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EUROPEAN SOCIAL CHARTER

REPLY TO SUPPLEMENTARY QUESTION

25th National Report on the implementation of
the European Social Charter

submitted by

THE GOVERNMENT OF GERMANY

(for the period from 1 January 2005 to 31 December 2006:
Article 1§2)

Report registered by the Secretariat on 22 May 2008

Berlin, 21 May 2008

25th report of Germany on the implementation of the European Social Charter
re: Question of the Committee of Experts concerning
Article 1§25

Germany guarantees the protection of employees' individual dignity and freedom as follows:

A. Rules and principles for the protection of employees' privacy rights

The **constitutional** guarantee of the individual's dignity and right to privacy (Article 1 (1) and Article 2 (1) of the Basic Law) is of particular significance, also for the employment relationship. The employer, like the works council, shall safeguard and promote the free development of the personality of the employees in the company (s. 75 (2) of the Works Constitution Act (*Betriebsverfassungsgesetz – BetrVG*)). Starting out from the rights of liberty and privacy enshrined in the constitution, the extensive case law of the labour courts developed principles for information and data protection in a labour law framework.

The discrimination bans of the **General Equal Treatment Act** (*Allgemeines Gleichbehandlungsgesetz – AGG*) also play a major role in protecting employees' privacy rights. The General Equal Treatment Act rules out any discrimination of employees on the grounds of sex, religion or ideology, disability, age, sexual identity, race or ethnic origin at the point of recruitment and termination of employment as well during the lifetime of the employment relationship. In the context of an employment relationship the discrimination ban under the General Equal Treatment Act must be borne in mind in particular in the collection and use of employee-related data (right of employer to inquire) and the provision of benefits.

Another aspect of information and data protection under labour law which relates to the lawfulness of genetic testing in employment will be explicitly regulated in the envisaged **Act on Genetic Diagnostics.** This Act will primarily regulate the collection and use of genetic data in working life (general prohibition of genetic tests in employment).

Employees are also protected by the **Federal Data Protection Act**'s provisions relating to personal information in general. These provisions apply also to the automatic processing of employee-related data. The Federal Data Protection Act (*Bundesdatenschutzgesetz – BDSG*) restricts the kind of data that an employer may collect and use. According to section 28 (1) (1) of the Federal Data Protection Act, data may be collected, stored, modified and transmitted to third parties only insofar as they are necessary for the purposes of the

employment relationship. In defining these purposes the competing interests have to be weighed while respecting the principle of proportionality. It is not allowed to collect and/or use data that are unrelated to the employment relationship.

According to these principles, an employer may, for instance, request from job applicants only information needed to judge their skills and ability for the job (e.g. questions about their professional career, examination certificates and results), i.e. questions in which he has an objective and legitimate interest which outweighs the employees' interest in protecting their privacy and non-interference in their personal lives. If the employer asks inadmissible questions (e.g. questions about previous convictions that are not relevant for the post to be filled), the employee may refuse an answer. Even untruthful answers to inadmissible questions do not have negative legal consequences for the employee. In its rulings the Federal Labour Court established that an incorrect answer to an inadmissible question is no ground for dismissal and does not constitute wilful deceit which would give the employer reason to challenge the employment contract.

Of special importance for the protection of employee-related data are the provisions of the **Works Constitution Act** and the **Staff Representation Acts** governing the participation and co-determination rights of the works or staff council particularly in relation to the introduction and use of monitoring techniques. Details relating to the protection of employee-related data which touch upon the privacy rights of employees (e.g. collection of data on phone calls) are often regulated in company agreements negotiated between employers and the works councils.

B. Claims against the employer in case of violations of the employee's general personality rights

Interference by the employer in the employee's privacy rights is an infringement of the obligations arising from the employment contract. In case of a culpable (i.e. intentional or negligent) violation of the employee's privacy rights by the employer, the employee may claim damages (German Civil Code, sections 280 (1) and 823 (1)) and damages for pain and suffering (German Civil Code, sections 280 (1) and 823 (1) in conjunction with section 253). In this context employees' faults are ascribed to the employer (German Civil Code, sections 278 and 831). Where the employer culpably causes harm to an employee through the collection, processing or use of personal data that is inadmissible or incorrect under the Federal Data Protection Act or other data protection regulations, he is liable to damages. In case of dispute whether the harm caused is a consequence of circumstances for which the employer is to be held accountable, he bears the burden of proof (Federal Data Protection Act, section 7). In case of objectively unlawful interference according to sections 12, 862,

1004 of the German Civil Code (*BGB*), the employee may request the employer to **stop** the interference or, given the danger of recurrence, **restrain** further privacy intrusions, even if the employer cannot be blamed for culpable conduct.

