# Challenges for privacy and data protection of the employees

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In Austria, the challenges known in other countries obviously arise as well. Also the main legal texts are the same as in the other countries of the EU, namely Article 8 ECHR and the Data protection Directive. However, there are neither special rules on individual rights nor many court rulings dealing with important questions that would be noteworthy to be reported. Thus, I try to sketch some areas of major concern – as a kind of road-map for discussion that hopefully will supplement the other, comprehensive contributions.

**1. Variety of legal sources**

In Austria (and in Germany) the legal basis for protection can/must be found in three areas of law. Individual rights are conferred by the right to privacy (mainly Art 8 ECHR) and data protection law (Directive and national statute). Besides, there are rules of collective labour law, which empower the works council. The double way of individual and collective rights/protection may strengthen the overall protection. In many cases, only the rights vested in the works council can secure some protection. Further, they allow for negotiations that normally would not be possible between the employer and individual employees. However, the works council is not empowered to litigate if merely an individual right of an employee is at stake. In addition, the double way does not necessarily strengthen the overall protection, as the collective and the individual protections might not fit together too well. The existence of a collective procedure might even weaken the importance of the worker's individual rights in fact (not in law), as national standards are construed in view of the collective protection. This might lower the protection for employees that are not (well) represented by a works council.

**2. Works Council's rights**[1]

Austrian Labour Law stipulates that the employer needs the works council's consent for specific measures. Two of them concern our topic.

Firstly, the employer needs the consent for a measure that is intended or able to supervise employees and affects (but not violates) human dignity. If the consent lacks, the measure is unlawful and the works council has an enforceable right to its removal or omission. The employees may refuse to work under the supervision-measure. This right of co-determination comprises for example the video-supervision of the workplace, where the supervision does not violate human dignity. If a measure violates human dignity, the works council, according to the predominant opinion, is not able to take legal action against it. If no works council has been elected, the employer needs the consent of the employees concerned individually.

[1] Cf. *Risak*, Austria, in ECLL § 803 ff.

Secondly, the employer needs the works council's consent for measures that introduce electronic data processing related to qualified personal data of the employees or that introduce systems to assess employees. However, here he can call in a conciliation board, which is empowered to substitute the failing consent.

Unfortunately, the scope of application of these two provisions is not clearly defined. An example is a ruling that deals with a system to evaluate employees who compete for a better job ("performance-management"). The Court says that the employer does not need the works council's consent if the business interests outweigh the interests of the employees aimed at the protection of their personality (*Persönlichkeitsrechte*), which was the case.[2]

**3. Future Union legislation: floor or ceiling?**

The Data protection Directive, which is actually in force, applies also to the employment relationship and harmonises – according to the ECJ, not to the text – in a concluding manner. Although this has not raised many problems hitherto in Austria (and presumably also in Germany), the new Regulation which is in the pipeline may change this, as it will regulate many questions more in detail. Thus, a major problem in the future will be the extent to which the new Regulation will apply also to the employment relationship and whether it will exclude national rules that try to protect the employee more than the Directive does. This might be especially relevant in regard of the mentioned rights enshrined in collective labour law, which lead to divergent levels of protection inside the EU. In the future, this might perhaps raise doubts about their compatibility with Union law, if the new Regulation does not explicitly allow for stronger protection by collective rights.

**4. Importance of sanctions**

The best rules do not have great effect if the sanctions are too weak. Very strict rules combined with inefficient sanctions might be less useful than less stricter rules which can be effectively enforced. In Austria, the sanctions in case of an infringement of employee's privacy or data rights are rather weak. The main lacuna is that the Courts allow the employer to use evidence even if it has been obtained in an unlawful manner (there is no poisonous-tree doctrine). As long as this opinion prevails, many infringements of data or privacy rights will remain without an effective sanction. Another main enforcement-problem regards the deletion of data. Employees often have no possibility to control, whether the employer has deleted data he is obliged to delete, and even if they know that the employer has not complied with the duty to delete it is difficult to enforce it.

[2] Oberster Gerichtshof, 20.8.2008, 9 ObA 95/08y. According to the statute, the employer in this case could try to "ovverule" the lack of consent by the decision of an independent board. In other cases, where the interests of the employees are more affected, this possibility does not exist.

**5. Employers' interests: Control and Compliance**

The traditional view on the protection of employee's privacy and data focuses on the employer's interest to control in order to further their own – mostly economic – interests. However, the law, national and unional, increasingly demands that employers control their businesses and therefore their employees in order to pursue "public" interests. This new dimension might perhaps require new considerations regarding the employee's protection. However, equally (if not more) important is to include the values of employee's privacy already in the shaping of the rules on compliance.

**6. Employee's consent**

The main rules on data protection allow for data-use in many cases if the person concerned agrees. The ECJ has stated, in the context of working time and conflict of laws, the consent of the employee – as the weaker party – has to be free and with full knowledge of all the facts.[3] This reasoning should apply also with regard to the Data-Protection Directive. However, in at least some jurisdictions derogation is allowed even if the employee is not fully informed and aware of the measures of control and the use the employer intends to make of the information.

