

Employment and ICT Law

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1	Introduction	60
2	Data Protection	60
2.1	EU Framework after Lisbon	60
2.1.1	Basic Concepts	62
2.1.2	The general principles relating to data quality	63
2.1.3	criteria for making data processing legitimate	64
2.1.4	Subject access rights	64
2.1.5	Specific labour related provisions	64
2.1.6	Monitoring of workers	65
2.1.7	Consultation of social partners on the protection of workers' personal data	66
2.2	National Legal Framework in the Scandinavian Countries	66
3	Teleworking	69
3.1	Background to the Teleworking Agreement	69
3.2	Definition and Scope	70
3.3	Voluntary Character	70
3.4	Employment Conditions	71
3.5	Data Protection	71
3.6	Privacy	72
3.7	Equipment	72
3.8	Health and Safety	72
3.9	Organisation of Work	73
3.10	Training	73
3.11	Collective Rights Issues	73

1 Introduction

Many aspects of ICT law may be relevant for an employment relationship.¹ In this article I will discuss two inter-related set of problems concerning employment and ICT law:

workers' data protection and employers' monitoring and surveillance of workers by means of ICT,² and
teleworking.

The focus is on EU law and the way it is implemented in the Scandinavian (EU) countries in regard to the labour market.

2 Data Protection

2.1 *EU Framework after Lisbon*

In 2010, FRA (the EU Fundamental Rights Agency) published a report³ on data protection in the EU where it highlighted the changes in EU data protection law as a result of the coming into force of the Lisbon Treaty as of 1 December 2009. The protection of personal data is now recognized in primary EU law as an autonomous fundamental right in Article 8 of the Charter, related to but distinct from the right to respect of private and family life in Article 7 of the Charter. Article 8 of the EU Charter of Fundamental Rights reads:⁴

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

1 See generally Däubler, Wolfgang: *Internet und Arbeitsrecht*, Frankfurt 2001.

2 See Craig, John D. R.: *Privacy and Employment Law*, Oxford, 1999, Simitis, Spiros: *Reconsidering the premises of labour law - prolegomena to an EU regulation on the protection of employees' personal data*, European Law Journal, 1999 p 45 and Peter Blume og Jens Kristiansen: *Databeskyttelse på arbejdsmarkedet*, Copenhagen 2002.

3 *Data Protection in the European Union: the role of National Data Protection Authorities. Strengthening the fundamental rights architecture in the EU II*, FRA - European Union Agency for Fundamental Rights, 2010.

4 For a commentary on Article 8 of the Charter see Commentary of the Charter of Fundamental Rights of the EU by the EU Network of Independent Experts on Fundamental Rights, June 2006, "ec.europa.eu/justice_home/doc_centre/rights/charter/docs/network_commentary_final%20_180706.pdf".

3. Compliance with these rules shall be subject to control by an independent authority.

The EU Charter of Fundamental Rights has according to Article 6 of the Treaty on European Union (TEU), the same legal value as the Treaties. The EU Charter provides data protection in a different way than other human rights documents, in that it provides both for privacy protection⁵ and data protection while data protection is only guaranteed as an aspect of privacy protection in other human rights instruments.

The EU data protection regime was (and still is) profoundly affected by the former pillar division structure of the EU, which was abolished by the Lisbon Treaty. Data protection within each pillar was structured around separate sets of instruments. Insofar as the former first pillar of the EU was concerned, i.e. the former Community pillar, the main objective was to ensure the free flow of personal data between Member States in the process of the operation of the internal market, while at the same time protecting the fundamental rights of natural persons, and in particular their right to privacy with respect to the processing of personal data.

There was and still is no Directive relating to data protection specifically in the employment context. In the beginning of the century, the Commission consulted the social partners at European level about the desirability of adopting a specific directive in the employment field, see below.⁶ It was for some years the Commission's policy to encourage the adoption of a Directive on data protection in employment but it resulted in no formal proposal.

There are currently, at EU level, three Directives in the field of (general) data protection. The general Data Protection Directive⁷ concerns the protection of individuals with regard to the processing of personal data and the free movement of such data and the Teledata Directive⁸ concerns the processing of personal data and the protection of privacy in the telecommunication sector. The Data Retention Directive⁹ aims at harmonizing Member States' provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data that are generated or processed by them. This ensures that the data are available for the purposes of the investigation, detection and prosecution of serious crimes, as defined by each Member State in its national law. With one

5 In Article 7 which provides: Everyone has the right to respect for his or her private and family life, home and communications.

