

**I. INTERNATIONAL
CONGRESS ON PERSONAL
DATA PROTECTION**

"DEVELOPMENTS IN TURKEY AND THE WORLD"



12-14 NOVEMBER 2021

Surveillance at the Workplace – do employees have a right to data protection?

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Data Protection Commissioner
Schleswig-Holstein, Germany

The 1st International Congress on Personal Data Protection
İstanbul Üniversitesi Hukuk Fakültesi
12 November 2021

forum
<privatheit>
selbstbestimmtes_leben_
in_der_digitalen_welt

ULD



Unabhängiges Landeszentrum für
Datenschutz Schleswig-Holstein

Setting of ULD

- Data Protection Authority (DPA) for both the public and private sector
- Also responsible for freedom of information

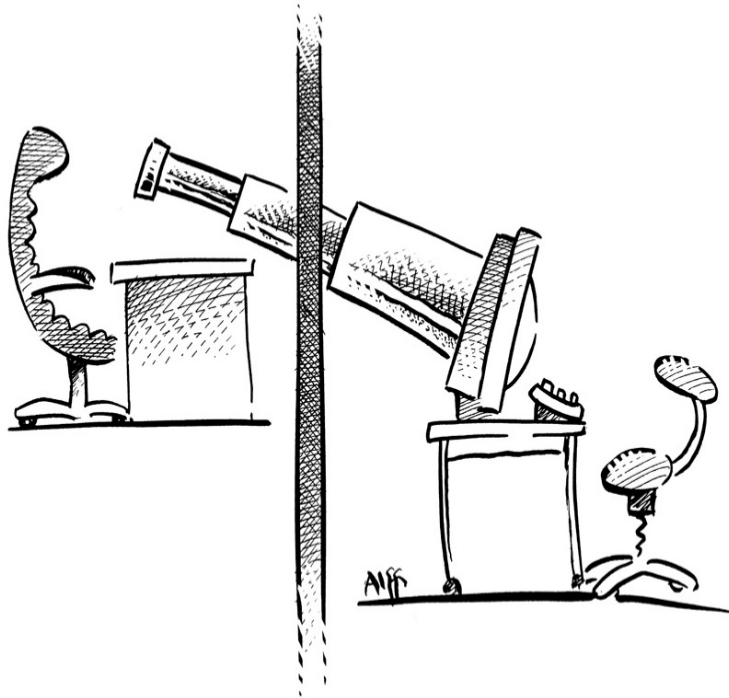
Schleswig-Holstein	
State of Germany	
	
Flag	Coat of arms
	
Coordinates: 54°28'12"N 9°30'50"E	
Country	Germany
Capital	Kiel
Government	
• Body	Landtag of Schleswig-Holstein
• Minister-President	Daniel Günther (CDU)
• Governing parties	CDU / Greens / FDP
• Bundesrat votes	4 (of 69)
Area	
• Total	15,763.18 km ² (6,086.20 sq mi)
Population (2016-12-31) ^[1]	
• Total	2,881,926
• Density	180/km ² (470/sq mi)

Berlin



Source: en.wikipedia.org/wiki/Schleswig-Holstein

Overview



- Surveillance at the Workplace
- GDPR: Rights of the employees
- Challenge: How to balance rights and interests?
- Current trends
- Conclusion

Surveillance – how?

- **Video / audio** surveillance, potentially combined with **biometrics**
 - Further assessment of **sensors**, e.g. at the workspace or via **wearables**
 - **Computer** usage:
 - Keylogger, mouse movements, screen captures
 - Browser / app monitoring
 - Access logs
 - **Geolocation tracking**
 - **Background checks** (e.g. social media)
- General task performance
 - Emotional analysis
 - Attention tracking
 - Occupancy tracking

