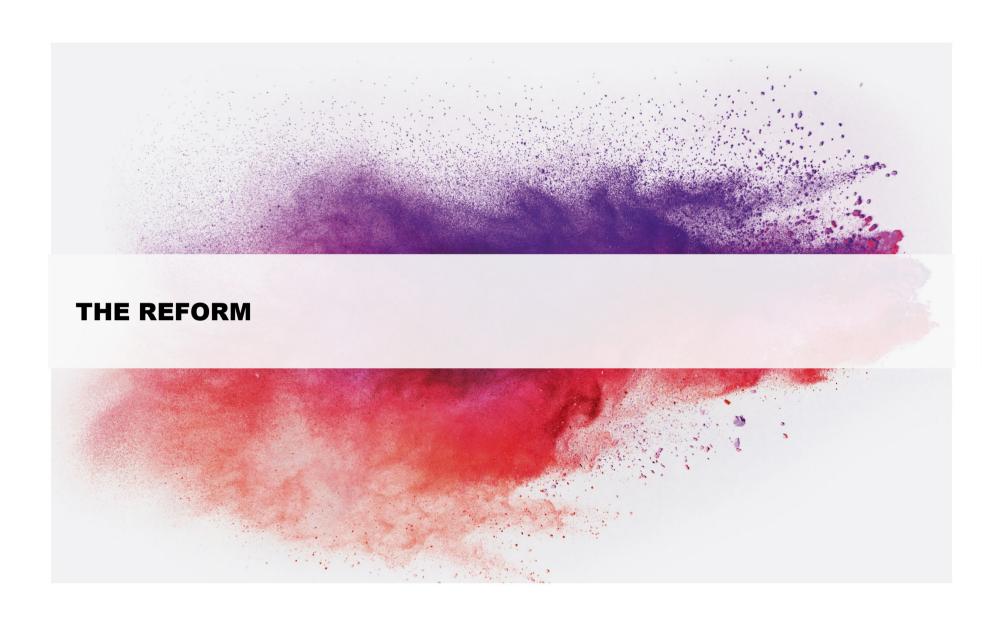
C L I F F O R D C H A N C E

LEGAL ®EVOLUTION 2018

LAWYERS IN A DIGITAL WORLD - REGULATORY CHALLENGES AND OPPORTUNITIES

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§ 203 (3) GERMAN CRIMINAL CODE

(3) There shall be no disclosure of secrets if the persons listed in para 1 and para 2 grant access to secrets to persons working for them as professional assistants or as part of their professional education. The persons listed in para 1 and para 2 may disclose third party secrets to other persons which cooperate in respect of their professional or official activity to the extent this is required for the rendering of services by these other cooperating persons; the same shall apply to these other cooperating persons if they commission services from further persons which cooperate in respect of the professional or official activity of the persons listed in para 1 and para 2.

§ 203 (3) GERMAN CRIMINAL CODE

(3) ¹Kein Offenbaren im Sinne dieser Vorschrift liegt vor, wenn die in den Absätzen 1 und 2 genannten Personen Geheimnisse den bei ihnen berufsmäßig tätigen Gehilfen oder den bei ihnen zur Vorbereitung auf den Beruf tätigen Personen zugänglich machen. ²Die in den Absätzen 1 und 2 Genannten dürfen fremde Geheimnisse gegenüber sonstigen Personen offenbaren, die an ihrer beruflichen oder dienstlichen Tätigkeit mitwirken, soweit dies für die Inanspruchnahme der Tätigkeit der sonstigen mitwirkenden Personen erforderlich ist; das Gleiche gilt für sonstige mitwirkende Personen, wenn diese sich weiterer Personen bedienen, die an der beruflichen oder dienstlichen Tätigkeit der in den Absätzen 1 und 2 Genannten mitwirken.