6 See Second stage consultation of social partners on the protection of workers' personal data, 2002, available at "ec.europa.eu/social/keyDocuments.jsp?type=50&policyArea=0&subCategory=0&country=0&year=2002&advSearchKey=&mode=advancedSubmit&langId=en".

7 95/46/EC.

8 2002/58/EC.

9 2006/24/EC.

exception,¹⁰ these Directives do not contain any specific provisions on the processing of data in the employment context.

The general Data Protection Directive 95/46 is a combination of a human rights directive and a free movement directive. It protects, at the same time, the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data and the free movement of data related to physical persons. It is a general directive applying to nearly all areas of life, including working life but not specifically adapted to situations concerning employment relations. The ECJ has interpreted Directive 95/46/EC in many rulings but there is only scarce case law clarifying the consequences of the Directive in matters of employment and occupation.¹¹ In *Österreichischer Rundfunk v Rechnungshof*,¹² the ECJ was asked to rule on whether the Directive 95/46 was applicable at all to the control activity exercised by the Austrian court of Audit about the salaries of the employees of certain entities. The ECJ found that it was applicable.

2.1.1 Basic concepts

Article 2 of Directive 95/46 defines its key concepts. For the purposes of the Directive 'personal data' means any information relating to an identified or identifiable natural person ('data subject'). There is no doubt that information about prospective or actual employees is 'personal data' within the meaning of the Directive.

'Processing of personal data' ('processing') is a broad concept. It means any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction. In *Lindqvist*,¹³ the ECJ held that the act of referring, on an internet page, to various persons and identifying them by name or by other means, for instance by giving information regarding their working conditions, constitutes the processing of personal data wholly or partly by automatic means within the meaning of Article 3(1) of the general Data Protection Directive.

'The data subject's consent' means any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed. An employee's consent must thus be freely given specific and informed in order to justify data processing. The question may be raised as to whether consent, in certain situations, is a suitable ground in view of the real nature of the employment relationship, in which the worker is subordinate and dependent. Furthermore, workers or prospective

10 See below on Article 8 (2)b and d of Directive 95/46/EC.

11 See in particular Joined cases C-465/00, C-138/01 and C-139/01 *Rechnungshof* [2003] ECR I-4989 and Case C-101/01 Criminal Proceedings against *Bodil Lindqvist* [2003] ECR I-12971.

12 Joined cases C-465/00, C-138/01 and C-139/01 *Rechnungshof* [2003] ECR I-4989.

13 Case C-101/01 Criminal Proceedings against *Bodil Lindqvist* [2003] ECR I-12971.

workers are often in a situation where they cannot give the 'freely, specific and informed' consent necessary under the provision of the Directive to make processing legitimate. For example, a worker or prospective worker is often in the position where it is not possible to refuse, withdraw or modify consent due to the employer's position of power, and the worker's fear of loss of promotion prospects or job offer. Given the imbalance of power in the employment relationship it could be argued that consent alone is not an adequate safeguard, particularly in relation to the processing of sensitive data (data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership or health or sex life). This doubt about the adequacy of consent as a safeguard in the employment field is one of the Commission's main arguments for specific data protection provisions in the employment field.¹⁴

Article 3 on the scope of Directive 95/46 provides that it 'shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.

It may thus be argued that any information that is intended to end up in a personnel file is covered by the Directive no matter whether the processing is done by means of modern information and communication technology or by other means. If an employer collects information which he destroys after use without filing it, Directive 95/46 applies if the processing is done wholly or partly by automatic means.

2.1.2 The general principles relating to data quality

Under Directive 95/46, subject to the exceptions permitted under Article 13, all processing of personal data must comply, first, with the 'principles relating to data quality' set out in Article 6 of the directive and, second, with one of the 'criteria for making data processing legitimate' listed in Article 7.

The main principles laid down by Article 6 of the Directive are that the data controller (the employer) must ensure that personal data are processed fairly and lawfully and collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. This is the so-called finalité principle. It means, for example, that employee data collected for the purpose of personnel administration cannot be used for marketing purposes.