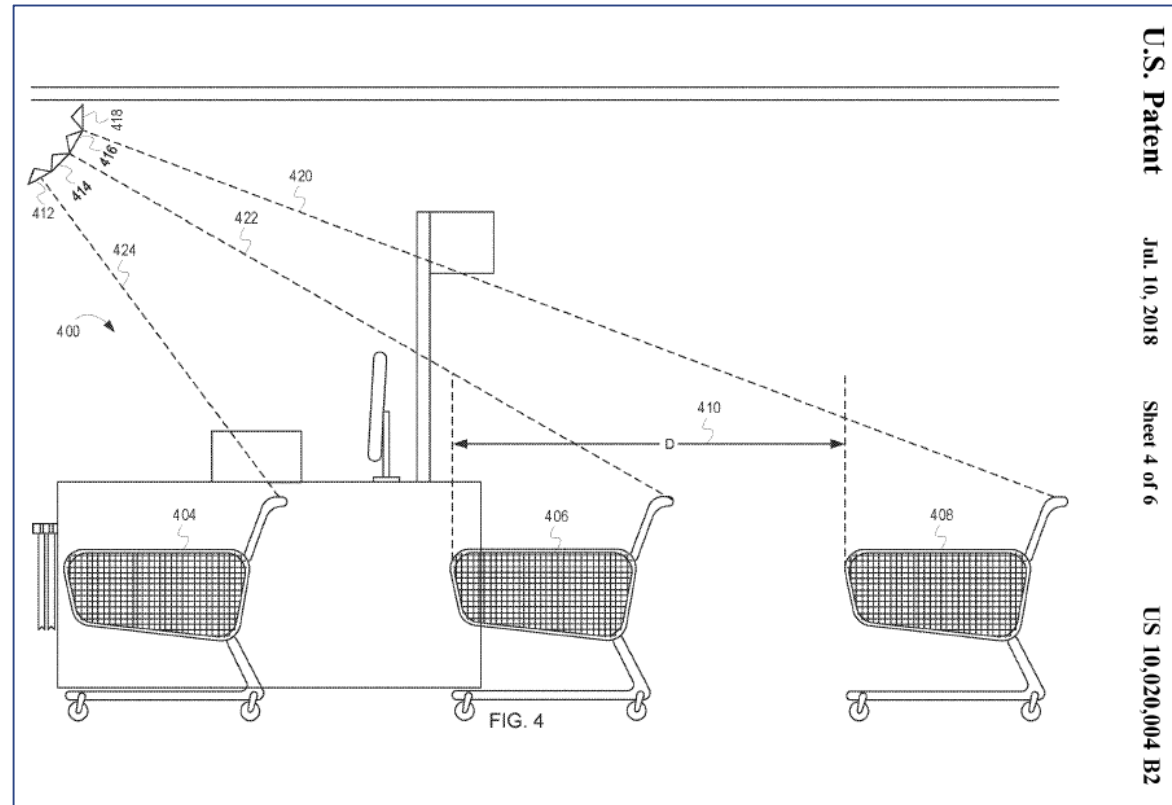
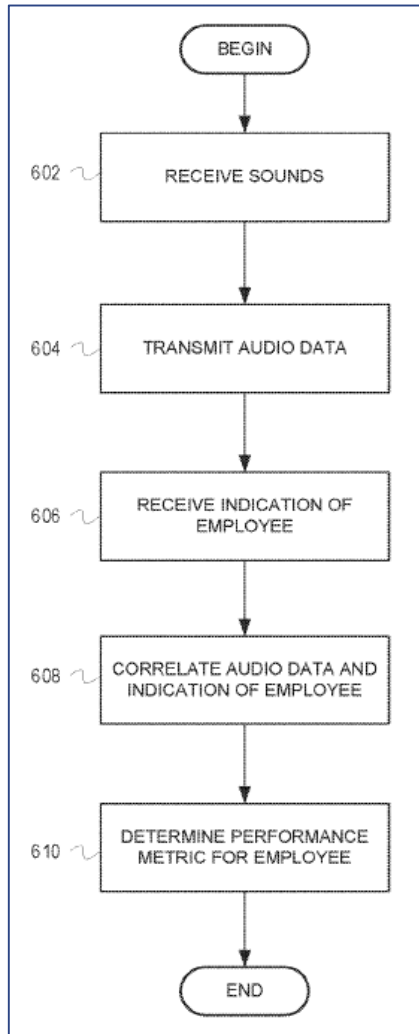
Surveillance – why?

- Safety and security of the employees
- Protection of company assets (e.g. data, other resources, reputation)
- Monitoring **employees' actions or behaviour** because of
 - Compliance with company policies
 - Measuring productivity
 - Preventing health or safety problems
- **Gathering data**
 - For optimizing business processes
 - For optimizing use of human resources (who to hire, who to fire)

Where is the line between lawful and unlawful monitoring of employees?

What methods may be lawful but still unwise?

