Topics in our issue:

ECJ: Data retention, take two

Last December, the European Court of Justice (ECJ) revisited the issue of storing traffic and location data of all users of electronic communications services without a given suspicion and found that national regulations providing for the general and blanket retention of data for the purpose of crime fighting are unlawful.

Unsurprisingly, given the cancellation of Data Retention Directive 2006/24/EC in April 2014, the ECJ found that the storage of traffic and location data without a given suspicion must not be the rule but an exception only, on the grounds that the entirety of such data allows drawing accurate conclusions regarding the private life of the individuals concerned even if the content of such a communication is not stored. This time the judicial review concerned national regulations in Sweden and the UK.

A national regulation that allows the preventive retention of such data for the purpose of fighting serious crime, however, is not contrary to EU law when it is limited to what is absolutely necessary in terms of the relevant data categories, the means of communication concerned, the individuals affected and the retention period adopted.

Data retention that is permitted as an exception nevertheless obliges operators of electronic communications services to take suitable technical and organisational measures to protect such data. In this respect, a national regulation must provide that such data be stored on EU territory and irrevocably destroyed once the retention period has expired.

Whether and how a new regulation governing data retention on this basis will be implemented in Austria remains to be seen.

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P) PRESLMAYR RECHTSANWÄLTE

New data protection rules in labour law

The General Data Protection Regulation extends to the use of employee data: what will change and what will persist?

Employers are faced with a plethora of rules when it comes to the use of personal data. And they cannot expect any improvement of the situation from the European Union's General Data Protection Regulation (GDPR) once it enters into application on 25 May 2018. With regard to data in an employment context, the GDPR includes an escape clause which enables national legislations to pass own rules by 25 May 2018 at the latest. Accordingly it is impossible to specify before this date which changes will occur regarding employee data.

Nevertheless it is obvious that the general principles of proper data processing will apply to the processing of employee data. These principles will remain basically unchanged. Accordingly, personal data must continue to be processed lawfully, fairly and transparently.

One change affects the notification of data applications to the authority's data processing register. In future controllers as well as processors must keep internal records of processing activities which must be made available to the data protection authority upon the latter's request.

Organisations with fewer than 250 employees, on the other hand, are not obliged to keep a record of their processing activities unless they constitute a risk to the rights and freedoms of data subjects, are not carried out occasionally only or include sensitive or criminal-law-related data.

To the extent possible, controllers will need to state in their records the periods after which the data of specified categories must be erased. The permissible storage period depends on the type of data and their concrete purpose of use and it may be based on statutory periods of limitation, periods of retention and other limits. Thus payment claims under labour law generally become statute-barred after three years. Business records and vouchers need to be stored for seven years. A claim for a job testimonial, on the other hand, takes 30 years to expire.

Even though the systematic listing of such periods for erasure is first stipulated in the GDPR, the principle already applies that data may be stored only so long as is necessary to achieve the purpose for which they were obtained. The obligatory establishment of internal records of processing activities should therefore be utilised to review current erasure policies. To this end it is first necessary to identify why given data categories are processed. Only when this has been achieved it will be possible to identify suitable time limits for their storage.

The GDPR thus calls for more responsibility among employers in processing employee data. In future, the data protection authority will no longer check in advance whether it is permissible to use data applications that contain sensitive items. At the same time, sanctions for violations are increased to a maximum of € 20 million or 4% of the total worldwide annual turnover of the preceding financial year. Until the time the GDPR becomes effective it is thus advisable to perform a detailed review of own data uses and draw up records of processing activities.

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New liability risks on the construction site

The new law to fight wage and social dumping has created additional provisions for liability for building owners. Consumers may be affected as well.

The new Act to Combat Wage and Social Dumping (LSD-BG), entered into force on 1 January 2017, combines various regulations to fight wage dumping and in its Section 9 includes a new (and additional) rule governing the liability of building owners. A building owner, i.e. a person who commissions construction works, is liable to stand surety and pay for minimum pay claims of workers posted or temporarily leased across the border by the contractor and for the pay supplements under the Act Governing Vacation and Severance Pay for Construction Workers (BUAG) payable to employees thus affected. When a contractor employs workers who customarily work in or are assigned to a (branch) office in another EU member state than Austria, liability for non-payment of the minimum pay and BUAG supplements due under Austrian law (statutes, regulations, collective bargaining agreements) rests with the person who orders such construction works.

