

What happens to data protection when a company goes bankrupt?

The company is subject to a statutory insolvency regime. Does that mean the FADP barely applies anymore? Or does it still apply – and if so, how strongly?

The following short overview provides answers – in 6 cards.

Where data protection and insolvency intersect

Personal data is embedded in many assets. It can sometimes even be the most essential asset of an insolvent company (example: e-commerce).

Marketing Tools: Prospective Contacts

Prospective contacts are also a potential asset for a new acquirer, but not immediately monetizable.

CRM Systems: Customer Data

Customer data represents an essential asset for service-oriented companies. An acquirer can monetize this data anew.

HR Systems: Employee Data

Employee data is a relevant asset for managing the employment relationship, handling the bankruptcy proceedings, and any subsequent company sale.

Sale of a Company Out of Bankruptcy

Tension between the statutory mandate to realize the bankruptcy estate (Art. 256 DEBA) and the limits on disclosing data to third parties under the FADP.

Art. 256 DEBA

Statutory mandate to liquidate the insolvency estate in a manner that preserves value as much as possible. A high sale price is often only achievable if personal data required for the takeover and continuation of the business is disclosed.

The FADP Remains Applicable

Transparency, data minimization and purpose limitation continue to apply – only what is necessary for valuing and continuing the business is disclosed.

Recommended: a staged disclosure concept from early negotiations through to contract signing.

Share Deal / Asset Deal

In a share deal, the company remains the controller under the FADP – generally unproblematic. In an asset deal, personal data is disclosed to a third party as the new controller.

Role of the Bankruptcy Administration

Data protection obligations continue to apply even in bankruptcy proceedings.

Securing IT Systems

Coordination with IT providers, especially for cloud services: Who has access, and is data deleted if payments stop? Access rights and passwords need to be reset, and data must be secured against loss.

Data Protection-Compliant Processing

Transparency, proportionality, purpose limitation and data security must be maintained. Engaging external third parties (potentially abroad) requires FADP-compliant data processing agreements. Sensitive data also requires the highest level of confidentiality.

Accountability

Accountability under data protection law does not lapse – the bankruptcy administration steps into the same role of obligations.

Realization of Digital Assets

Data itself can constitute an asset, e.g. customer lists, databases, online platforms, or AI training data.

Art. 242 DEBA – Segregation

Segregation of digital assets that do not belong to the bankruptcy estate. Complex in practice, as data sets are often intermingled with other data (example: servers of the bankrupt party or of a cloud provider that is itself insolvent).

Realization Mandate – Art. 256 DEBA

The value-preserving realization mandate can serve as the statutory justification for disclosing data – but the essential data protection framework remains in place. Realization occurs through public auction or private sale; personal data is usually disposed of as part of the sale of a company/business unit as a “going concern,” rarely in isolation.

Data Protection Creates Value

Not a showstopper – but a success factor.

Liability Risks

Acquiring a data-sensitive business (e.g. an online shop or a clinic) with inadequate data protection management is, in practice, a liability risk for the buyer (FADP criminal sanctions). FADP advice beforehand or alongside the transaction helps.

Trust & Governance (Facilitates Realization)

An acquirer is more willing to pay a price when it is clear that the data has been processed lawfully to date and that its transfer is structured in a data-protection-sound manner. Compliance with data protection by the bankruptcy administration creates transparency and trust – customers, employees and business partners remain in a relationship of trust.

Questions about data protection in insolvency?

Let's talk.

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