

# Privacy and Employee Surveys in Germany

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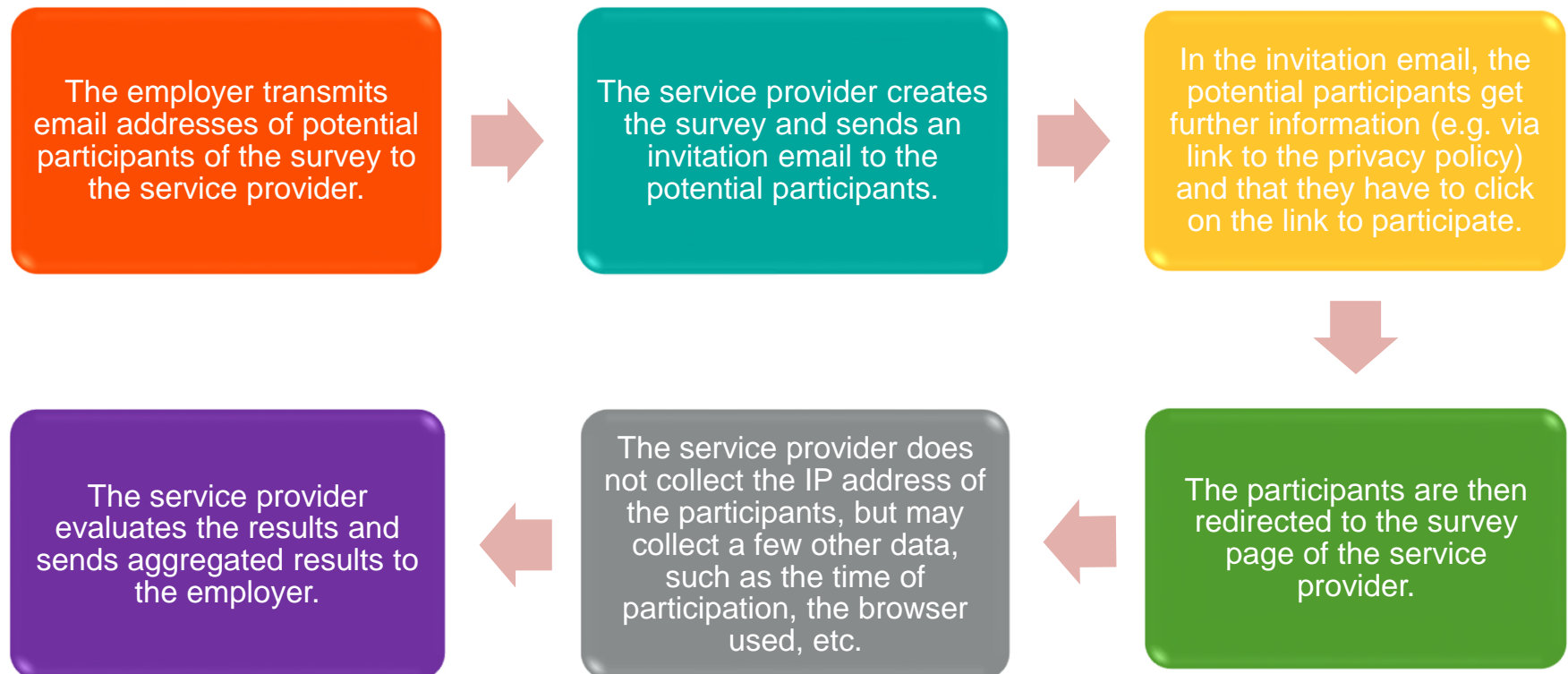