§ 203 (4) GERMAN CRIMINAL CODE

- (4) There shall be imprisonment of up to one year or a fine if a person discloses a secret without justification which he has learnt in the exercise or at the occasion of rendering its services as other cooperating person or as data protection officer of a person listed in para 1 or para2. Equally shall be punished a person
 - 2. which is another cooperating person as defined in para 3 and has commissioned services from another cooperating person, that has disclosed without justification a third party secret, and had not seen to it that that person had been contractually bound to confidentiality

§ 203 (4) GERMAN CRIMINAL CODE

- (4) ¹Mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe wird bestraft, wer unbefugt ein fremdes Geheimnis offenbart, das ihm bei der Ausübung oder bei Gelegenheit seiner Tätigkeit als mitwirkende Person oder als bei den in den Absätzen 1 und 2 genannten Personen tätiger Beauftragter für den Datenschutz bekannt geworden ist. ²Ebenso wird bestraft, wer
 - 2. als im Absatz 3 genannte mitwirkende Person sich einer weiteren mitwirkenden Person, die unbefugt ein fremdes, ihr bei der Ausübung oder bei Gelegenheit ihrer Tätigkeit bekannt gewordenes Geheimnis offenbart, bedient und nicht dafür Sorge getragen hat, dass diese zur Geheimhaltung verpflichtet wurde; dies gilt nicht für sonstige mitwirkende Personen, die selbst eine in den Absätzen 1 oder 2 genannte Person sind, oder [...]

§43E BRAO (FEDERAL LAWYERS' ACT)

- (1) A lawyer may permit service providers the access to facts which are the subject of the confidentiality obligation according to sec 43a (2) sentence 1 to the extent this is necessary for the use of the services. Service provider shall be another person or institution which the lawyer has commissioned in the course of the exercise of his profession.
- (2) The lawyer is obliged to **diligently select** the service provider. The lawyer has to **terminate the cooperation immediately** if the compliance by this service provider with the requirements provided in para 3 is not ensured.

§43E BRAO

- (1) ¹Der Rechtsanwalt darf Dienstleistern den Zugang zu Tatsachen eröffnen, auf die sich die Verpflichtung zur Verschwiegenheit gemäß § 43a Absatz 2 Satz 1 bezieht, soweit dies für die Inanspruchnahme der Dienstleistung erforderlich ist. ²Dienstleister ist eine andere Person oder Stelle, die vom Rechtsanwalt im Rahmen seiner Berufsausübung mit Dienstleistungen beauftragt wird.
- (2) ¹Der Rechtsanwalt ist verpflichtet, den **Dienstleister sorgfältig** auszuwählen. ²Er hat die **Zusammenarbeit unverzüglich zu beenden**, wenn die Einhaltung der dem Dienstleister gemäß Absatz 3 zu machenden Vorgaben nicht gewährleistet ist.

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§2 (3) BORA (RULES OF PROFESSIONAL PRACTICE)

- (3) A violation does not exist where the Rechtsanwalt's conduct
- a) is undertaken with the client's consent;
- b) is necessary for the enforcement of or defence against justified claims arising from a case, or for the defence of the Rechtsanwalt's own interests, or
- c) occurs in the framework of the firm's work processes including the use of third party services and where they objectively correspond to **normal conduct in social life** as approved by the general public (social adequacy).

§2 (3) BORA

- (3) Ein Verstoß ist nicht gegeben, soweit das Verhalten des Rechtsanwalts
- a) mit Einwilligung erfolgt oder
- b) zur Wahrnehmung berechtigter Interessen erforderlich ist, z.B. zur Durchsetzung oder Abwehr von Ansprüchen aus dem Mandatsverhältnis oder zur Verteidigung in eigener Sache, oder
- c) im Rahmen der Arbeitsabläufe der Kanzlei, die außerhalb des Anwendungsbereichs des § 43e liegen, objektiv einer üblichen, von der **Allgemeinheit gebilligten Verhaltensweise im sozialen Leben** entspricht (Sozialadäquanz).

