# GDPR @WORK

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# Introduction

Choice of a “Regulation” to improve harmonisation

- direct application without need for national implementation
- however, exceptions to the rule!

*Art. 88 GDPR – Processing in the context of employment*

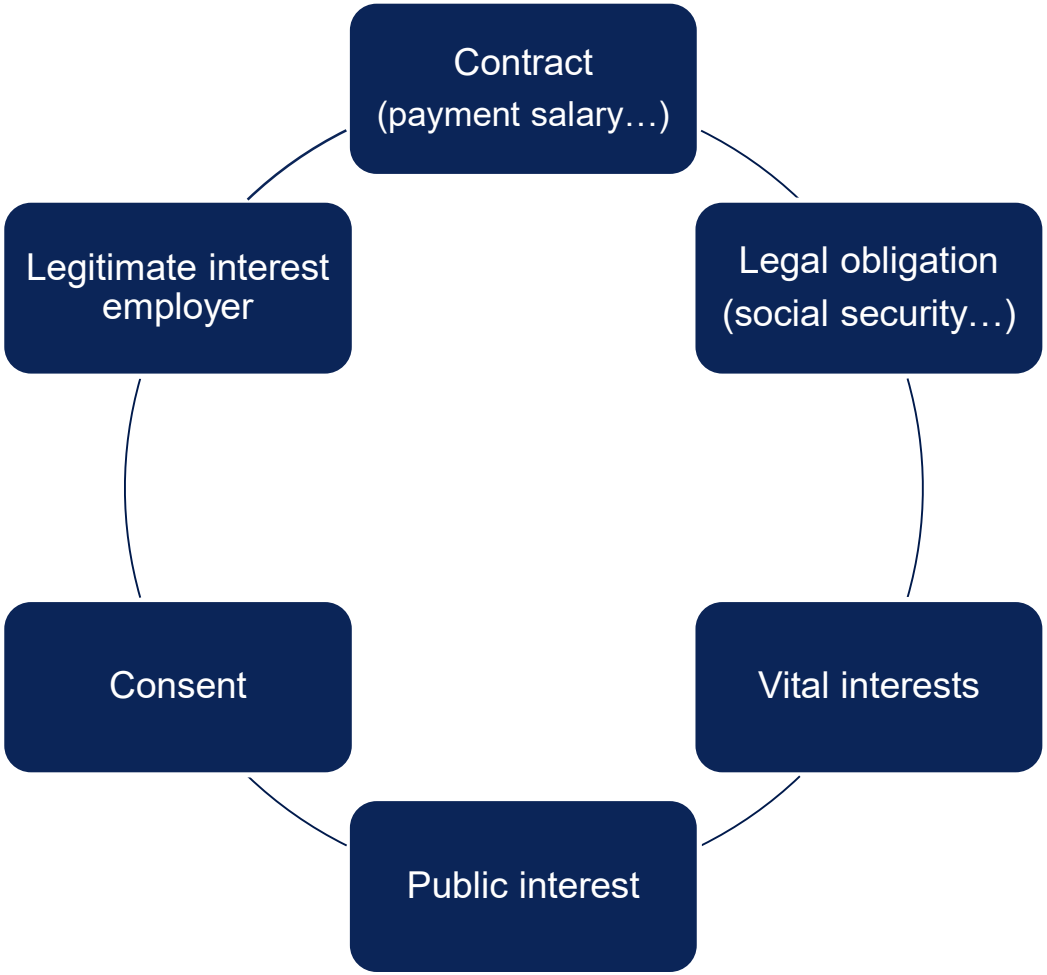
*“MS may, by law or by collective agreements, provide for* ***more specific rules*** *to ensure the protection of the rights and freedoms in respect of the processing of* ***employees' personal data in the employment context in particular for the purposes of the recruitment, the performance of the contract of employment*** *[…]”*

1 Lawfulness of processing

2 Employees' rights

3 Concrete examples

# 1 Lawfulness of processing



# Focus – consent

- Conditions:
  - **free** – employee/employer: clear imbalance?