Example: Walmart Patent "Listening" at the cashiers



Objective:
"performance metric for employee"

Two studies from 2021: U.S. and Austria



Kathryn Zickuhr: Workplace surveillance is becoming the new normal for U.S. workers. Washington Center for Equitable Growth, August 2021, <https://equitablegrowth.org/wp-content/uploads/2021/08/081821-worker-survey-report.pdf>

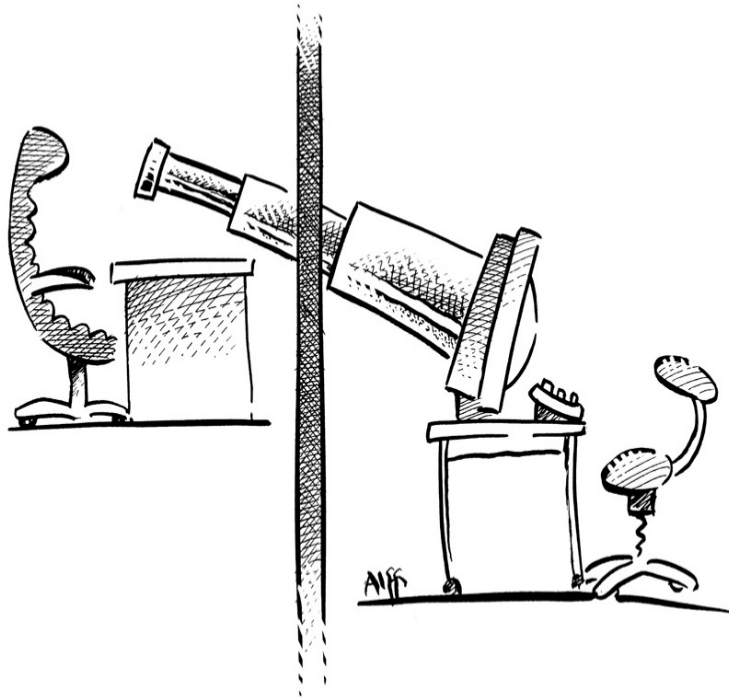


Wolfie Christl: Digitale Überwachung und Kontrolle am Arbeitsplatz. Von der Ausweitung betrieblicher Datenerfassung zum algorithmischen Management? Eine Studie von Cracked Labs, September 2021, <https://crackedlabs.org/daten-arbeitsplatz>.

Zooming into the picture: What's your score?



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Art. 88 General Data Protection Regulation

For the European Union:
application of the GDPR

Article 88

Processing in the context of employment

1. Member States may, by law or by collective agreements, provide for **more specific rules to ensure the protection** of the rights and freedoms in respect of the processing of employees' personal data in the **employment context**, in particular for the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down **by law or by collective agreements**, management, planning and organisation of work, equality and diversity in the workplace, health and safety at work, protection of employer's or customer's property and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship.

Collective agreements:
negotiation between employer and **staff councils**

Art. 88 General Data Protection Regulation

Art. 5:
Data Protection
Principles

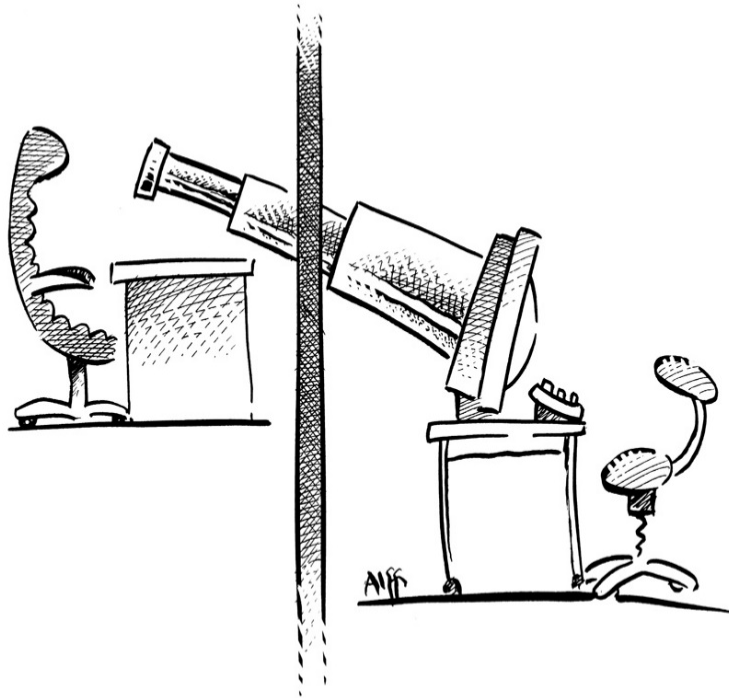
Art. 12-22:
Data Subject
Rights

Article 88

Processing in the context of employment

2. Those rules shall include **suitable and specific measures to safeguard the data subject's human dignity**, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity and monitoring systems at the work place.