§2 (4) BORA

(4) The duty to observe confidentiality requires the Rechtsanwalt to take the organisational and technical measures that are necessary to protect confidentiality and are risk adequate and reasonable for the profession of lawyer. Technical measures are sufficient when they satisfy the requirements of data protection law in cases where the latter is applicable. Other technical measures must also be state of the art. Para. 3 c) shall remain unaffected.

§2 (4) BORA

(4) Die Verschwiegenheitspflicht gebietet es dem Rechtsanwalt, die zum Schutze des Mandatsgeheimnisses erforderlichen organisatorischen und technischen Maßnahmen zu ergreifen, die risikoadäquat und für den Anwaltsberuf zumutbar sind. Technische Maßnahmen sind hierzu ausreichend, soweit sie im Falle der Anwendbarkeit der Vorschriften zum Schutz personenbezogener Daten deren Anforderungen entsprechen. Sonstige technische Maßnahmen müssen ebenfalls dem Stand der Technik entsprechen. Abs. 3 lit. c) bleibt hiervon unberührt.



FREEDOM OF ORGANIZING ONE'S PRACTICE INCLUDING OUTSOURCING

- ❖Generally: the use of outsourcing for people bound by professional secrecy is under the respective requirements – permitted
- Decision on professional infrastructure is up to the lawyer
- ❖Release of information limited to what is necessary for the use of the service
- ❖But what does "necessary" mean?

§ 43e BRAO:

(1)A lawyer may permit service providers the access to facts which are the subject of the confidentiality obligation according to sec 43a (2) sentence 1 to the extent this is necessary for the use of the services. Service provider shall be another person or institution which the lawyer has commissioned in the course of the exercise of his profession.

TERMINOLOGY: GEHILFE AND SERVICE PROVIDER

- ❖ The involvement of service providers is permissible under the Criminal Code
- ❖ Introduction of new terminology provides challenges in light of § 43e BRAO

§ 203 German Criminal Code

(3) There shall be no disclosure of secrets if the persons listed in para 1 and para 2 grant access to secrets to persons working for them as professional assistants or as part of their professional education. The persons listed in para 1 and para 2 may disclose third party secrets to other persons which cooperate in respect of their professional or official activity to the extent this is required for the rendering of services by these other cooperating persons; the same shall apply to these other cooperating persons if they commission services from further persons which cooperate in respect of the professional or official activity of the persons listed in para 1 and para 2.

INFORMATION AND NOTICES TO BE GIVEN

Issue: Definition of services for direct support in a specific mandate as opposed to use of infrastructure

§ 43e BRAO

- (3) The contract with the service provider must be in text form. It must oblige the service provider to maintain confidentiality and instruct him of the criminal sanctions connected with a breach
- **(5)** If services are contracted for direct support in a specific mandate, the lawyer may permit the service providers the access to third party secrets only upon consent by the client.

INFORMATION AND NOTICES TO BE GIVEN

Consent to use of external service providers

to provide services directly relevant to a specific mandate (section 43e Federal Lawyers' Act (Bundesrechtsanwaltsordnung, "BRAO"), section 26 a Federal Notaries' Act (Bundesnotarordnung, "BNotO"), section 62 a Tax Consultancy Act (Steuerberatungsgesetz, "StBerG"), and section 50a Public Accountants' Act (Wirtschaftsprüferordnung, WPO))

We [name and address of client] have a client relationship to Law Firm XYZ, ("Law Firm XYZ").

We agree to Law Firm XYZ commissioning an external service provider, [XYZ/ [•]], to [provide a document analysis/project management tool / perform an eDiscovery / review and analyse documents / provide a tool to collect and manage conditions precedent].

The service provider has outsourced [the data and programs] to a cloud. The cloud server is operated [by another company] in [Frankfurt am Main / Ireland / [•]][; ISO certification has been obtained]. The client also consents to this.