Personal data must further be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed. There is thus to some extent a necessity requirement in the Directive. In the Finnish Act on Protection of Privacy in Working Life in 2001¹⁵ this requirement has been supplemented by a stricter necessity requirement, see below.

Personal data must be accurate and, where necessary, kept up to date. Every reasonable step must be taken to ensure that data which are inaccurate or

14 See Second stage consultation of social partners on the protection of workers' personal data, 2002, available at "ec.europa.eu/social/keyDocuments.jsp?type=50&policyArea=0&subCategory=0&country=0&year=2002&advSearchKey=&mode=advancedSubmit&langId=en".

15 An unofficial translation into English by the Finnish Ministry of Labour is available at "www.finlex.fi/pdf/saadkaan/E0010477.PDF".

incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified. Personal data must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.

2.1.3 Criteria for making data processing legitimate

It follows from Article 7 in the Directive that personal employment data may be processed only if the data subject (the employee) has unambiguously given his consent; or processing is necessary for the performance of a the employment contract; or processing is necessary for compliance with a legal obligation to which the controller (the employer) is subject; or processing is necessary in order to protect the vital interests of the data subject; or processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed.

Finally processing of employment related personal data is lawful if it fulfils the so-called interest balance test in Article 7(f), i.e. the processing is necessary for the purposes of the legitimate interests pursued by the controller (the employer), except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject (the employee).

2.1.4 Subject access rights

Under Article 10 of the general Data protection Directive the data subject has a right of access to and the right to rectify data concerning him. In responding to a questionnaire distributed by the European Commission in preparing a report on implementation of the Directive, the UK Government stated:

Technological developments have had a huge impact on the way in which the exercise of [subject access rights] affects data controllers. It is no longer the case that data controllers can discharge their obligations by simply downloading data from centrally held databases . . . Data controllers' task in dealing with subject access requests [is] immeasurably more complex, time-consuming and costly.

The view of the Commission, on the other hand, was that it is 'not convinced that the implementation of the provision is in fact posing serious practical problems'.¹⁶

2.1.5 Specific labour related provisions

Article 8 of Directive 95/46 provides for Member States to prohibit the processing of sensitive personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life. That does¹⁷ not apply where (emphasis added):

¹⁶ See further Lorber, Steven: *Data Protection and Subject Access Requests*, Industrial Law Journal 2004 p. 179.

¹⁷ According to Article 8(2) of Directive 95/46.

(b) processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law in so far as it is authorized by national law providing for adequate safeguards;

or

(d) processing is carried out in the course of its legitimate activities with appropriate guarantees by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of the body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects;

If for example under national law a closed shop agreement is lawful the employer is under the above provision entitled to process data on trade union membership in order to be able to abide by the agreement.

Trade unions are also allowed a wider scope for processing sensitive data, for example on political opinions or religious matters. In some countries admission to membership of some trade unions is dependant upon a particular political or religious view. In other countries there are such affiliations between the trade unions and political parties that ordinary members of certain unions support a particular political party or movement via the fee they pay for union membership, while those who do not sympathise with this arrangement can opt out.

2.1.6 Monitoring of workers

Under the auspices of ILO comprehensive works on testing and workers privacy have been published.¹⁸ The working environment Directive¹⁹ from 1990 on work display screen equipment lays down minimum safety and health requirements for work with such equipment. It provides in point 3(b) of the Minimum requirements annexed to the Directive that software must be easy to use and, where appropriate, adaptable to the operator's level of knowledge or experience. No quantitative or qualitative checking facility may be used without the knowledge of the workers. Secret monitoring of employees is thus prohibited.

The monitoring of workers' behaviour, correspondence (for example e-mails and internet use), etc is an issue that is currently the subject of some debate in a number of Member States. Some provisions restricting monitoring in the workplace are contained in employment law, others are part of criminal law, whilst trade unions and works councils in some of the Member States have developed their own codes of practice on employee monitoring. In addition, location data is becoming widely used by employers in particular to monitor the

18 ILO: *Conditions of work digest. Workers' privacy. Part I: Protection of personal data*, Geneva 1991 and ILO: *Conditions of work digest. Workers' privacy. Part III: Testing in the work place*, Geneva 1993.

19 90/270/EEC.

whereabouts of their employees at any given time. The data may be obtained from a number of sources i.e. the vehicle the worker is driving or the equipment the worker is using, for example, GSM mobile phones. This data may then be used to monitor the worker's location, performance and habits etc.

