

Germany: Relevant legislation

We have identified the following key pieces of legislation which are applicable to employee IT monitoring in Germany. Note that there is other legislation which is applicable which we have not included in this document.

German Constitution

- General right of privacy.
- Right of informational self-determination.
 - Every individual has the right to decide on their own on the surrender and use of personal data as a basic principle.
- Right to one's own image.
 - Right to decide if and to which extent others may publically present their biography or certain events of their lives.
- Protection for the spoken word, whether it is made available for others, and whether it may be recorded.
- Any monitoring measures which may lead to the violation of employees' general privacy rights must be proportionate to the risk.

The Federal Data Protection Act

- Employer is allowed to use personal data of employees if the use is necessary for the establishment, performance, or termination of an employment relationship.
- Authorises use of employee's data to unveil criminal actions by the employee, if:
 - there is actual evidence which causes suspicion that the employee has committed a criminal offence in the framework of the employment relationship;
 - the processing and use of the data is necessary for the purpose of prosecuting the crime; and
 - no other overriding legitimate interest of the employee in his data being excluded from such processing and use is given.
- Personal data may also be used if employees have given consent. This consent must be based on a free decision, and the employee must be informed of the purpose of the collection, processing and use of the data.
- The GDPR articles will be enforced under a new Data Protection Act in 2018.



The Telecommunication Act

- If an employer allows private use of internet/email in the work place, the employer could be seen as a 'service provider', meaning they are bound to the telecommunication secrecy obligation deriving from that provision. These provisions severely restrict the access and permanent monitoring of private emails and internet communication.
- In most cases it is recommended that the employer prohibits the private use of the internet and email at work and consequently takes care that such prohibition is adhered to by staff.

The German Criminal Code

- Restrictions can derive from this Code, specifically related to the following criminal offences:
 - violation of the privacy of the spoken word;
 - violation of the privacy of the written word;
 - phishing; and
 - violation of the postal and telecommunication secret.

The Works Constitution Act

- The works council has a right of co-determination when new technical systems are implemented to monitor employee conduct or performance. The right of co-determination should be observed if a works council exists at the company.

Principles deduced from case law

There is a huge amount of case law surrounding employee IT monitoring. Proportionality is a common thread.

Proportionality: Consider the following aspects to assess whether a monitoring measure is permissible:

- the reason behind the measure (e.g. suspected criminal offence or serious misconduct);
- the time and duration of the monitoring;
- the specific area of monitoring and why that area (e.g. private v public place)
- monitoring with/without knowledge and/or (explicit) voluntary consent of employees;
- the group of affected employees; and
- the specific impact on employees.

Permanent monitoring

- Unlikely to be legally justified, especially without any specific reason for the measure as the pressure caused by feeling under constant observation leads to a considerable infringement of the employee's privacy rights.
- Even if there is a valid reason, the employer is generally obliged to take the least restrictive action towards their employees that would be effective to achieve the stated goal.
- Covert monitoring *may* be permissible under certain limited circumstances if less restrictive measures to find clarifications on a (suspected) incident have been exhausted and that covert monitoring is the only remaining and adequate measure to follow.
- Open (overt) random monitoring (rather than continuous) is a better mechanism to employ in proportionality terms.

Social media

Immediate dismissal on the basis of negative social media comments that may not be directly associated with an employer (though it may imply it) is likely to be disproportionate action by an employer.

Illegally obtained evidence

The summary of the case law provided indicates that the admissibility of evidence can be an issue where improperly obtained.

The future

GDPR: The General Data Protection Regulation applies in Germany, as a member of the EU. See UK chapter or short report for more detail on the GDPR.

Proportionality: Adherence to the principle of proportionality is a permanent trend.

Organisations must be aware that legal considerations for employee monitoring will vary from organisation to organisation and specific issues will arise depending on the nature of the organisation undertaking monitoring and the risks it is trying to mitigate. Dentons UK and Middle East LLP (Dentons) prepared a report for CPNI on Employee IT Monitoring in March 2018 (the Report), to serve as a legal resource only, it is not a substitute for professional advice. This document provides a snapshot of some of the information contained in the Report and must not be read in isolation. Neither the Report nor this document are designed to provide legal or other advice and you should not take, or refrain from taking, action based on their content. The Report and this document are not a comprehensive report of all the information or materials that are relevant to this area of law, and do not address any particular concerns, interests, value drivers or specific issues you may have. This is a complex area of law that is changing rapidly. If you require assistance with a specific issue, you should seek legal advice from an appropriately qualified professional. Organisations planning to implement or review existing employee monitoring should seek their own professional advice. The Report (and therefore the information contained in this document) was current as of the date of the Report publication (being March 2018). Neither CPNI nor Dentons owe any duty to you to update the content of the Report or this document at any time for any reason. Please note the Report and this document do not represent the views of CPNI or Dentons. Neither CPNI nor Dentons UK and Middle East LLP accept any responsibility for any loss which may arise from reliance on the Report and/or this document.