INFORMATION AND NOTICES TO BE GIVEN

In this context, Law Firm XYZ is entitled to grant the external service provider access to confidential and / or proprietory information, which is subject to confidentiality. Law Firm XYZ will allow the external provider to access third-party confidential and /or proprietory information only to the extent necessary to use the aforementioned services. Law Firm XYZ has obliged the external service provider to maintain confidentiality with regard to information that is confidential and / or proprietory and made the service provider aware that it is liable for prosecution in case of any unauthorised disclosure.

We are aware of the provisions of section 43e paras 2 and 3 BRAO and these were also explained to us by Law Firm XYZ. We agree to the service provider, at its duly exercised discretion, involving other people to process the order. As a precaution, we waive any right to request that such persons be checked by Law Firm XYZ in advance and that Law Firm XYZ check or demonstrate that each entity/person has signed a confidentiality agreement and been made aware of their potential liability for prosecution in the event of a breach.

SUPERVISION

- Code requires termination in case of doubt about reliability
- Supervison appears to be implied...
- ...but no clear standards
- Intensity of supervision to be determined on a case by case basis?
- What is reasonable?
- How does supervision work in respect of the chain of suppliers and sub-suppliers?

SUPERVISION

§ 43a BRAO

(2) The lawyer must impose confidentiality obligations on the persons employed by him in writing and he must instruct them of their criminal liability for breach. He must also **take appropriate steps to ensure observance of confidentiality.**

§ 43e BRAO

(1) The lawyer is obliged to diligently select the service provider. The lawyer has to terminate the cooperation immediately **if the compliance** by this service provider **with the requirements provided in para 3 is not ensured**.

§ 203 German Criminal Code

- (4) There shall be imprisonment of up to one year or a fine if a person discloses a secret without justification which he has learnt in the exercise or at the occasion of rendering its services as other cooperating person or as data protection officer of a person listed in para 1 or para2. Equally shall be punished a person
 - 2. which is another cooperating person as defined in para 3 and has commissioned services from another cooperating person, that has disclosed without justification a third party secret, and had not seen to it that that person had been contractually bound to confidentiality

EXTRAORDINARY TERMINATION

❖ Subject matter of supervision: § 43e (3) BRAO

§ 43e BRAO

- (2) The lawyer is obliged to diligently select the service provider. The lawyer has to terminate the cooperation immediately if the compliance by this service provider with the requirements provided in para 3 is not ensured.
- (3) The contract with the service provider must be in text form. It must
 - 1. oblige the service provider to maintain confidentiality and instruct him of the criminal sanctions connected with a breach,
 - 2. oblige the service provider to gain knowledge of third party secrets only to the extent this is necessary for the fulfilment of his contractual obligations,
 - 3. set out whether the service provider shall be entitled to involve third parties for the fulfilment of his contract; in this case the service provider must undertake to oblige, in text from, these persons to maintain confidentiality.

SERVICE PROVIDERS ABROAD – SPECIAL REQUIREMENTS

§ 43e BRAO

(4) If services are contracted which will be **performed abroad**, the lawyer may provide the service provider with access to third party secrets only if the protection of secrets found in that foreign country is **comparable with the protection in Germany**, unless the protection of these secrets does not require it.

SERVICE PROVIDERS ABROAD – EQUIVALENT LEVEL OF PROTECTION

- ❖What does "comparable" mean?
- Identical provisions are not required
- ❖Such a requirement would frustrate the reform
- Functional equivalence is required
- Understood as effective mechanism for sanctioning breaches of confidentiality
- Complex evaluation needed
- Client may waive this requirement
- ❖Further exception: If data do not require significant protection

SERVICE PROVIDERS ABROAD -PRESUMPTION: WITHIN EU OK, **UNLESS BETTER KNOWLEDGE**

- ❖Comparable level assumed for all EU member states
- ❖Assumption avoids breach of EU Services Directive
- ❖User should not rely on assumption in case of doubt or better knowledge