In many Member States, there are no express legal provisions concerning camera surveillance in the workplace.²⁰ Camera surveillance in the workplace has given rise to debate in Denmark²¹ in the last years, partly due to an Act on Prohibition against Camera Surveillance.²² The Camera Surveillance Act obliges the employer to inform the employees about the camera surveillance in a distinct way, e.g. by displaying a sign.

2.1.7 Consultation of social partners on the protection of workers' personal data

The social partners were, in August 2001, asked in a Communication from the Commission²³ if, in their opinion, the data protection directives, as implemented in the Member States, adequately address the protection of workers' personal data or whether they would consider entering into a European Agreement on this issue.²⁴ In particular the social partners were asked to consider if it is advisable that the Community takes an initiative in this field focusing notably on the following areas: Consent, Medical data, Drug testing and genetic testing and Monitoring and surveillance.

A Second Stage Consultation with the Social Partners took place in October 2002.²⁵ The employers' organisations did not see any need for EU legislation on this issue and are also opposed to entering into a European Agreement on data protection in the employment field.

2.2 National Legal Framework in the Scandinavian Countries

The general Data Protection Directive 95/46 is implemented in all the Nordic countries.²⁶ Apart from Finland there are only few employment specific

20 Hendrickx, Frank: *Protection of workers' personal data in the European Union - (1) general issues and sensitive data and (2) surveillance and monitoring at work*, Study for the EU Commission, available at europa.eu.int/comm/employment_social/labour_law/docs/dataprotection_hendrickx_combinedstudies_en.pdf p. 110 pp.

21 See further Blume, Peter and Jens Kristiansen: *Databeskyttelse på arbejdsmarkedet*, Copenhagen 2002.

22 Consolidated Act no 76 of 1 February 2000.

23 First stage consultation of social partners on the protection of workers' personal data, 2001, "ec.europa.eu/social/keyDocuments.jsp?type=50&policyArea=0&subCategory=0&country=0&year=2001&advSearchKey=&mode=advancedSubmit&langId=en".

24 See generally on the consultation process between the European Commission and the social partners Fransson, Edith: *Legal Aspects of the European Social Dialogue*, Antwerp 2002.

25 See Second stage consultation of social partners on the protection of workers' personal data, 2002, available at "ec.europa.eu/social/keyDocuments.jsp?type=50&policyArea=0&subCategory=0&country=0&year=2002&advSearchKey=&mode=advancedSubmit&langId=en".

26 Hendrickx, Frank: *Employment privacy law in the European Union - human resources and sensitive data*, Antwerp 2003 contains Länderberichte from a number of EU Member States.

provisions on data protection in Nordic law but the question is a matter of debate in all the Nordic countries.

Finland adopted an Act on Protection of Privacy in Working Life in 2001.²⁷ The purpose of the Finnish Act is to implement the protection of private life and other basic rights safeguarding privacy, and to promote the development of and compliance with good processing practice, when personal data are processed in working life.

In the preparatory works of the Act on Protection of Privacy in Working Life Act the Finnish government evoked the need for special regulation in working life and therefore went further than required in the Data protection Directive 95/46. It was stated that the general data protection Act could not fully meet the special needs in respect of employment relations. The Act on Protection of Privacy in Working Life Act is meant to supplement the data protection Act and even has priority over this Act in case of conflict.

The Act on Protection of Privacy in Working Life Act lays down a 'necessity requirement' in section 3 which states that the employer is only allowed to process personal data that is directly necessary for the employment relationship and concerns management of the rights and obligations of the parties to the relationship or benefits provided by the employer for the employee, or arises from the special nature of the work concerned. No exceptions can be made to this provision even with the employee's consent.

Under section 4 of the Act the employer shall collect information concerning the employee primarily from the employee him/herself. In order to collect information from elsewhere, the employer must obtain the consent of the employee. However, this consent is not required when an authority discloses information to an employer to enable the latter to fulfil statutory function or when the employer is collecting data on the employee's personal credit history or criminal record in order to establish the employee's reliability. The employer shall give the employee concerned advance notice that data is to be collected in order to establish the employee's reliability. If information concerning the employee has been collected from some source other than the employee him/herself, the employer must notify the employee of this information before it can be used in making decisions concerning the employee. The employer's duty to provide information and the employee's right to check the personal data concerning him/herself are also subject to other relevant provisions of the law.

