



**Gesellschaft für Datenschutz
und Datensicherheit e. V.**

**German Association for Data Protection
and Data Security**

POSITION PAPER

ON A EUROPEAN LEGAL FRAMEWORK FOR

THE PROTECTION OF PERSONAL DATA IN THE EMPLOYMENT SECTOR

I. CURRENT SITUATION

The 1995 European Data Protection Directive (95/46/EC) sets general minimum standards for the protection of personal data in the European Union. These standards have been transposed by the Member States rather inconsistently. The EU Data Protection Directive contains only a few specific requirements concerning the handling of personal data of employees.

The Commission Communication on 'a comprehensive approach on personal data protection in the European Union' – COM(2010) 609 final – does not include specific regulations on the protection of personal data of employees.

Irrespective of national labor law, a specific protection of employee data does apparently not exist in the European Union. In Germany the protection of personal data of employees is supposed to be established as an amendment to the German Federal Data Protection Act (BDSG) until the end of 2011.

II. REGULATIONS ON THE PROTECTION OF PERSONAL DATA OF EMPLOYEES

At a European level the protection of personal data of employees on the one hand and the necessity to meet international, European and national compliance requirements on the

other hand are in conflict. At the same time the use of modern information and communication technologies in the workplace leads to new challenges with regard to the protection of employee privacy rights.

When considering to establish a uniform legal EU framework for the protection of employee data, (minimum) standards for crucial constellations in the employment sector could be set, e. g. concerning the collection of personal data during the recruiting process, medical examinations and the monitoring of employees (also with regard to modern technologies).

Establishing employee data protection standards at EU level could not only be favorable in terms of harmonization, but also in order to avoid competitive distortions and locational disadvantages between the Member States.

However, a European framework for the protection of employee data should be based on the general modernization the European Commission is currently preparing. In this way redundant regulation and contradictions could be avoided. Therefore, European regulations on the protection of employee data could be developed in parallel to or after the establishment of a general legal framework for data protection in the European Union. Depending on the progress of the new general legal framework, they could either be integrated right away or after the new legal framework has come into force. However, the ongoing developments concerning the new general legal framework should not be delayed inappropriately.

With regard to the protection of personal data of employees the Article 29 Working Party has already provided some guidance for the interpretation of the EU Data Protection Directive, e. g. with regard to whistleblowing, the role of consent and standard contractual clauses for data transfers to third countries. Some of the guidance already provided could serve as a basis for a later codification.

III. POSSIBLE CONTENTS OF A LEGAL FRAMEWORK FOR THE PROTECTION OF PERSONAL DATA OF EMPLOYEES

1. Minimum standards

A future EU legal framework for the protection of employee data should set minimum standards for the handling of personal data in the employment context. A minimum level of protection should be defined which must not be undermined by contractual clauses, employee consent or works agreements.

2. Drawing a 'red line' for the screening of employee data

The requirements for the screening of employee data should be legally defined. Compliance requirements must be accompanied by adequate data protection measures and procedures. Especially, the principle of data minimization should be defined in more detail.

3. Processing of employee data within business groups

Currently, the EU data protection law does not include a specific provision on the processing of personal data within business groups consisting of various legal entities. With regard to their collaboration transfers of employee data between affiliated companies should be simplified, at least, if they are situated in the EU or the European Economic Area where European data protection law is applies.

4. Remaining technologically neutral

On the one hand, an effective EU legal framework for the protection of employee data may have to address specific technology related issues. On the other hand, it is necessary to maintain a technologically neutral approach. Given this conflict the technologically neutral character of EU data protection law should be preserved as far as possible.

5. Internal supervision by the Data Protection Officer

According to Communication COM(2010) 609 final the Commission will consider to enhance data controllers' responsibility by making the appointment of an independent Data Protection Officer (DPO) mandatory. This approach should also be reflected in a possible EU legal framework for the protection of employee data. In this context one could consider to determine certain processing operations which require prior checking. The idea of demanding for the appointment of an additional DPO who is merely in charge of the handling of employee data is not recommendable. Such an approach would weaken the general DPO and create conflicts as far as the individual competencies are concerned.

The DPO should be in charge of all processing operations involving employee data, including the processing of employee data which is carried out by the works council or staff representatives. A new European legal framework should include a general duty of the DPO to maintain secrecy, not only on the identity of the data subject, but also on the activities of the works council or staff representatives.

6. Co-determination

Employee data protection also depends on the question whether or not national labor law allows for co-determination by works councils or staff representatives. The answer to that question should be left to the Member States.

Bonn, October 18th 2011

About the GDD

The German Association for Data Protection and Data Security (Gesellschaft für Datenschutz und Datensicherheit e.V., GDD) was founded in 1977 and stands as a non-profit organisation for practicable and effective data protection. With more than 2400 – mostly company – members the GDD is Germany`s leading privacy association. Besides offering various member services such as education, training and certification of Data Protection Officers, guides for practitioners and networking opportunities for data protection professionals all across Germany, the GDD also represents member positions at national and European level.