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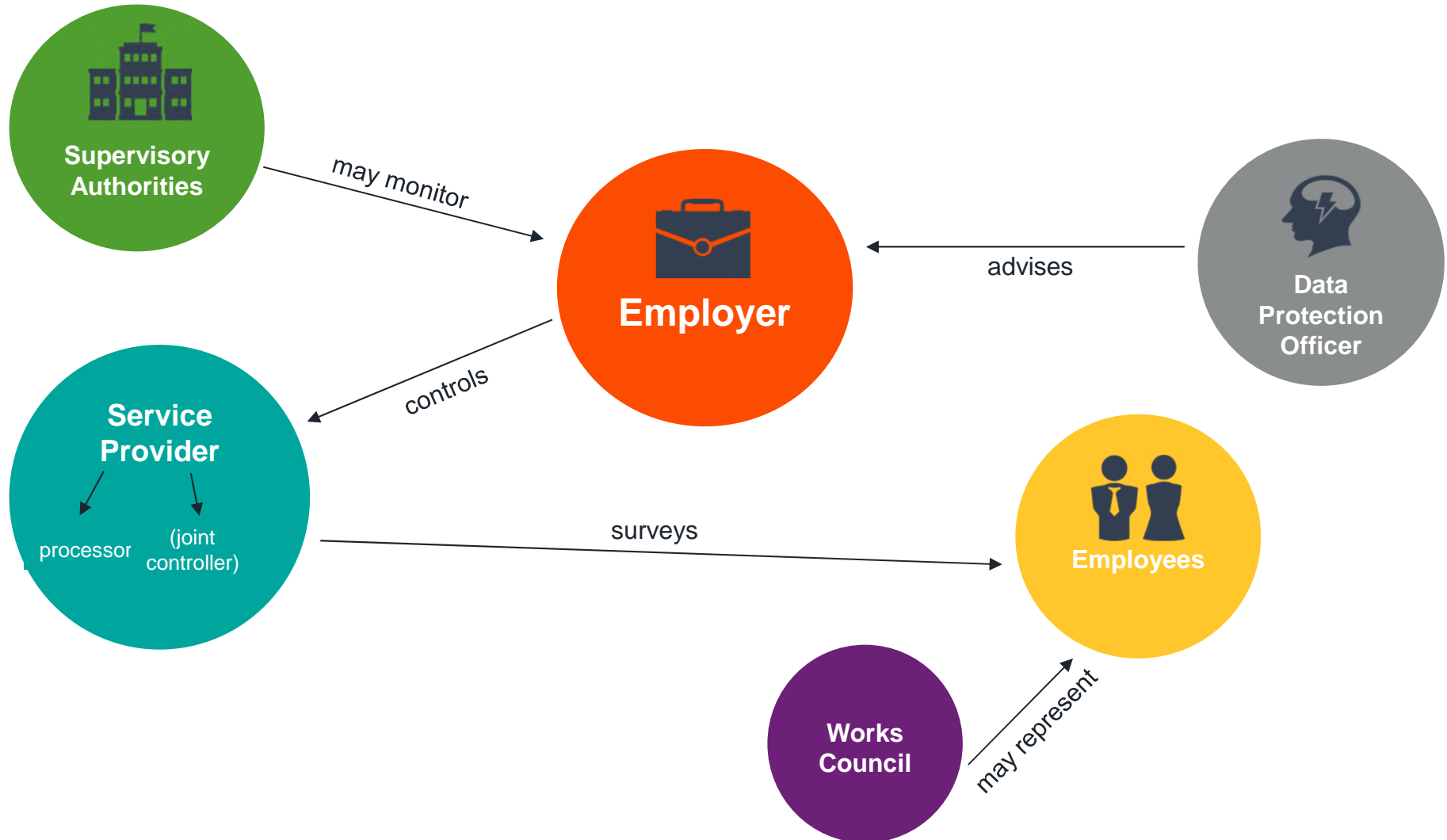
- General considerations
- Employee surveys and personal data
- Consent as the main legal basis
- Ideas for the architecture
- Involving the works council?
- Conducting a data protection impact assessment?
- Employee surveys and Covid-19

- Employee surveys become more and more important.
- In times of Covid-19, for example, companies often would like to know how their employees are doing while in home office.
- However, are employee surveys allowed at all? And if so, what should be kept in mind?