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Regulatory approach in Germany

- Ongoing discussions on “Do we need a specific employee data protection law” – **for decades!**
- Approximation: **§ 26 BDSG** (Federal Data Protection Act)
- Still: many **open questions** – especially with respect to new technologies (sensors, artificial intelligence, ...)
- Currently: **lack of legal certainty**
- Much work for **Labour Courts**
(albeit quite few (high court) decisions)



Section 26 Federal Data Protection Act (§ 26 BDSG)

Section 26

Data processing for employment-related purposes

- (1) Personal data of employees may be processed for employment-related purposes where necessary for hiring decisions or, after hiring, for carrying out or terminating the employment contract or to exercise or satisfy rights and obligations of employees' representation laid down by law or by collective agreements or other agreements between the employer and staff council. Employees' personal data may be processed to detect crimes **only if there is a documented reason to believe** the data subject has committed a crime while employed, the processing of such data is **necessary** to investigate the crime and is **not outweighed by the data subject's legitimate interest** in not processing the data, and in particular the type and extent are **not disproportionate** to the reason.



Section 26 Federal Data Protection Act (§ 26 BDSG)

Section 26

Data processing for employment-related purposes

- (2) If personal data of employees are processed on the **basis of consent**, then the employee's level of dependence in the employment relationship and the circumstances under which consent was given shall be taken into account in assessing **whether such consent was freely given**. Consent may be freely given in particular if it is **associated with a legal or economic advantage** for the employee, or if the employer and employee are pursuing the **same interests**. [...]

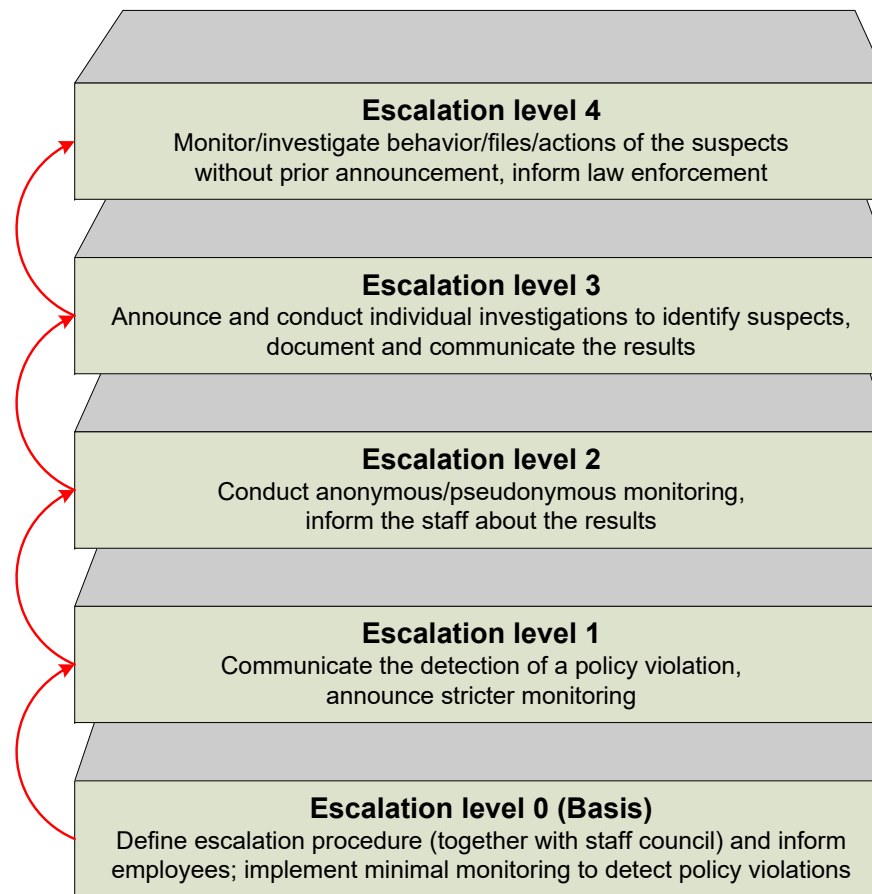
- (5) The controller must take **appropriate measures** to ensure compliance in particular with the principles for processing personal data described in **Article 5** of Regulation (EU) 2016/679. [...]

