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**Employees data protection in accordance with Polish and German labour
law - a comparative analysis**

*(Ochrona danych osobowych pracowników w świetle polskiego i niemieckiego prawa pracy-
analiza komparatystyczna)*

Abstract

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The dissertation deals with the issue of employees data protection under Polish and German labour law. It takes into account the changes taking place in both legal systems as dictated by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27.04.2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), hereinafter referred to as 'GDPR'. It provides a comparative analysis of the basic legal constructions in force in the discussed area in both legal systems.

Personal data and the right to protect it at the end of the last century have also come into focus due to technological changes and the far-reaching computerization of various areas of life.

The employee's personal data protection is an extremely complex issue and it is impossible to present all the threads relevant to the topic within the framework determined by the nature of the dissertation. For this reason, the dissertation focuses on Polish and German regulations against the background of international and EU law, and the subject of the research are issues concerning the protection of personal data and selected forms of their processing in the context of employee employment. The analysis of the protection of an employee's personal data has been limited to employment based on an employment contract, focusing on the regulations of individual labour law and only to a limited extent referring to the issues of collective labour law. With this in mind, the concept of the dissertation was constructed in such a way as to allow for a comparative analysis of both national sources on the subject under study and the most important legal solutions for the protection of employees' personal data.

The dissertation consists of an Introduction, eight chapters and a Conclusion containing the final conclusions of the conducted comparative analysis *de lege lata* and comments *de lege ferenda*. The bibliography includes literature, legal acts and case law divided into Polish and German positions. At the end of the paper, there are five Annexes containing tables concerning: penalties and decisions of relevant supervisory authorities in Poland and Germany for violations of data protection regulations, rulings of Polish and German courts in cases of protection of employees' personal data, and a comparison of Polish and German regulations in the studied area. The assumptions of the comparative analysis determined to a large extent the layout of the work.

The first chapter presents the sources of international and EU law shaping employee data protection standards. The aim of this chapter is to demonstrate not only the multiplicity and diversity of these sources, but also to justify the need for sector-specific regulations in national orders, including in the employment sector. Given the specific nature of the GDPR for the standardization of legislation in the discussed area, the analysis of this normative act was carried out taking into account the role of the GDPR recitals for the interpretation of the provisions of this regulation and national laws relating to the protection of employees' personal data.

The second chapter focuses on the sources of national law in Poland and Germany on the subject of employee data protection. The evolution of legal solutions relevant to the topic is presented, taking into account the most recent legislation in the field of personal data protection, i.e. the German Data Protection Act 2017, as well as draft German laws on the protection of personal data in employment. This is followed by a presentation of the Polish Data Protection Act 2018, as well as the provisions of the Labour Code being amended in this respect in 2018, 2019 and 2023. This analysis is supplemented by a summary of the Polish and German provisions in Annex 5 to this thesis.

The author considered that, despite presenting the foundations of the right to privacy in Chapter Two, it was nevertheless necessary to emphasise the role of the employee's right to privacy doctrinally, as an axiological justification for the protection of the employee's personal data. These issues became the subject of analysis in chapter three.

The purpose of chapter four was to demonstrate the differences in the definition of the concepts relevant to the topic in the area under study, i.e. the concept of employee and the concept of personal data, taking into account the classification of employee personal data in Polish and German law.

The fifth chapter was devoted to a general nature of the basis for processing personal data, without going deeper into the grounds for processing employees' personal data. The purpose of this chapter was to clarify the very concept and the differentiated grounds for processing data due to their different categories. Attention was also drawn to the particular relevance of the principles of personal data processing to the grounds for processing.

The remarks made in chapter five then served to analyse the processing of personal data, but only concerning employees-chapter six. Attention was drawn to the role of the GDPR on this subject, focusing, however, on the regulations of Polish and German law. The prerequisite of the employee's consent, which the GDPR explicitly exposes as permissible, is discussed

separately, and Polish and German employment law contains particularly significant restrictions in this regard.

Chapter seven presents selected cases of processing of employees' personal data in the two compared systems. It analyses regulations concerning video surveillance in the workplace, data processing in connection with the employee's image, sobriety checks and the presence of alcohol-like substances in the employee's body, and the acquisition of employee health data in connection with preventive examinations. The selection of these cases is intentional. Based on the review, the author will attempt to demonstrate the differences in the applicable national regulations, in both legal orders. The study of these cases will enable an assessment of Polish and German legal solutions on the subject of employee data protection.