Recital 43 GDPR
*In order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller […].*

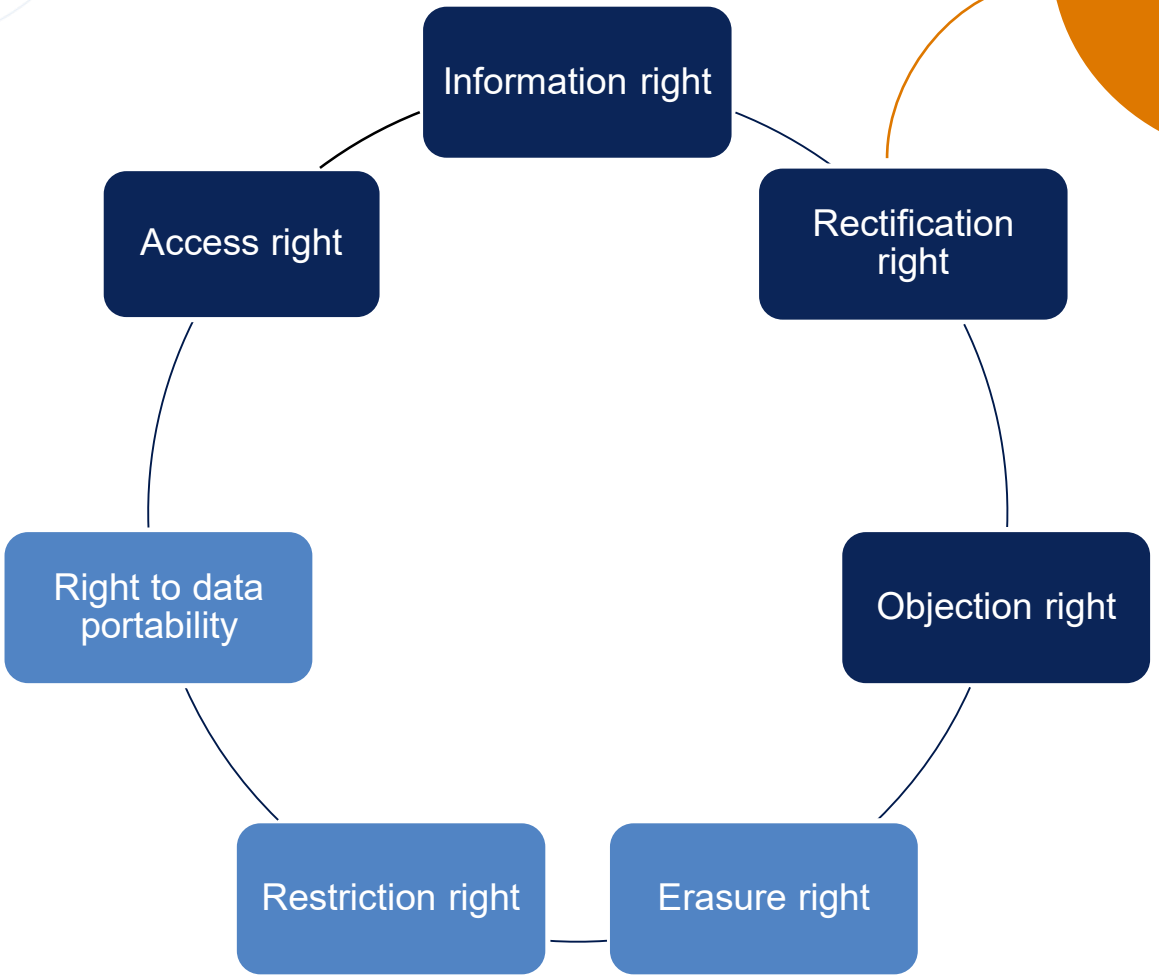
Guidance Art. 29 WP (48)
*If it is not possible for the worker to refuse it is not consent. […] Thus a worker must be able to withdraw consent without prejudice.*

Guidance Art. 29 WP (249)
*Unless in exceptional situations, employers will have to rely on another legal ground than consent—such as the necessity to process the data for their legitimate interest.*