In Sweden questions regarding privacy protection for employees have been vividly discussed for the last decade. A draft proposal for new legislation was presented in March 2002.²⁸ It did, however, not result in adopted legislation. In 2006,²⁹ an the chair of the Swedish Labour Court assisted by a number of experts

See also Freedland, Mark: Data Protection in the EU. An analytical study of the law and practice of data protection and the employment relationship in the EU and its Member States, Study for the EU Commission.

27 An unofficial translation into English by the Finnish Ministry of Labour is available at "www.finlex.fi/pdf/saadkaan/E0010477.PDF".

28 See further SOU 2002:18. See also Westregård, Annamaria J: *Integritetsfrågor i arbetslivet*, Lund 2002.

29 *Personlig integritet i arbetslivet*, Dir. 2006:55.

were given the task of examining the issue once again. It resulted in a proposal in 2009.³⁰ Under the terms of reference, these experts were required to propose legislation to regulate certain measures – namely monitoring of private email and internet use, and surveillance through other computer-aided means, e.g. logging, monitoring of employees and job-applicants via health and drug tests – and establish the conditions under which employers would be entitled to view extracts from criminal records. At the time of writing, it is not yet clear whether this proposal will lead to adoption of legislation.

In Denmark, there is specific legislation regarding health data, referring to medical examinations in the employment context. The Medical Data Act (1996) delimits the conditions under which an employer may have access to and process workers' medical data. It does not deal with the use of aptitude tests, interviews or any other kind of investigation which has the objective of confirming that the candidate for employment has the necessary abilities and skills to perform the work or how good the candidate is in comparison with other applicants. Nor does this law deal with the extent to which an employer may introduce control measures, such as drug or alcohol tests. The Act permits the employer to collect information about the employee's health in certain circumstances:

- when the information is relevant to the employee's ability to perform the work in question (Paragraph 2);
- with the permission of the Minister of Labour in order to satisfy essential interests in the safety and health of consumers or others, the environment or other social interests (Paragraph 4);
- after agreement with the union or with permission from the Minister of Labour in order to satisfy essential interests connected with the running of the business or concern (Paragraph 5);
- as a service to the employee, if the circumstances of the working environment make it reasonable and efficient with regard to the employee himself or others (Paragraph 3).

The employee must give the employer, on his own initiative, any information about his health of which he is aware and that is relevant to his ability to perform his job. The employer may not collect information about the employee's health when the information is not relevant to the employee's ability to perform the work (Paragraph 2(1)) or when the information concerns the extent to which the employee may suffer from an illness in the future.

30 *Integritetsskydd i arbetslivet*. SOU 2009:44.

3 Teleworking

3.1 *Background to the Teleworking Agreement*

The European Commission initiated in June 2000 a first stage of consultations on ‘modernising and improving employment relations’.³¹ The first consultation covered both teleworking and ‘economically dependent workers’ (workers who are not employees in the traditional sense, but nevertheless rely on a single source of employment), inviting the social partners to give their views on the possible future direction of Community action in these areas.

In launching the second round of consultations - in March 2001 - the Employment and Social Policy Commissioner stated that they focused on teleworking as this was the subject on which the two sides of industry had shown the keenest immediate interest. She added that around 7 million employees in Europe - some 4.5% of the labour force - telework on a regular basis.³²

The social partners were invited to forward an opinion or recommendation on the content of a Commission proposal in this area (under Article 154 TFEU (ex Article 138(3) EC)) or to inform the Commission of their wish to begin negotiations for a European-level agreement (on the basis of Article 154 TFEU (ex Article 138(4) EC) and Article 155 TFEU (ex Article 139 EC)). The Commission provided the following list of ‘general principles that should serve as a framework for practical implementation’:

- teleworking on a voluntary basis and the right to return to office-based work;
- guaranteed retention of the employment status of teleworkers;
- equal treatment with office-based colleagues; issues surrounding the information to be given to teleworkers;
- guarantees that the employer should bear the costs involved in teleworking;
- guarantees of suitable training; the health and safety of teleworkers;
- working time; the protection of the private life and personal data of teleworkers; maintenance of contact with the company;
- the collective rights of teleworkers; and access to teleworking.