Role of staff councils

- Approach to mitigate the **power imbalance between employer and each individual employee**
- In Germany:
 - **Elected by the employees**
 - For representation of the employees' interests
 - Has to be **involved in specific processes** that affect all employees
 - Aim: trustworthy collaboration between employer and staff council
- Concerning data protection:
 - For **negotiating the specific rules** of data processing and safeguards for the employees → collective agreement
 - **Difficulty:** lack of transparency of data processing technologies and limited options of their use

Recommendations for practical solutions

- E.g. escalation strategies



- Objective:** detect policy violators with **minimal privacy infringement**

- Don't forget to define the **de-escalation process**

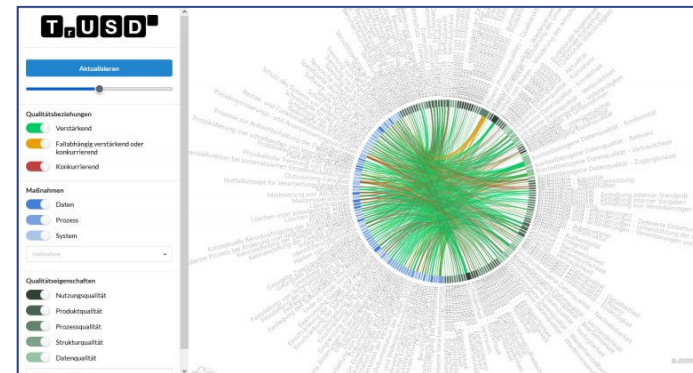
Recommendations for practical solutions

- Define **escalation strategies**
 - Strive for a workplace climate that fosters loyal, faithful and productive employees
 - Starting from minimal privacy infringement
- An escalation strategy should include:
 - Steps, conditions, responsibilities
 - Demands for documentation
 - Conditions for de-escalation
 - Date for regular review (for refinement)
- **Integrate staff council and data protection officer** of the organization

Research on technology for supporting employee data protection

Examples:

- **Privacy Dashboards** (project TrUSD), <https://www.trusd-projekt.de/wp/veroeffentlichungen/>
- **Data minimisation** in software development tools (project EMPRI-DEVOPS), <https://empri-devops.de/publications/>



International Workshop on Data Privacy Management
 International Workshop on Cryptocurrencies and Blockchain Technology
 DPM 2019, CBT 2019: Data Privacy Management, Cryptocurrencies and Blockchain Technology pp 138-155 | Cite as

Towards Minimising Timestamp Usage In Application Software
 A Case Study of the Mattermost Application

Authors [Authors and affiliations](#)

Christian Burkert , Hannes Federrath

Conference paper
 First Online: 20 September 2019

2 Citations 1k Downloads

Part of the [Lecture Notes in Computer Science](#) book series (LNCS, volume 11737)

Proposals for self-audits

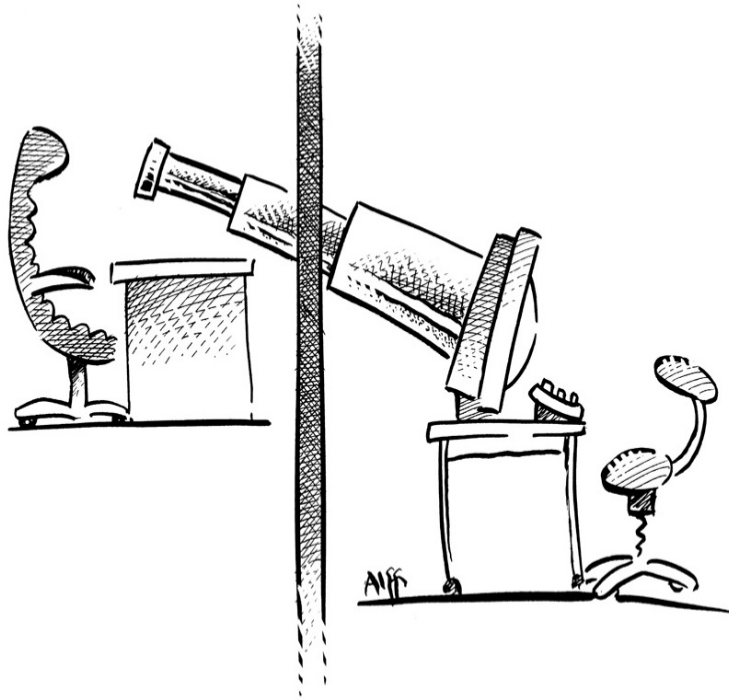
- Checklist / **guided questions**
 - For employer
 - For staff councils
- To analyse the **current status** of data protection measures concerning employees
- To identify **open issues**
- E.g. to be conducted (2-)annually – **comparison** of the results
- Basis for discussion, also for new collective agreements



