

Data protection of employees – certain aspects of GDPR and ECHR protection

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Privacy of employees

The Charter of Fundamental Rights of the European Union ('CFREU') follows the spirit to the ECHR and sets lawfulness criteria (GDPR)

GDPR

ECHR-Article 8 the right to respect for private life (case-law of the ECtHR)

Guidelines and interpretations by the European Data Protection Board ('EDPB'), formerly Article 29 Data Protection Working Party ('Article 29 Party')

COVID-19 examples relating to employment

- Possible human rights violations
- **Scanning of the employees' body temperature** at the entrance - justified for the purposes of preserving public health – **are data kept in the system?**
for how long?
who has access thereto?
- **PCR testing of employees** - contact with customers (hotels, restaurants, pharmacies, care centres, hospitals, etc)
-not unnecessarily disclosed to public, stigma?
-the principle of purpose limitation - purpose of controlling the pandemic
- **Vaccines** - obligatory for employees in contact with vulnerable groups?

Legal diversity and complexity

- Principles of transparency, lawfulness and purpose limitation
- Member States may adopt **laws and collective agreements**.-Article 88 GDPR
- Legal diversity
- Data protection **before, during and after** the employment

Data protection in the recruitment procedure

- **First instance** of dealing with a prospective employees' data
- Types of **data-personal data** (name, address, ..) **and** possibly? **special data** (A. 9 GDPR) such as:
 - religious belief (school certificates),
 - membership to a trade union,
 - health issues
- Special categories of data – **explicit consent?**
- expected employment and **consent?**
 - Article 29 Party-free will?
(Opinion 2/2017 on data processing at work, Article 29 Party, of 8 June 2017)
- Legal grounds (7 months in Austria – Law on equal treatment)

Data processing during employment

- Regulated by **national laws** and **collective agreements**
- Types of data-employment contract
- Payroll
- Possibly special data (sick leave)
- fulfilling of legal or contractual obligation or legitimate interest by the employer and **not consent!**
- employees should feel safe, **trust**

Data processing after the employment

- Data access (A 15 GDPR)
- National law or collective agreement
- Keeping employee's certificate of employment 30 years in Austria (§ 1163 and 1478 of the General Civil Code (Allgemeines bürgerliches Gesetzbuch)).

Personal communications of employees

- Most direct intrusions
- Where is the border between private and professional? Do employees have a right to private sphere during their working time?
- Use of office communications for private purposes?
- **Niemitz v. Germany** (1992) – communication included into the sphere of private life
- **Copland v. the United Kingdom** (2007) e-mails sent from business premises could be a part of an employee's private life and correspondence and collection of such information without the knowledge of employee is **interference** with the employee's rights
- **Barbulescu v. Romania** (2016), is employer entitled to look into his employee's private messages? – (yahoo account, correspondence with fiancée)

Barbulescu judgments

1. Judgment (2016)– **no violation** of A8- no '**expectation of privacy**'
2. Grand Chamber judgment (2017) – **violation** of A 8 and **set of standards**:
 - **clear** and **in advance notification** to employees of possible monitoring by the employer,
 - the **extent** of monitoring and **degree** of intrusion into the employee's privacy,
 - any **legitimate reasons** by the employer to justify the monitoring,
 - existence of **less intrusive** methods, consequences of monitoring,
 - the existence of adequate **safeguards** to employees.
- Article 29 Party contends that losing employee's expectation of privacy **does not lead** to non-violation of privacy,
- Prevention
- Monitoring should generally **be avoided**

Video surveillance

- **Lopez Ribalda and others v. Spain** - Spanish supermarket chain, the employees
- **CCTV** – surveillance of cash registers
- 1. judgment (2018) - **violation**
 - monitoring of **all employees**
 - **no time limit**
 - during **all working hours**
 - **failure** of employer **to inform** the applicants of the installation of a system of video surveillance
- 2. Grand Chamber judgment (2019) – **no violation**
 - Although no time limit - limited to 10 days
 - Public space (**expectation of privacy was lower** then for example in private spaces such as toilets.)
 - **A strong suspicion** (lower grade of suspicion on the part of employees could not justify the surveillance)



Future developments

- **Köpke v. Germany** (2010) - the possibility of a different standing in the future, having regard to possible intrusions into private life by **new, more sophisticated technologies**.
- **Article 29 Data Protection Working Party**
 - collecting data **remotely**, reduction in the **cameras' sizes**, monitoring of the worker's **facial expressions**, identifying **patterns**, and likely to involve **profiling** - **generally unlawful**
 - recording an employee's **keystrokes** and **mouse** movements – **home office**
- **GDPR** - processing of personal data, **the principle of transparency**
- persons under the CCTV monitoring **must** be informed of the installation
- **a visible CCTV sign**



Conclusion

- GDPR-direct and effective protection
- ECHR with ECtHR case-law - a valuable resource for interpretation and conduct
- **High level of protection of privacy data of employees**

THANK YOU FOR YOUR ATTENTION

DANKE FÜR ihre AUFMERKSAMKEIT