EU DIRECTIVE 2006/123/EC on services in the internal market

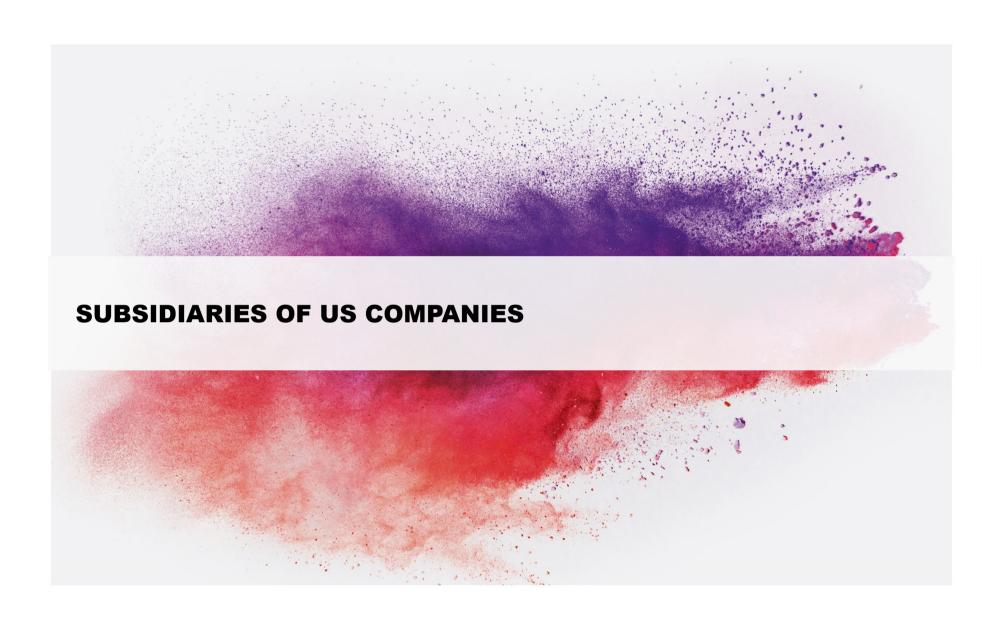
(16) This Directive concerns only providers established in a Member State and does not cover external aspects. It does not concern negotiations within international organisations on trade in services, in particular in the framework of the General Agreement on Trade in

Services (GATS).

SERVICE PROVIDERS ABROAD -UK SOON THIRD COUNTRY

- ❖Underestimated issue?
- Documentation necessary
- Continued observance of current EU standards would help





HISTORY

- Safe Harbor: agreement between the EU and the US regarding data protection
- ❖ EU-US Privacy Shield: replaced Safe Harbor in 2016. The EU-US Privacy Shield is in place to protect Europeans fundamental rights when their data is transferred to US companies.
- **Patriots Act**: According to the Patriot Act from 2001, US companies are obliged to give out personal data to US authorities, given that the data is stores in the US.
- Cloud Act: US companies are obligated to hand over data about US citizens, people that live in the US and data stored with US companies, irrespective of the nationality of the individual or entity concerned.
- ❖ BUT: Similar issues might exist in other areas, too

ISSUE: US CAN REQUIRE US ENTITY TO RELEASE DATA EVEN IF STORED BY EU SUBSIDIARY

Cloud Act in conflict with GDPR

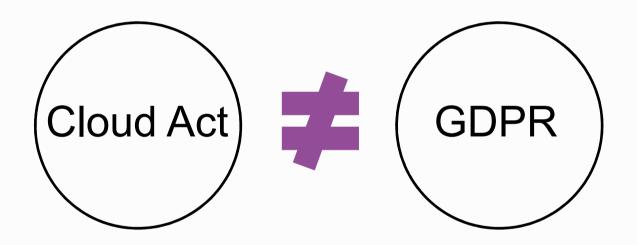
§ 2713 United States Code: Required preservation and disclosure of communications and records "A provider of electronic communication service or remote computing service shall comply with the obligations of this chapter to preserve, backup, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber,

