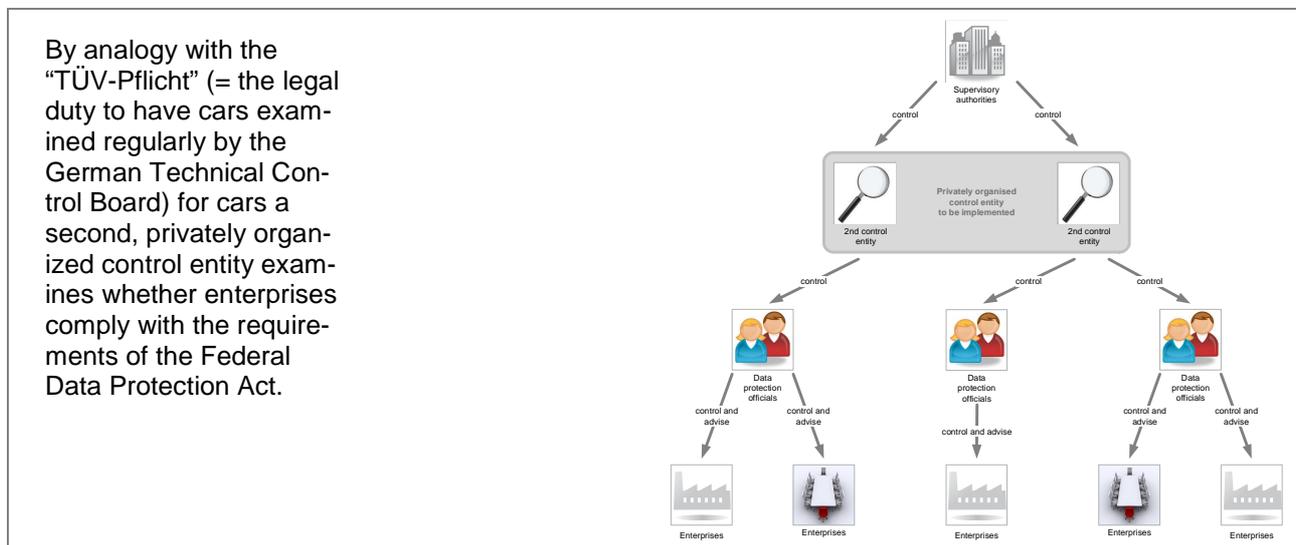


Figure 7: A staged control mechanism could boost the privacy protection in Germany effectively

¹⁵ Ebd. S. 3

¹⁶ Holländer, Corinna (2009): Datensündern auf der Spur – Bußgeldverfahren ungeliebtes Instrument der Datenschutzaufsichtsbehörden? In: Recht der Datenverarbeitung (RDV), Oktober 2009. S. 215 - 222.

¹⁷ Ponemon Institute (2005): National Survey on Data Security Breach Notification. November 2005.

6 Glossary

In the tables below you will find translations of the terms used in the figures above.

Related to figure 1, 2 and 4	
German	English
Werbung	Advertising
Vereine	Associations
Verarbeitendes Gewerbe	Manufacturing Sector
Unternehmensberatung	Consulting
Rechtsanwälte & Steuerberater	Lawyers & Tax Accountants
Medien	Media
Informationstechnik	Communication Technology
Handwerker	Craftsmen
Handel, Instandhaltung und Reparatur von Kfz und Gebrauchsgütern	Trade, Maintenance and Repair of Cars and Durable Goods
Grundstücks- und Wohnungswesen	Housing and Real Estate
Gesundheitswesen	Health Care
Gemeinden und Politik	Municipalities and Politics
Gastgewerbe	Hotel and Restaurant Industry
Energie und Wasser	Power and Water

Related to figure 3	
German	English
Veraltete Shop-Software	Outdated shop-software
Adsense ohne Datenschutzerklärung	Adsense without any privacy information
Kontaktformulare ohne Datenschutzerklärung	Contact forms without any privacy information
Heimliche Webstatistik	Secret web statistics
Google Analytics	Google Analytics
Veränderung Fälle pro 100 Webpräsenzen zum Vorjahr	Annual percentage change of cases on web sites compared to last year

Related to figure 6	
German	English
Öffentlicher Dienst	Civil Service
Privatwirtschaft	Private sector

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