The European Social Partners - on the trade union side ETUC and on the employer side: UNICE (now Business Europe), CEEP and UEAPME - concluded a Framework Agreement on Telework on July 16 2002.³³ The agreement aims at establishing a general framework at the European level to be

31 See further “www.eiro.eurofound.ie/2000/07/inbrief/eu0007259n.html”.

32 See further “www.eiro.eurofound.ie/2001/04/inbrief/eu0104205n.html”.

33 Available at “www.etuc.org/a/579”.

implemented by the members of the signatory parties in accordance with the national procedures and practices specific to management and labour.³⁴

3.2 *Definition and Scope*

In academic writing,³⁵ the changing conditions surrounding the employment contract have been vividly discussed for the last twenty years or thereabouts.

Telework is in the Telework Agreement defined as a form of organising and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employer's premises, is carried out away from those premises on a regular basis. The Agreement does not clarify when there is an employment contract/relationship.

The Agreement covers teleworkers. A teleworker is any person carrying out telework as defined above.

3.3 *Voluntary Character*

Telework is voluntary for the worker and the employer concerned. Teleworking may be required as part of a worker's initial job description or it may be engaged in as a voluntary arrangement subsequently. In both cases, the employer must provide the teleworker with relevant written information,³⁶ including information on applicable collective agreements, description of the work to be performed, etc. The specificities of telework normally require additional written information on matters such as the department of the undertaking to which the teleworker is attached, his/her immediate superior or other persons to whom she or he can address questions of professional or personal nature, reporting arrangements, etc.

If telework is not part of the initial job description, and the employer makes an offer of telework, the worker may accept or refuse this offer. If a worker expresses the wish to opt for telework, the employer may accept or refuse this request.

34 See generally on the operation of the Telework Agreement Deakin, S. and Koukiadaki, A., *Diffusion of EU-level norms through reflexive governance mechanisms? The implementation of the EU Framework Agreement on Telework in five Member States*, Cambridge, Centre for Business Research, University of Cambridge 2007, Christian Welz and Felix Wolf: *Telework in the European Union*, Eurofound, Dublin 2010, "www.eurofound.europa.eu/docs/eiro/tn0910050s/tn0910050s.pdf" and SEC(2008) 2178, COMMISSION STAFF WORKING PAPER. Report on the implementation of the European social partners' Framework Agreement on Telework.

35 See for example Henning, Ann: *Tidsbegränsad anställning*, Lund 1984, Betten, Lammy (ed): *The Employment Contract in Transforming Labour Relations*, Deventer 1995, Kravaritou-Manitakis, Yota: *New Forms of Work. Labour Law and Social Security Aspects in the European Community*, Luxembourg/ Dublin 1988, Supiot, Alain: *Les notions de contrat de travail et de relation de travail en Europe*, Luxembourg 1992, Supiot, Alain: *Au-delà de l'emploi - transformations du travail et devenir du droit du travail en Europe*, Paris 1999, Fahlbeck, Reinhold: *Flexibility. Potentials and Pitfalls for Labour Law. An International Analysis*, Lund 1998, Vigneau, Christophe, Kerstin Ahlberg, Brian Bercusson and Niklas Bruun: *Fixed-Term Work in the EU*, Stockholm 1999 and Nielsen, Ruth: *European Labour Law*, Copenhagen 2002.

36 In accordance with directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.

The passage to telework as such, because it only modifies the way in which work is performed, does not affect the teleworker's employment status.

A worker refusal to opt for telework is not, as such, a reason for terminating the employment relationship or changing the terms and conditions of employment of that worker.

If telework is not part of the initial job description, the decision to pass to telework is reversible by individual and/or collective agreement. The reversibility could imply returning to work at the employer's premises at the worker's or at the employer's request. The modalities of this reversibility are established by individual and/or collective agreement.

3.4 Employment Conditions

Regarding employment conditions, teleworkers benefit from the same rights, guaranteed by applicable legislation and collective agreements, as comparable workers at the employer's premises.

However, in order to take into account the particularities of telework, it is stated in Article 4 of the Telework Agreement that specific complementary collective and/or individual agreements may be necessary. There is thus no prohibition against discrimination on grounds of telework. In this respect the Telework Agreement differs from EU legislation based on European collective agreements on other new forms of work (part-time,³⁷ fixed-term,³⁸ etc) which have been adopted during recent years.