On the other side, the consent can be withdrawn unilaterally at any moment. The employer then is obliged to delete the data. This might unduly interfere with his duties that stem from compliance rules and further may not take into account adequately his interests.

**7. General rule**

Regarding information/data that has been processed by an employee in digital form one should ask in a first step whether and to what extent the employer would be allowed to access this information in case it would be present in a traditional form (e.g. a letter in the desk). The digital processing must not enlarge the employer's possibilities to access; even if the digital processor belongs to the employer (he would not be allowed to read a letter that has been written on paper of the office after having acknowledged that it is a private letter). On the contrary, one should always ask whether the employer's access to information should be more restricted if the information is digitally, in particular systematically, processed than if it were present in a traditional form, because the possibility to process vast amounts of infor-

[3] . "Any derogation from those minimum requirements must therefore be accompanied by all the safeguards necessary to ensure that, if the worker concerned is encouraged to relinquish a social right which has been directly conferred on him by the directive, he must do so freely and with full knowledge of all the facts. Those requirements are all the more important given that the worker must be regarded as the weaker party to the employment contract and it is therefore necessary to prevent the employer being in a position to disregard the intentions of the other party to the contract or to impose on that party a restriction of his rights without him having expressly given his consent in that regard." (ECJ C-397/01 Pfeiffer).

mation “automatically” changes the quality of the information (quantity alters quality). This applies to data produced by the employee as well as to information about the employee. The general rule that the employee works in “subordination”, under the direction and surveillance of the employer, does not justify as such modern methods of control.

In Austria, most cases are dealt with using the concept of weighing of the interests involved. However, this concept as well as a test of proportionality does not really provide for a clear guidance to employers and employees, as the outcome is rarely predictable. Thus, clear statutory rules would be preferable, that ban or allow specific measures or at least give – besides a general rule – some examples for licit and illicit measures.

**7. “Private life”**

For many employees, the new ways of work, enhanced by the information technology, blur the boundary between work and spare time not only regarding working time, but also with regard to accessibility, information and control. This enables the employer to get information on the behaviour outside the workplace. The law should provide for clearer boundaries between the spheres of work and out-of-work as well as for clear rules regarding the use of information that mainly concerns the out-of-work sphere. This regards primarily the data (localisation, connections, content) operated by devices that are used for work as well as for private aims, either if the employee is allowed to use his own device (BYOD) or if the employee is allowed to use an employer’s device also for private aims. It regards as well the information about the employee that is accessible in social networks. The use of programs that allow following all communication of employees in networks and blogs (dragnet investigation) should be banned.

**8. Electronic communication**

The employer should be responsible for clear rules stating the extent to which the use of business tools for private communication is allowed. Any lack of clarity in these rules should be weighted in favour of the employee. Thus, the default rule should be that private use is permitted. As private devices for electronic communication are ubiquitous, however, there should be not duty on the employer to allow the private use of business communication tools. Especially, the ban to use the business internet for research on topics that are not related to the business (e.g. sport, holiday-travel, society) cannot be qualified as censorship. If the employer is confronted with a communication that can easily be recognised as private, he must not proceed to inform himself of the content, even if he has banned the private use of business devices, as he is able to react without this knowledge. The employee should be able to delete all mails that he classifies as private (connection, header, content) effectively from

the servers used by the employer. Communication by spoken word (telephone, video) is in relation to the state protected in a stricter manner. It should be considered if this higher standard should apply also in relation to business communication.

**9. Human Resource-Management**

The main problem here is the vast amount of personal information that can be collected and analysed today automatically and systematically. Thus, a management tool should not be permitted merely because the employer could use the information also in the traditional manner. This applies especially to tools that allow many employees to "follow" the activities of their colleagues ("presence-manager") even if they are not at all present to them.

The technic enables today to get a much more precise and comprehensive picture of an employee than it was possible in the past. It might be that the concepts on the right behaviour, especially when misbehaviour triggers a sanction, rely on the hidden assumption that an employer cannot get such comprehensive information. Therefore, it should be asked if "total information" requires new standards of sanctions in some cases.

**10. Customer Management and Security**

Employees who work outside the office increasingly have to monitor all their activities in an electronic (cloud) system, in order to improve the Customer Management. This enables the employer to track the ways and the time use in a quite detailed manner, perhaps in a more intense manner than for those who work at a premise of the employer. Until now, this is in most cases not seen as a problem of individual rights, thus only the rights of the works council may put a limit to the employer's plans.

**11. Cloud-computing and US-rules**

In many cases, the data related to the employees are stored in a system located in the United States. Especially if a Public Cloud Computing system is used, the rules of the US (Patriot Act) apply as well. Some fear, that these rules would "overrule" the European rules.

**12. Economically dependent workers**

The number and the share of working persons, who work in person and for their own account but depend economically from their contracting partner, has risen in some countries remarkably. It should be considered if special rules that strengthen the protection of privacy and data for employees should cover as well these persons. On the other hand, one might consider if some of the provisions that alleviate the rules for employers should apply as well to the contracting partners of economically dependent workers. In both cases, the reasons that justify special rules for the employment relationship might apply also to these personal working relations.