  - **specific** (no one-fits-all consent language – each separate item requires a distinct consent (e.g., distinct consent for use of picture on intranet)
  - **informed** and
  - **unambiguous**

# 2 Employee's rights

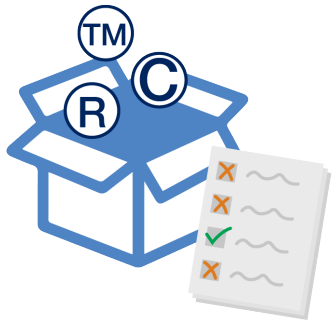
**Challenge:** conciliation employer interests with data subjects' rights



# Focus – Right to be forgotten

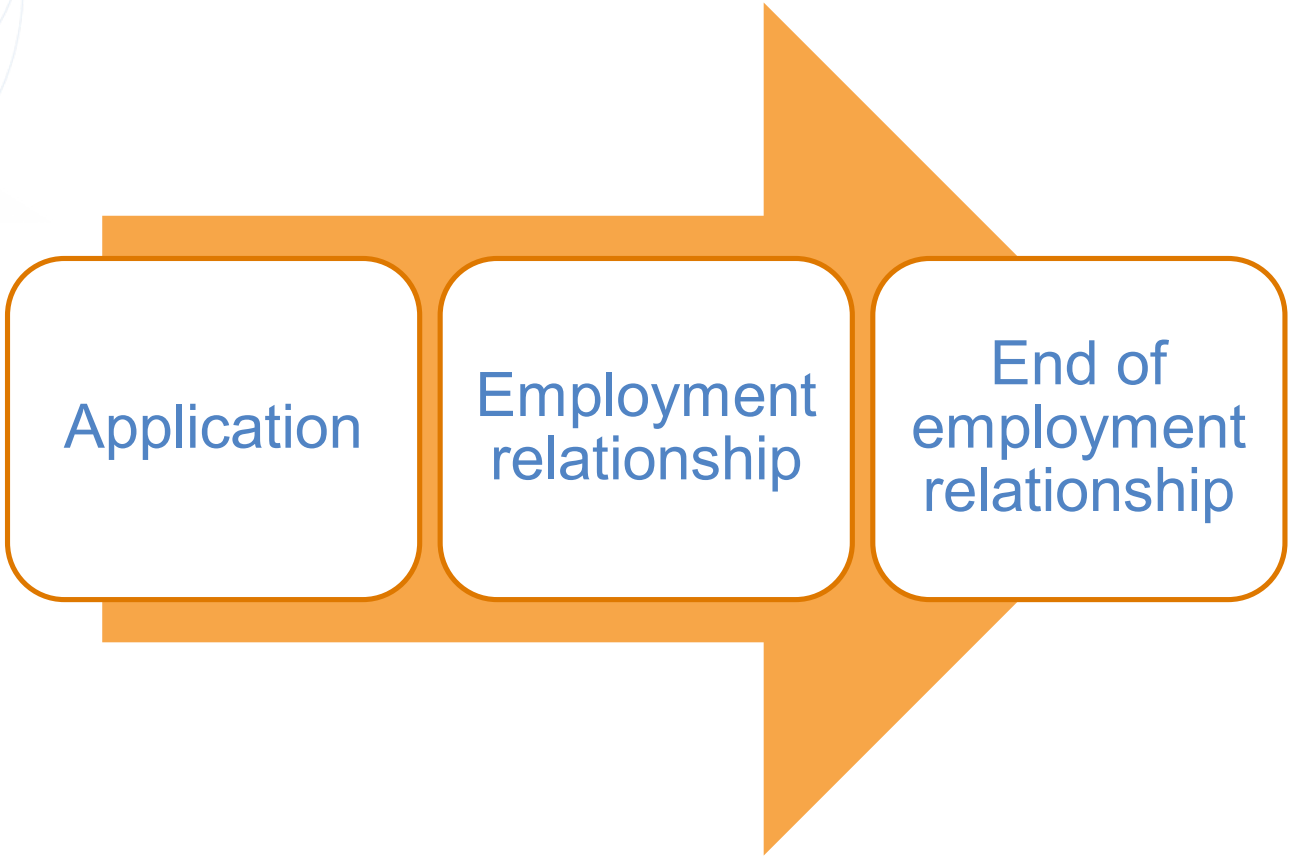
- Only in certain cases, such as:
  - personal data no longer necessary in relation to the purposes for which they were collected or otherwise processed
    (e.g. applicant refused job offer and is employed by competing company)
  - personal data have been unlawfully processed
    (e.g. transfer to third countries without appropriate safeguards)
- Many exceptions relevant for HR processing, such as:
  - for compliance with a legal obligation
    (e.g. social security, payment of taxes)
  - for the establishment, exercise or defence of legal claims
    (e.g. in case of litigation relating to a dismissal)