C. Monitoring of employees at the workplace

I. Admissibility

Monitoring mechanisms at the workplace affect the privacy rights of employees. Employees' right to privacy is safeguarded through the specific principles governing the protection of employee-related data ensuing from the Basic Law, the provisions of the Federal Data Protection Act, the Works Constitution Act's provisions regulating the participation and co-determination rights of the works councils and from the jurisprudence and case law on general information and data protection in a labour law context (see chapters A and B).

For a legal appraisal of **video surveillance** at the workplace, we have to distinguish between surveillance of premises that are open to the public and the surveillance of premises with restricted access.

1. Surveillance of premises open to the public

Under section 6b (1) of the Federal Data Protection Act video surveillance of premises that are open to the public (which may include salerooms and restaurants) is only allowed insofar as it is necessary for the purpose of

- enabling public agencies to fulfil their tasks,
- keeping out trespassers, or
- asserting justified interests in defined concrete situations (e.g. suspicion of crime)

if there is no indication of prevailing legitimate interests of those affected.

It must be made clear in advance that surveillance is conducted and who is included (section 6b (2) (4) of the Federal Data Protection Act). Clandestine surveillance is not permissible. As a rule, the data collected may processed and used only if needed for reaching the specific purpose provided there is no evidence of prevailing interests of the employees concerned (section 6b (3) of the Federal Data Protection Act). The data must be deleted as soon as they are no longer needed for achieving the defined purpose or if legitimate interests of the employees affected rule out continued storage of the data (section 6b (5) of the Federal Data Protection Act).

2. Surveillance of premises with restricted access

According to the jurisdiction of the Federal Labour Court section 6b of the Federal Data Protection Act does not apply to workplaces which – unlike salerooms – are not open to the general public. In these cases, the admissibility of surveillance by video cameras or other technical devices follows the general provisions protecting the privacy of employees.

The personal rights guaranteed by the constitution include the right to one's own image. The right to self-determination implies that individuals can freely decide whether they may be videotaped and whether the pictures can be used against them. Moreover, there is also protection for the spoken word, i.e. the right to determine oneself whether the spoken word is available to the partner of the conversation only or made accessible also to third parties or even the general public and whether it may be recorded by electronic or other means.

The assertion of overriding legitimate interests of the employer may justify interference in the privacy rights of the employees. When the general privacy rights conflict with employer interests, the legally protected interests have to be weighed to determine on a case by case basis whether the general right to privacy merits priority. According to the Federal Labour Court clandestine surveillance by technical devices is only permitted if

- there is concrete indication of a criminal offence or another serious misconduct at the expense of the employer
- the less drastic means to clear up the suspicion have been exhausted,
- covert surveillance is practically the only remaining means, and
- surveillance is not out of proportion, e.g. a cash deficit that cannot be cleared up in any other way (see Federal Labour Court on 27.3.2003 - 2003 2 AZR 51/02 NZA 2003, p. 1193 ff).

Surveillance measures may by no means invade employee privacy (intrusion upon seclusion). Therefore video surveillance is definitely not permitted in rooms such as changing rooms and toilets.

Even if the employees have been informed that a video camera or a similar technical device is to be installed at the workplace, this does not mean that surveillance is automatically admissible. Monitoring employee performance and behaviour is an interference in the privacy rights of employees that is inevitable in an employment relationship. Employees are aware of this and consent when they sign the employment contract. Yet this cannot be taken as consent to continuous surveillance made possible in particular by technical devices because the pressure on employees

caused by the feeling of being under constant observation constitutes a considerable infringement of the personality right. This applies in particular where the employer has possibilities for undetected surveillance. In this case, again, the interests of the employees have to be weighed against the legitimate interests of the employer (Federal Labour Court on 29.6.2004 AZ. 1 ABR 21/03 in: NZA 2004, p. 1278 ff.).

The above-mentioned principles to safeguard personality rights apply also to other surveillance measures by employers. Employers, for instance, who **eavesdrop** on **private phone calls** of employees at the workplace, violate employees' privacy. The Federal Labour Court ruled that this is also true for **phone calls** on business matters. If such calls are to be intercepted, employees must be notified in advance.

II. Co-determination rights of the works council

Under section 87 (1) (6) of the Works Constitution Act, the works council has a right of co-determination when the employer plans to introduce or use technical devices designed to monitor the behaviour or performance of the employees.

At first, the works council has the right to comprehensive information from the employer about the technical devices to be introduced. The employer must give the works council any introduction-related information that is needed to enable the works council to assess the extent to which these surveillance facilities risk to invade employees' privacy. This includes information i.a. about the period of introduction, the place, the purpose and mode of operation of the surveillance as well as information about any resulting modifications to the workplace or the work processes.