The screenshot shows the website for 'Index Beschäftigtendatenschutz [BeDaX]'. The page features the BeDaX logo, which consists of the text 'BeDa' in a bold, black font and a stylized red 'X' symbol. Below the logo, the text reads 'Index Beschäftigtendatenschutz' and '... dabei geht es um uns, um unsere Persönlichkeitsrechte!'. The main content area describes the project's goals: 'Das Projekt BeDaX hat sich es zur Aufgabe gemacht, die Kolleginnen und Kollegen sowie deren Interessensvertretungen bei Fragen zum Beschäftigtendatenschutz zu unterstützen. Wir präsentieren Gestaltungsbeispiele und stellen konkrete praxisorientierte Lösungsvorschläge zur Verfügung, wie die Persönlichkeitsrechte der Beschäftigten geschützt werden können. Dazu entwickeln wir Fragen, um den Beratungsbedarf feststellen zu können. Und wir bauen eine Informationsdatenbank auf, mit den wichtigsten Antworten und aktuellen Entwicklungen rund um den Beschäftigtendatenschutz.' On the right side, there is a sidebar with logos for 'INPUT consulting' and 'ver di'. Below the logos, the project leader is listed as 'Projektleiter: Karl-Heinz Brandt (Telefon: 01 70-222 3 789)' and the scientific advisor as 'Wissenschaftlicher Berater: Prof. Dr. Jürgen Taeger'. The project manager is listed as 'Projektbäuer: Lothar Schröder'.

<https://www.bedax.net/>

Overview



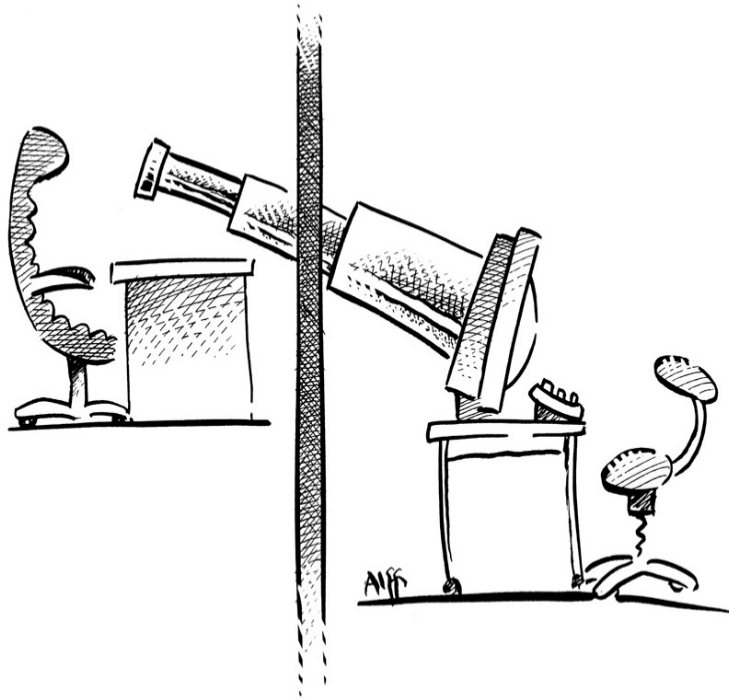
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Trends

- Covid pandemics as a booster for digitization
- ... and as a **booster for employee monitoring software**
- If workplace **surveillance is “the new normal”** in the U.S., this affects standard software on the **global market**
- **Counter-trends:**
 - Demanding sufficient information for a data protection impact assessment
 - Debates on digital sovereignty
 - Open Source workplace software strategies
- **Staff councils** and trade unions?



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Conclusion

Question:

Surveillance at the Workplace – do employees have a right to data protection?

Answer:

Sure they do.

But it will take a long, concerted effort to become effective in practice.

And: Exploitation of human resources is short-sighted – **taking employee rights seriously** is in the interest of the employer, too.

Strive for a workplace climate that fosters loyal, faithful, motivated and productive employees