# Focus – Access right




- Scope
  - right to obtain from the controller confirmation as to whether his/her personal data are processed
  - if so, access to the personal data and certain information
- How?
  - provision of a copy of the personal data undergoing processing
- Limitation
  - rights and freedoms of others (e.g. other data subject)
- Illustration
  - Landesarbeitsgericht Baden-Württemberg, 20.12.2018 – 17 Sa 11/18: access right vs. whistleblower protection

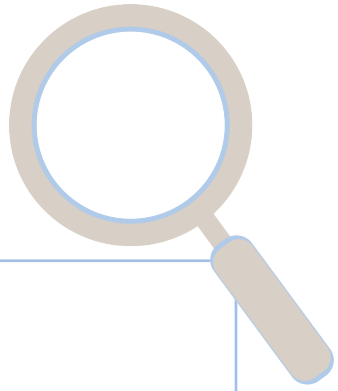
# 3 Concrete examples



# Application

| | |
|---|---|
| **Type of processing** | Application forms and work references |
| **GDPR point of attention** | ▪ **Lawfulness of recruitment processing**<br><br>Art. 6 (1) (b) GDPR - Processing is necessary in order to take steps at the request of the data subject prior to entering into a contract<br><br>or<br><br>Art. 6 (1) (f) GDPR – Legitimate interest of the company<br><br>▪ **If the candidate is not hired but the company wants to keep its application for a future job offer**<br><br>Art. 6 (1) (a) GPDR – Consent<br><br>or<br><br>Art. 6 (1) (f) GDPR – Legitimate interest of the company (limited duration) |

# Application



| | |
|---|---|
| **Type of processing** | Inspection of candidate's profile |
| **GDPR point of attention** | Art. 6 (1) (f) GDPR - Legitimate interest of the company |
| **Legal basis** | Art. 29 WP (249) – Data processing at work<br>▪ **Internet**:<br>  ▪ Business (not private) social media<br>  ▪ Data necessary and relevant for the performance of the job (e.g. assessment of specific risks)<br>  ▪ Information of data subjects of such processing before they engage with the recruitment process (e.g. text of job offer)<br>▪ **Contact with previous employers**: only after information and authorisation given by candidate |

# Application

| | |
|---|---|
| **Type of processing** | Criminal record |
| **GDPR point of attention** | Art. 10 GDPR – processing of data relating to criminal convictions and offences only when authorised by EU or MS law providing for appropriate safeguards for the rights and freedoms of data subjects |
| **Legal basis** | Luxembourg Law of 29 March 2013 on criminal record organisation, as amended<br>▪ Under certain conditions Bulletin n°3 ("standard" criminal record) and Bulletin n°4 (criminal record including driving prohibition) may be requested by employer<br>▪ Deletion: immediately where applicant does not become an employee or within 1 month from signature of employment agreement (exceptions on a case by case basis) |

# Employment relationship

| | |
|---|---|
| **Type of processing** | <u>Employee general file</u><br>*annual leave records, records relating to promoting, transfer, training, disciplinary matters, attendance records, reimbursement of expenses (e.g. travel), tax information* |
| **GDPR point of attention** | ▪ Art. 6 (1) (b) GDPR – Processing is necessary for the performance of a contract → employment agreement<br>or<br>▪ Art. 6 (1) (f) GDPR – Processing is necessary for the purposes of the legitimate interests by the controller or by a third party<br>⇒ Assessed on a case by case basis |