The eighth chapter focuses on presenting the variety of consequences of violations of employee data protection provisions under Polish and German law, taking into account the sanctions under the GDPR. This part of the thesis contains a characterization of the Polish and German authorities authorized to apply specific sanctions resulting from violations of the GDPR, which is indispensable for the research area. This chapter is supplemented by tables constituting the following annexes: Annex 1 containing an overview of selected penalties and decisions of the PUODO imposed on employers as data controllers; Annex 2 containing decisions of Polish courts based on Article 82 GDPR, including in relation to employment; Annex 3 containing an overview of selected penalties and decisions of the Land Plenipotentiaries imposed on employers as data controllers; Annex 4 containing decisions of German courts based on Article 82 GDPR, including in relation to employment. The appendices indicated above are for the years 2018-2023. Annex 5 contains a set of data protection legislation in Poland and Germany before and on the date of entry into force of the GDPR.

The research carried out showed that, despite the common sources from which both legal systems drew, the very fact that the sources of labour law were shaped differently meant that the final system of employee personal data protection is different in Poland and Germany. While the standard of protection of individuals' personal data in both countries is at a similar level, in Poland we are in fact dealing with a separate protection of employees' personal data within the framework of labour law, in which it is specified:

- scope of protection (subject and object),
- protection mechanisms, including a catalogue of standard personal data that can be collected and processed by the employer at the time of establishing the relationship with the candidate and the employment relationship with the employee,

- the possibility to extend the catalogue of data collected on the basis of the employee's consent.

On the subject of the consequences of a breach of employee data protection in Polish law as well as in German law from the perspective of the GDPR, which was dealt with in chapter eight, significant differences in the structure and activity of supervisory authorities for compliance with employee data protection standards became apparent. The multiplicity of German state authorities is not conducive to a uniform interpretation of the regulations. The labour courts in Germany, which are able to decide on data protection violations, do not conduct proceedings in proportion to the number of employees in the individual Länder. On the other hand, in Poland, unlike in Germany, such significant administrative fines are not imposed on employers in connection with video surveillance. The severity of the penalties has no legislative effect in Germany and the repetition of these violations confirms the lack of preventive power that could be attributed to the exceptional severity of the authorities' decisions (Annex 3).

The above conclusions allow the author to acknowledge the validity of the three theses adopted in the thesis. There is no doubt that Polish and German regulations on the protection of employees' personal data are embedded substantively primarily in the GDPR (thesis one). The protection of employees' personal data under labour law provides more effective protection of such data, as confirmed by Polish solutions (thesis two). The proper use of the possibility to create national systems for the protection of personal data in employment through "more detailed", i.e. more protective provisions (Article 88 of the GDPR) has given rise to the development of a new field (branch) of law, which is the law on the protection of personal data in employment (thesis three).

The implementation of EU standards in the discussed area has become an impulse for changes, which in Poland led to amendments in the Labour Code and the creation of a kind of 'employee personal data protection system'.

The analysis of the Polish and German legal solutions on the protection of employees' personal data also leads to the reflection that it is necessary to take into account a certain sequence of the employer's duties as a controller of employees' personal data, starting with the processing of the personal data of the employee candidate, then of the employee and finally of the former employee, whose data in the form of employee documentation must also be processed by the employer - controller.

The German regulations, apart from § 26 BDSG, do not contain provisions allowing for a comprehensive regulation of the processing of employees' personal data, and each time the need to adapt a specific/selected case to the EU regulations requires searching for regulations

in related laws or regulations constituting a reference under Article 88 GDPR. This does not guarantee adequate protection of the employee's personal data. In the author's opinion, it is necessary to enact a comprehensive law on the subject in Germany. A simplification of the structure of the German supervisory authorities should also be advocated, so that their decisions have the value of a uniform line of jurisprudence on the subject of the consequences of violations of the protection of employees' personal data.

On the other hand, a request was made to the Polish legislator for the necessity of a separate labour law judiciary, within which, as in Germany, cases concerning the protection of employees' personal data are settled.