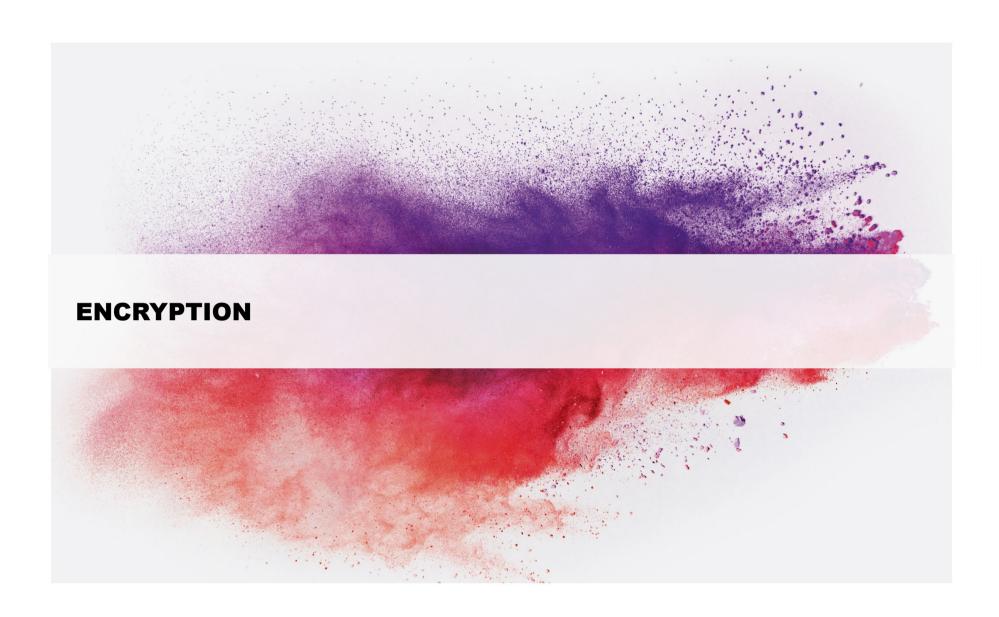
within such provider's possession, custody, or control, regardless of whether such communication, record, or other information is located within or outside of the United States."

Art. 48 GDPR

Any judgment of a court or tribunal and any decision of an administrative authority of a third country requiring a controller or processor to transfer or disclose personal data may only be recognised or enforceable in any manner if based on an international agreement, such as a mutual legal assistance treaty, in force between the requesting third country and the Union or a Member State, without prejudice to other grounds for transfer pursuant to this Chapter.

EU REGULATION NOT TO COMPLYWITH FOREIGN STATE INSTRUCTIONS





LEGAL EFFECT

- Encryption legally recognized to protect data
- Readable text is transformed into secret text
- Encrypted data is not the subject of section § 203 German Criminal Code or § 43a BRAO

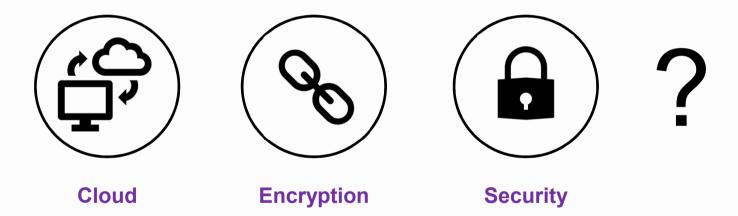
Art. 32 GDPR

Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, the controller and the processor shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk, including inter alia as appropriate:

- a) the pseudonymisation and encryption of personal data;
- b) the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing

systems and services;

TECHNOLOGY ALREADY AVAILABLE?