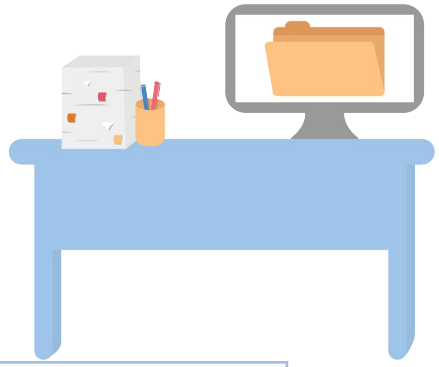
# Employment relationship

| | |
|---|---|
| **Type of processing** | Employee health file<br>*Maternity leave, medical examination, sickness records, social benefits information* |
| **GDPR point of attention** | ▪ **Art. 9 (2) (b) GDPR - Processing of special categories of data**<br>Authorised for employment, social security and social protection law, if authorised by Union or MS law or a collective agreement<br>▪ **Art. 66 Law of 1 August 2018**<br>Genetic data excluded |
| **Legal basis (non exhaustive)** | Art. 1 Code de la sécurité sociale<br>Art. L. 121-6, L. 234-43 et sqq., L. 326-1 Code du travail |

# Employment relationship

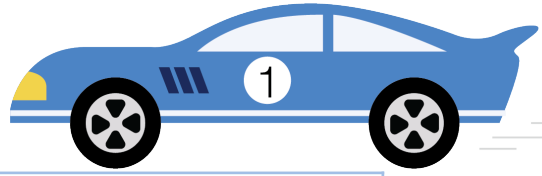
| | |
|---|---|
| **Type of processing** | Use of employees' image for marketing purposes |
| **GDPR Point of attention** | Recital 51 of GDPR – falls under Art. 9 GDPR if processed through specific technical means allowing the unique identification/authentication of a person |
| **Legal basis** | ▪ **Personality right – 1982 and 2004 Laws = consent required**<br>▪ "Tacit consent" (!GDPR – consent definition) = where photos have been fragrantly taken during an event / a meeting<br>▪ Where possible, written consent recommended (purpose limitation and limited validity duration)<br>▪ **GDPR**<br>▪ Lawfulness basis – either legitimate interest or consent |

# Employment relationship



| | |
|---|---|
| **Type of processing** | Monitoring of employees (video, usage of IT tools) |
| **GDPR point of attention** | ▪ **Art. 88 GDPR (adoption of specific rules by MS) + Art. L. 261-1 Code du travail as modified by Law of 1 August 2018:**<br>  ▪ abolishing authorisation<br>  ▪ no purpose limitations<br>  ▪ additional prior information requirements<br>  ▪ social dialogue for certain processing<br>  ▪ prior opinion CNPD in case of dispute<br>▪ **CNPD deliberation n°34/2019**<br>  ▪ DPIA necessary for regular and systematic control of the employees' activities if this has a legal effect or a similar significant impact on the employee |

# Employment relationship

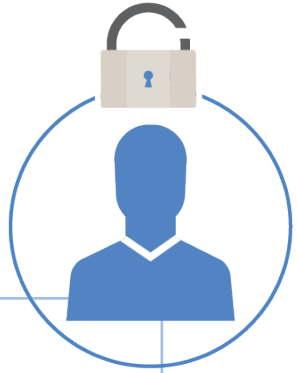



| | |
|---|---|
| **Type of processing** | In-employment screening – location tracking system |
| **GDPR point of attention** | ▪ Data relating to a vehicle's location and the driver's behaviour<br>▪ **Lawfulness basis**:<br>  ▪ compliance with statutory obligations (e.g. to ensure safety of the employees driving the vehicles)<br>  ▪ legitimate interest<br>▪ **Information**: clear information notice in every vehicle<br>▪ **Private use**: if authorised, employees should be able to temporarily deactivate location tracking<br>▪ **CNPD deliberation n°34/2019:** DPIA necessary for systematic location tracking |