# Possible procedure



# Involved parties



## (Directly) personal data

- Employee email address
- Employee IP address
- Assignment to an organisational unit of the employer
- Job profile of the employee

## (Indirectly) personal data

- Survey data (aggregated data, raw data)
- Whether survey data is personal data depends on whether it is anonymized
- If the survey data is only pseudonymized, it will most likely constitute even sensitive personal data

## Problem 1 IP Addresses

- The service provider may not collect the IP addresses of the employees
- However, he may use cookies to allow the survey to be resumed after interruptions
- Still, this should rather be avoided, where possible

## Problem 2 Email Addresses

- The service provider may not collect the email addresses of the employees
- Strictly speaking, the service provider, however, obtains it; at least in a logical second when the employee starts the survey.

## Problem 3 Group Specific Surveys

- This may give great results, but German supervisory authorities do not consider survey data anonymous if they belong to a group of less than 10 persons.



# May the employer oblige the employees to participate in the survey?

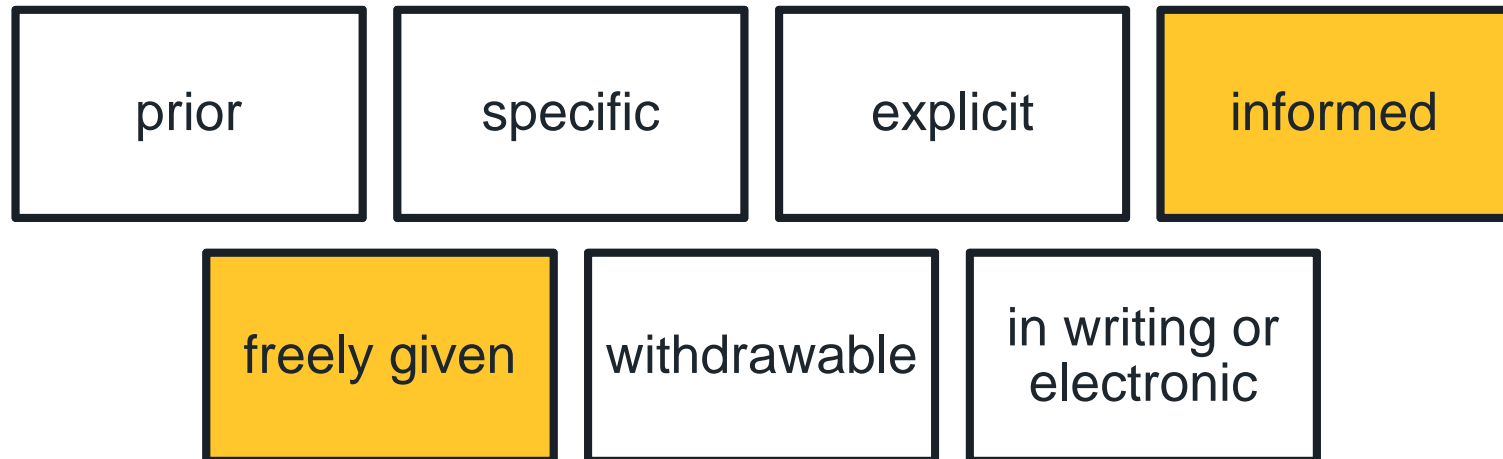
- Most likely not.
  - Particularly difficult in regard to anonymous surveys.
- Except if the survey is closely tied to carrying out their specific job.



# Possible legal bases for employee surveys



# The declaration of consent must be...



# Informed Consent -

## *Information towards employee*

### What to inform about?

- controller, processor, recipients, data categories, purposes of processing, data sources, data transfers, storage periods, rights of data subjects, possibility of withdrawal
- in the case of sensitive data: explicit mentioning of sensitive data!