3.5 Data Protection

The employer is responsible for taking appropriate measures, notably with regard to software, to ensure the protection of data used and processed by the teleworker for professional purposes. The employer must inform the teleworker of all relevant legislation and company rules concerning data protection. It is the teleworker's responsibility to comply with these rules.

The employer must inform the teleworker in particular of any restrictions on the use of IT equipment or tools such as the internet, and on sanctions in the case of non-compliance.

The Agreement does not explicitly state that the worker has a right to make (limited) use of the employer's ICT equipment for private purposes. To some extent that is probably the case. In respect of telephones it is usually considered a right for the worker to receive and make (some) private telephone calls. E-mail and internet will often serve the same functions.

37 See Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work.

38 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

3.6 Privacy

The employer must respect the privacy of the teleworker. If any kind of monitoring system is put in place, it needs to be proportionate to the objective and introduced in accordance with the directive³⁹ on visual display units.

3.7 Equipment

All questions concerning work equipment, liability and costs are clearly defined before starting telework. As a general rule, the employer is responsible for providing, installing and maintaining the equipment necessary for regular telework unless the teleworker uses his/her own equipment. If telework is performed on a regular basis, the employer compensates or covers the costs directly caused by the work, in particular those relating to communication. The employer provides the teleworker with an appropriate technical support facility.

The employer has the liability, in accordance with national legislation and collective agreements, regarding costs for loss and damage to the equipment and data used by the teleworker.

The teleworker shall take good care of the equipment provided to him/her and not collect or distribute illegal material via the internet.

The Telework Agreement does not address the issue of the employer's liability for the employees' use of the employers' ICT. If an employee violates the Telework Agreement and stores illegal material on the employer's technical equipment one may ask⁴⁰ whether the employer is just a host like other hosts who benefits from the liability limitations in Article 14 of the e-commerce Directive.⁴¹ Even when the employee has acted against the instructions of the employer he will probably be considered to have been under the control of the employer who is therefore not exempt from liability under Article 14 of the e-commerce Directive.⁴²

3.8 Health and Safety

The employer is responsible for the protection of the occupational health and safety of the teleworker in accordance with the framework directive on working environment⁴³ and relevant daughter directives, national legislation and collective agreements.

The employer must inform the teleworker of the company's policy on occupational health and safety, in particular requirements on visual display units. The teleworker must apply these safety policies correctly.

39 90/270/EEC.

40 Compare Lemarteleur, Xavier: L'employeur: un fournisseur d'accès à l'internet comme les autres? Implications juridiques de la fourniture d'accès à l'internet par l'entreprise, på www.juriscom.net/documents/resp20031029.pdf.

41 2000/31/EC.

42 According to Article 14 (2) of the e-commerce Directive the exemption from liability 'shall not apply when the recipient of the service [here the employee] is acting under the authority or the control of the provider [here the employer].

43 89/391/EEC.

In order to verify that the applicable health and safety provisions are correctly applied, the employer, workers' representatives and/or relevant authorities have access to the telework place, within the limits of national legislation and collective agreements. If the teleworker is working at home, such access is subject to prior notification and his/her agreement. The teleworker is entitled to request inspection visits.

3.9 Organisation of Work

Within the framework of applicable legislation, collective agreements and company rules, the teleworker manages the organisation of his/her working time. The workload and performance standards of the teleworker are equivalent to those of comparable workers at the employers premises. The employer ensures that measures are taken preventing the teleworker from being isolated from the rest of the working community in the company, such as giving him/her the opportunity to meet with colleagues on a regular basis and access to company information.

3.10 Training

Teleworkers have the same access to training and career development opportunities as comparable workers at the employer's premises and are subject to the same appraisal policies as these other workers. Teleworkers receive appropriate training targeted at the technical equipment at their disposal and at the characteristics of this form of work organisation. The teleworker's supervisor and his/her direct colleagues may also need training for this form of work and its management.

3.11 Collective Rights Issues

Teleworkers have the same collective rights as workers at the employers premises. No obstacles are put to communicating with workers representatives. The same conditions for participating in and standing for elections to bodies representing workers or providing worker representation apply to them.

Teleworkers are included in calculations for determining thresholds for bodies with worker representation in accordance with European and national law, collective agreements or practices. The establishment to which the teleworker will be attached for the purpose of exercising his/her collective rights is specified from the outset.

Worker representatives are informed and consulted on the introduction of telework in accordance with European and national legislations, collective agreements and practices.