# Employment relationship

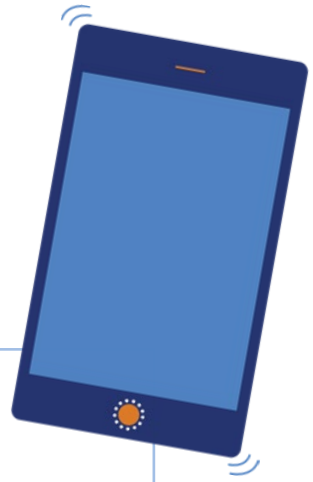
| | |
|---|---|
| **Type of processing** | Payroll |
| **GDPR point of attention** | ▪ **In case of outsourcing, payroll service provider = data processor**<br>▪ **Art. 28 GDPR:** agreement entered into between the employer and payroll service provider shall contain certain clauses (e.g. regarding security measures or deletion/return of data at the end of the relationship)<br>▪ **Art. 44 et sqq. GDPR:** obligation to implement appropriate safeguards in case of transfer to a third country (e.g. SCC, BCR) |

# Employment relationship



| | |
|---|---|
| **Type of processing** | In-employment screening |
| **GDPR point of attention** | ▪ Techniques enabling employers to permanently screen employees (such as friends, opinions, beliefs, etc.): not on a generalised basis<br>▪ Employers should refrain from requiring employee / job applicant access to information shared through social networking<br>▪ Choice to use "non-official" employer related social media profile (possibility to be stated in employment contract) |

# Employment relationship



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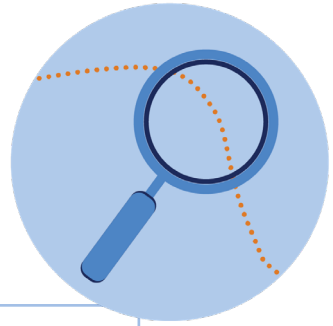
|---|---|
| **Type of processing** | In-employment screening – remote working |
| **GDPR point of attention** | ▪ **Monitoring of home and remote working**: technologies capable to monitor logging of keystrokes, mouse movements or applications used → considered as disproportionate by WP 29<br>▪ **BYOD *« bring your own device »***<br>  ▪ adoption of appropriate measures to distinguish private / business use of the device and<br>  ▪ implementation of methods to ensure that employer's own data on device is securely transferred to its network |

# Employment relationship



| | |
|---|---|
| **Type of processing** | Monitoring of former employees' professional social media profiles |
| **GDPR point of attention** | ▪ **Conditions**<br>▪ when employer has a legitimate interest (e.g. compliance with a non-compete clause),<br>▪ there are no other less invasive means available, and<br>▪ the former employee has been adequately informed. |

# End of employment relationship

| | |
|---|---|
| **Type of processing** | Retention of data (including personal data ex-employee) |
| **Employment contract, payment slips** | 10-year from entry in the accounting system or from end of employment contract (case by case basis) |
| **Timesheet record** | Statute of limitations *action en paiement de rémunérations* = 3 years (Art. L. 221-2 C. travail). However retention of 10 years might be necessary to comply with bookkeeping obligations |
| **Video monitoring** | Up to 8 days, however 30 days on justification |
| **Private documents** | Deletion just before effective termination |

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# Questions?
# At your disposal!

# A brief presentation of our firm

## Firm profile

Number of partners, associates and other legal staff.

- An international law firm practising Dutch, Belgian, Luxembourg and Dutch Caribbean law, founded in 1724.
- One of the largest law firms in the Benelux region:
  - 388 lawyers including 72 partners, including 14 female partners.
  - 10 of our lawyers are also university professors.
- Spread across 6 offices and 5 country desks: Offices in Amsterdam, Brussels, London, Luxembourg, New York and Rotterdam.
- Our country desks focus on: Germany, France, India, China and Japan. We also monitor growth markets such as Brazil, Mexico, Indonesia, South Korea and Turkey.
- An independent firm with non-exclusive relations with the top law firms in more than 80 countries.

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