The co-determination right can prevent legally inadmissible interference in the private and personal lives of employees prior to the introduction of such techniques (preventive safeguards).
Where such interference is admissible, it enables the works council to influence the introduction and use of these technical devices. This ensures that monitoring measures are not more extensive than is absolutely necessary for operational reasons.

The works council's right of co-determination includes the right of initiative which gives the works council the power to table proposals of its own, for example concerning changes of existing monitoring techniques.

Technical monitoring mechanisms introduced without the consent of the works council are not permissible; the works council may take legal action to interdict their use.

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ESC 081
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Strasbourg, 13 March 2008

Dear Mrs. Koenig,

The European Committee of Social Rights is currently examining the 25th German report on the European Social Charter and has instructed me to forward to you the enclosed questions concerning Article 1§2.

The Committee would be grateful if you could reply to these questions before 16 May 2008 in order to allow the information to be taken into account in Conclusions 2008.

Yours sincerely,

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EUROPEAN COMMITTEE OF SOCIAL RIGHTS

COMITE EUROPEEN DES DROITS SOCIAUX

13 March 2008

Question in respect of the 25th report of Germany

Article 1§2 – Right to Private Life

The Committee asks Germany to provide information allowing the Committee to assess how employees' individual dignity and freedom are protected by legislation or through case law of courts from interference in their private or personal lives that might be associated with or result from the employment relationship. It refers, to the comments made in the General Introduction to Conclusions 2006 below:

"c. Comment on Article 1§2 – Right to Private Life

13. Individuals must be protected from interference in their private or personal lives associated with or arising from their employment situation. Modern electronic communication and data collection techniques have increased the chances of such interference.

14. Since the term "private life" may be defined with varying degrees of strictness it may be preferable to speak of "infringements of private or personal life".

15. In the first place, employers may place unnecessary restrictions on their employees' freedom of action. These include interference in their personal, or non-working, lives, even though the activities included in this autonomous sphere may be viewed as "public" because they occur in public. Examples include dismissing employees for attending a political rally or for buying a make of car in competition with that sold by their employer. The Charter's insistence that anyone is entitled to earn his living in an occupation freely

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entered upon (Revised Social Charter, Part I, 26 and Article 1§2) means that employees must remain free persons, in the sense that their employment obligations, and hence the powers of management, are limited in scope.

16. The principle is indisputable, even though it is sometimes difficult to determine the precise boundary between the occupational and non-occupational spheres, bearing in mind the nature of the work and the purpose of the business.

17. Admittedly, Article 1§2 only refers explicitly to the time when workers enter into employment. Logically, though, the fundamental principle of freedom which the Charter refers to with respect to this particluar occasion must continue to apply thereafter in the non-work sphere. According to the Committee's case-law, "the discriminatory acts and provisions prohibited by this provision are all those which may occur in connection with recruitment and employment conditions in general (mainly remuneration, training, promotion, transfer, dismissal and other detrimental action)" (Conclusions XVI-1, Vol. 1, p. 313).

18. Secondly, employees must be protected against infringements of their dignity, as embodied in the Charter (Part I, Article 26, in which "dignity" appears in the title). What is at issue here is people's private lives in the strictest sense. For example, certain employers, taking advantage of their dominant position over employees, intercept oral or written conversations of their employees or of job seekers between themselves or with third parties or question them about their sexual relationships or their religious or political beliefs.

19. Infringements of the two principles described above take many diverse forms. They may arise from questions to employees or job seekers about their family situation or background, their associates, their opinions, their sexual orientation or behaviour and their health or that of members of their family and about how they spend their time away from work. They may also arise from the storage, temporarily or permanently, and processing of such data by the employer, from their being shared with third parties and from their use for purposes of taking measures regarding the employees.

20. In Articles 1§2 and 26, as cited above, the principles protecting employees from unnecessary interference in their personal or private lives are worded in the most general terms. However, it should not be overlooked that under various specific circumstances, violations of these principles can also constitute violations of other articles of the Revised Social Charter. This applies in particular to Article 3 (one of whose aims is to counter threats to workers' health, including their mental health), Article 5 (in relation to the right to join organisations and not to disclose that one is a member), Article 6 (in relation to collective bargaining), Article 11 (in relation to mental health), Article 20 (in relation to discrimination on the ground of sex), Article 24 (in relation, in particular, to paragraph a., on reasons for dismissal) and Article 26 (in relation to protection against various forms of harassment).

21. Quite apart from the fact that the various types of conduct described above are sometimes aggravated by an intention to discriminate, they may in themselves upset the balance between the needs of the workplace and the individual's right to protection."

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