ISSUES FOR LEGAL-TECH SUPPLIERS: LEGAL SERVICES ACT (RDG)

- Providing legal advice requires permission
- Are electronic services the equivalent of legal advice?
- Legal advice requires analysis of facts and application of a legal rule
- Abstract information may be provided
 - Sample Contracts: Can be distributed
 - Plattforms can recommend lawyers and establish contact
- Critical: Customer uploads his own data and facts and receives result
- Functional equivalent to advice rendered by lawyer?
- Electronic services are intended to step in where legal advice are not available or accessible
- Amendment of regulation likely, but so far unclear



FUTURE OUTLINE OF THE LEGAL PROFESSION

Legal knowledge engineer

legal process analyst legal technologist

legal management consultant

ODR practitioner legal hybrid

legal data scientist legal project manager legal risk manager R&D worker

LEGAL TECH UNIVERSITY OFFERINGS (GERMANY - INCOMPLETE)

University	What is offered?
Bucerius Law School, Hamburg	Seminars, Bucerius CLP
Goethe University, Frankfurt am Main	Seminars, Legal Tech Lab
LMU Munich and other universities in Munich	Courses and Munich Legal Tech Student Association
EBS University, Oestrich-Winkel	Seminars, Legal Innovations Lab
Europa University Viadrina Frankfurt (Oder)	Legal Tech Center
University Freiburg	Courses
University Hannover	Legal Tech Inkubator
University of applied Sciences Konstanz	Legal Tech Day 2018 @ Wirtschaftsrecht HTWG

University	What is offered?
Humboldt University Berlin	Research Center Legal Tech
Frankfurt University of applied Sciences	Research activities
University Hamburg	Cyber Law Clinic
University Passau	Courses
University Mannheim	Seminars
University Münster	Seminars
University Bonn	Seminars
HHU University Düsseldorf	Hackathon
University Bayreuth	Workshop

LEGAL TECH UNIVERSITY OFFERINGS (WORLDWIDE - INCOMPLETE)

University	What is offered?
Stanford University, USA	Future Law Conference, LLM Law, Science & Technology
University of Helsinki, Finland	Legal Tech Lab Hackathons
IE Law School, Madrid/Spain	LLM Legal Tech
Edinburgh Law School, England	LLM in Innovation, Technology and the Law
Leiden University, Netherlands	LLM Advanced Studies in Law and Digital Technologies
Tilburg University, Netherlands	LLM Law and Technology

University	What is offered?
Oxford University, England	Research Group
Suffolk University, USA	Legal Innovation and Technology Certificate
University of California, Berkeley, USA	Research Center
Cornell University, USA	LLM Law, Technology and Entrepreneurship
University of Toronto, Canada	GPLLM Innovation, Law and Technology
Ghent University, Belgium	Research Center, Techathon
University of Vienna, Austria	Institute for Innovation and Digitization in Law

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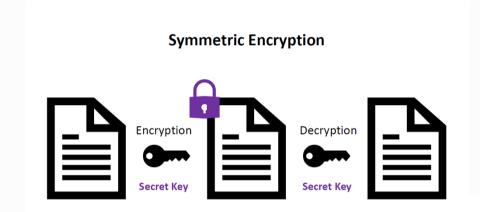
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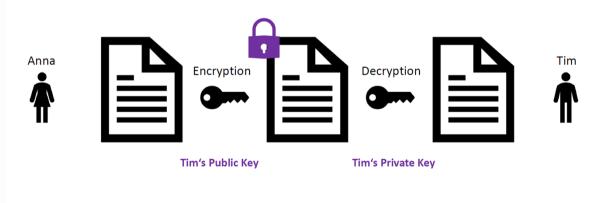
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WHAT DOES ENCRYPTION MEAN?



Asymmetric Encryption



KEEP THE KEY

Client-side encryption

Server-side encryption, client held keys

Server-side encryption, server held keys

No encryption

