



Privacy in the Workplace:

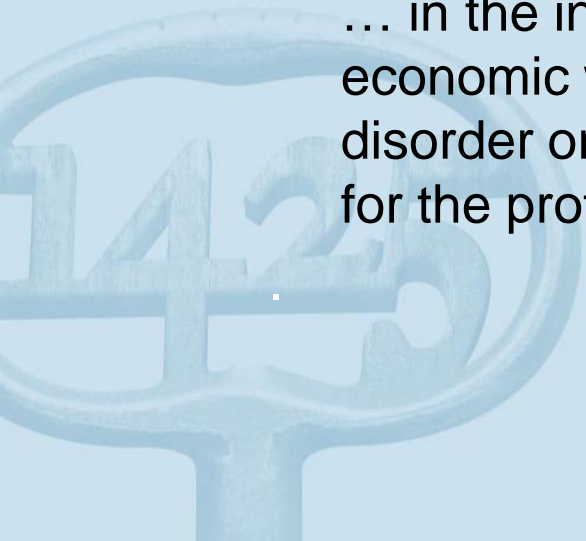
The European Convention of Human Rights

University of Pécs – International Conference
2-3 April 2012

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ...

... in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.



Art. 8: the workplace

- **Niemitz**

“There appears to be no reason of principle why the understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world.”

- **Halford**

“She had a reasonable expectation as to the privacy of calls made from her work telephone”

- **Copland**

“As there was no domestic law regulating monitoring at the relevant time, the interference in this case was not “in accordance with the law”

Parenthesis 1

- How can a conflict between Ms Lynette Copland and Carmarthenshire College be under the scope of Art. 8?
 - “indirect” horizontal effect before the ECtHR: Wilson
 - “direct” horizontal application by national courts?



Parenthesis 2

- What about the application of data protection law in the Copland case?
 - Directive 95/46/EC: which would be the criteria to make the data processing legitimate?
 - Directive 2002/58/EC: processing of electronic communications traffic data?



Question

If there is a law (authorising employers to monitor):
what about article 8 ECHR?



Rechnungshof?

Are the provisions of Directive 95/46/EC and Article 8 ECHR to be interpreted as **precluding national legislation** which requires certain public organisations to collect and transmit data on income for the purpose of publishing the names and income of employees?



Second question

If yes, are the provisions precluding national legislation directly applicable?



“The provisions of Directive 95/46 must necessarily be interpreted in the light of fundamental rights”

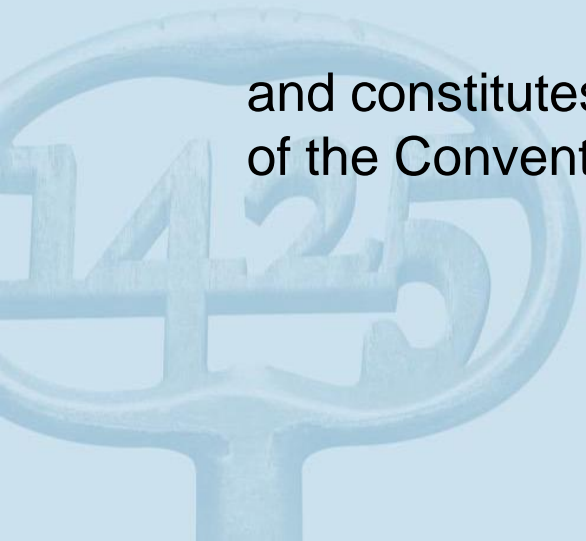


ECJ: ???

While the **mere recording** by an employer of data by name relating to the remuneration paid to his employees cannot as such constitute an interference with private life,

the **communication** of that data to third parties, in the present case a public authority, infringes the right of the persons concerned to respect for private life, whatever the subsequent use of the information thus communicated,

and constitutes an interference within the meaning of Article 8 of the Convention.



Privacy vs. Data Protection?

To establish the existence of such an interference, it does not matter whether the information communicated is of a sensitive character or whether the persons concerned have been inconvenienced in any way

It suffices to find that data relating to the remuneration received by an employee or pensioner have been communicated by the employer to a third party.



“Necessary”

The adjective 'necessary' in Article 8(2) of the Convention implies that a 'pressing social need' is involved and that the measure employed is 'proportionate to the legitimate aim pursued'

The national authorities also enjoy a margin of appreciation, 'the scope of which will depend not only on the nature of the legitimate aim pursued but also on the particular nature of the interference involved' (see the *Leander v. Sweden* judgment of 26 March 1987).

“Necessary”: to be ascertained by the national courts

The answer to the first question must be that Community law (e.g. Dir. 95/46/EC) and the ECHR do not preclude national legislation, ...

... **provided that it is shown that the wide disclosure** not merely of the amounts of the annual income above a certain threshold of persons employed by the bodies subject to control by the Rechnungshof but also of the names of the recipients of that income **is necessary** for and appropriate to the objective of proper management of public funds pursued by the legislature, ...

... **that being for the national courts to ascertain.**

Conclusion

- National legislation can authorise privacy intrusions in the workplace
- Its provisions should however be tested against:
 - Community law: Dir. 95/46/EC and Dir. 2002/58/EC
 - Art. 8 ECHR
- Only if the intrusion is necessary, the European rules don't preclude the national provisions
- Necessity - interpreted according to Art. 8 ECHR - is to be ascertained by national courts



Jos Dumortier

K.U.Leuven – ICRI

Sint-Michielsstraat 6

B-3000 Leuven

(t) +32 (0)16 32 51 49

www.icri.be / jos.dumortier@law.kuleuven.be



Jos Dumortier

time.lex - Information & Technology Law

Congresstraat 35

B-1000 Brussel

(t) +32 (0)2 229 19 47

www.timelex.eu / jos.dumortier@timelex.eu