### How to inform?

- “in a concise, transparent, clearly distinguishable manner and easily accessible form, using clear and plain language”
- visualization is allowed!
- In Germany, employers are, in principle, required to obtain employee consent in written or electronic form

### How to inform about the **right to withdraw**?

- The employer must inform about the employee`s right to withdraw his/her consent at any time prior to the consent
- The withdrawal must be as easy as the giving of the consent itself
- **Right to withdraw may be problematic when survey data are anonymous!**

# Informed Consent -

## *consent in written or electronic form*

### If consent shall be given in written form

- It should not be given together with other declarations

### If consent shall be given in electronic form

- It must be given consciously and unambiguously: pre-ticked boxes, silence, or inactivity are void!
- It must be documented
- The employee must be able to access its content at any time
- It must be withdrawable at any time with future effect
- The form may not be unnecessarily disruptive to the participation in the survey

# Informed Consent - *further considerations*

## Information on purpose of survey

☐

☐ be as specific as possible

☐ be in line with your general attitude and practice

☐ mention, where possible, any measures planned on the basis of the results

☐ mention, where applicable, why and how anonymous results will be published or transferred

## Information on the architecture

☐

☐ mention where the data will be stored

☐ name and describe the software used for the survey

☐ explain the storage period as concretely as possible

## Art. 7 par. 4 GDPR

- Consent may **not be freely given** if the participation in the survey “*is **dependent** on the consent to the processing of personal data that is not necessary for the performance*” of the survey.

## Rec. 43 GDPR

- “Consent is presumed **not to be freely given** if it does not allow **separate consent to be given to different** personal data processing operations despite it being appropriate in the individual case [...]”

## Sect. 26 par. 2 Federal Data Protection Act

- “[...] 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**.”

# Hint!

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Document the conducted employee surveys; and inform about the employee surveys not only in the declaration of consent, but also in your...

Records on Processing Activities

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Technical and Organisational Measures

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Data Protection Impact Assessments

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Privacy Policy

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Accountability Report

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Data Breach Response Plan

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Legitimate Interest Assessments

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## Ideas for the architecture

### Cookies

Avoidable, e.g. by not allowing the survey to be resumed after an interruption?

Certified?  
Servers in the EU?  
In how far are audits possible?

### Processor

### Software

Open source?  
Barrier-free?

Special authorization for persons evaluating & administrating the survey and its results?

### Admins

# Does the works council need to be involved?

- Depends on the specific concept of the employee survey, for example its technical design.
- May be required according to Sec. 87 of German Works Council Constitution Act:

*(1) The works council shall have a right of co-determination in the following matters in so far as they are not prescribed by legislation or collective agreement:*

*1. matters relating to the rules of operation of the establishment and the conduct of employees in the establishment*

*[...]*

*6. the introduction and use of technical devices designed to monitor the behavior or performance of the employees*

*[...]*

# Does a Data Protection Impact Assessment (DPIA) need to be conducted?

- DPIAs shall be conducted, where the **type** of processing is **likely** to result in a **high risk to the rights and freedoms of natural persons**. (Art. 35 par. 1 GDPR)
- Nine criteria, **two** of which are generally sufficient for the necessity of a DPIA (according to Article 29 Working Party):
  - **Evaluation** or scoring
    - Automated-decision making with legal or similar significant effect
    - Systematic monitoring
  - **Sensitive data**
  - **Data processed *on a large scale***
  - **Matching or combining datasets**
  - **Data concerning vulnerable data subjects**
  - **Innovative use or applying new technological or organisational solutions**
  - The processing itself “prevents data subjects from exercising a right or using a service or a contract”
- Also consider positive or negative lists by supervisory authorities.
- Eventually conduct a “DPIA light”, irrespective of a legal obligation!
- Minimum content of a DPIA is stipulated in Art. 35 par. 7 GDPR

- ... extraordinary circumstances for processing data which must be taken into account when planning employee surveys
  - Recommendation: Follow the specific Covid-19 guidelines by supervisory authorities!
- ... particular interest and focus on protecting both business interests as well as (the privacy of) employees
- In Covid-19-specific employee surveys,
  - questions on the situation of the **home office environment** of employees can be both privacy challenging and privacy enhancing.
  - questions on the **health situation of employees** for the purpose of containing infections at the workplace should rather not be asked within the survey itself, but - if appropriate - within a more adequate setting.
    - Legal basis for such questions might be Art. 9 (2) lit. b GDPR in conjunction with Sec. 26 (3) Federal Data Protection Act



# Thank you

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■ Office locations

■ Regional desks and strategic alliances