The definition of construction works is very wide, comprising all activities that involve the erection, maintenance, repair, conversion or demolition of structures. It includes excavation and earth-moving works, erection and removal of prefabricated elements, furnishing and fitting, renovation, repair, dismantling and demolition, maintenance, overhaul (including paintwork and cleaning) and refurbishing works.

Liability within the meaning of the new law may be imposed on the party that commissions the works – regardless of whether it is an entrepreneur or a consumer – as well as the contractor that subcontracts the job, always on condition that *"they knew before contracting that the compensation would not be paid or had to consider this to be seriously likely due to obvious signs, and accepted this situation"*. However, legislators remain silent about the concrete circumstances under which a party may be blamed for not knowing that payment was incorrect. One sign that the workers employed might be underpaid would be a suspiciously low price. When in doubt, it will be necessary before arriving at an agreement to ask the contractor whether he properly pays his workers. A written statement on the part of the contractor would be helpful for the purpose of evidence-gathering.

The Act specifies a complicated procedure when workers want to have recourse to such liability. The employee needs to contact the Building Workers Vacation and Severance Pay Fund (BUAK) which checks the amount of the claim and then in turn contacts the party that has commissioned the work. Liability is established only upon receipt of BUAK's letter of notification and ends automatically nine months later unless the employee has meanwhile taken legal action. If the claimee under such liability makes direct payment to the worker s/he is released from the obligation to pay for the works to the extent of such direct payment. However, this provision is of little use when – as is typically the case – the works have already been paid for. In such case, the claimee can have recourse against the contractor, a step of limited utility in case the contractor has gone bankrupt. One remedy would be to contractually agree on a retention bond.

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The new re-integration part-time scheme

After a long illness, it is not always advisable immediately to return to a full-time job. To foster the re-integration of persons after a long-term sick leave, a new law has been passed which provides for a **scheme of part-time work** for employees to be gradually phased back into work.

Provided that the employee has been employed for at least three months, under Section 13a AVRAG employee and employer may agree on **reducing weekly working hours** by at least 25% and at most 50% after six weeks of sickness leave. The agreed normal weekly working time must not be less than twelve hours and the pay due to the employee must be above the marginal earnings threshold. Participation in the scheme may be agreed for a duration of up to six months and may then be extended by another three months. Participation requires a **written agreement**. A re-integration schedule needs to be drawn up and a certificate obtained from a physician that the employee is fully fit to work is necessary.

Apart from the limited reduction of working hours, participation in the scheme does not affect the employment contract. Nevertheless, the employee must not be ordered to work beyond the agreed hours nor during other hours. While on the part-time scheme, the employee is entitled to *pro rata* pay and is further paid a **re-integration allowance** by the public health insurance organization. While an employee states his or her intention to make use of or actually uses the scheme or refuses to participate contrary to the employer's proposal, such employee is protected against dismissal.

The provisions governing the re-integration part-time scheme will become effective on 1 July 2017. For more information please contact:

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P) Inside

Expansion course: Franz Lippe and Günther Billes bring new vigour to Preslmayr Rechtsanwälte

A new addition to the team of Preslmayr Rechtsanwälte as of January 2017 is Dr. Franz Lippe, LL.M. He concentrates on media law, data protection, copyright and e-commerce. Prior to joining Preslmayr Rechtsanwälte, he had worked as an attorney-at-law with Lansky, Ganzger & Partner. Before, he had studied journalism and business communications at FH Joanneum in Graz as well as law at the University of Vienna and taken a course in information and media law.

Mag. Günther Billes studied law at the University of Vienna and worked as an attorney candidate at our office before becoming a full-scale attorney-at-law and partner in February 2017. His priorities are in company law and insolvency law.

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