EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2020/22 Works council's right to inspect remuneration lists (GE)

The Federal Labour Court (Bundesarbeitsgericht, 'BAG') has held that a works council must be provided with the documents necessary for carrying out its duties at any time on request. A works committee or another committee of the works council formed in accordance with the provisions of the Works Constitution Act (Betriebsverfassungsgesetz, 'BetrVG') is entitled to inspect the lists of gross wages. This right to inspect is not limited to anonymized gross pay lists. Data protection considerations do not dictate that the right is limited to anonymized gross payrolls. The processing of personal data associated with the right of inspection is permitted under the European General Data Protection Regulation ('GDPR') and the German Federal Data Protection Act (Bundesdatenschutzgesetz, 'BDSG').

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Background

p style="margin-right:-30px">Section 80(2) BetrVG grants the works council the right to inspect lists of gross wages of employees without having to demonstrate a special need for monitoring. This right is intended to enable the works council to monitor whether statutory and collectively agreed wage regulations are being observed.

p style="margin-right:-30px">The right to inspect exists independently of the consent of the employees. According to the case law of the BAG, the provision in Section 80(2) BetrVG, constitutes a legal basis within the meaning of the BDSG and authorizes the encroachment on the employees' fundamental right to informational self-determination associated with the inspection. Nevertheless, the right to inspect the payroll in larger companies is not vested in the works council as a body, but only in the so-called works committee, because of the confidentiality of the information. In small companies the works council has this right.

p style="margin-right:-30px">The employer only has to grant access to those gross payrolls which it actually keeps in analogue or electronic form. The works council has no right to demand the creation of such lists. Inspection of the lists means submission for inspection, not handing over the lists. The works council is not authorized to photocopy or copy the lists. However, the persons entitled to inspect the lists may make notes.

Facts

p style="margin-right:-30px">The employer was a hospital operator. The works council set up there had formed a works committee. The employer kept electronic payroll records of its employees. The lists contained information on the names of the employees and their activities, on basic salaries and various allowances as well as on the employees' constant and variable remuneration. In response to a request for access to the lists submitted by the works committee at the beginning of 2017, the employer only granted access to an anonymized version of these lists.

p style="margin-right:-30px">In its action in the so-called resolution procedure (*Beschlussverfahren*), the works council demanded that the works committee be granted access to the non-anonymized pay lists, stating the names of the employees. According to the works council, this is the only way to determine the principles according to which the employer grants special payments or wage increases. This might affect the company's remuneration system. The works council has a legal right of co-determination in this respect. Also with regard to its task of preventing possible discrimination against employees, the works council claimed to have access to the non-anonymized remuneration lists. Data protection law reasons do not prohibit this request. The defendant employer took the position that by

granting access to the anonymized payroll records in practice it has fulfilled its obligation under Section 80(2) BetrVG. The provision does not grant the works committee a right to inspect a list with the employees' clear names, either according to its wording or according to the system.

p style="margin-right:-30px">The labour court of the first instance and the appellate court of the second instance granted the works council's requests. The employer's appeal to the BAG was not successful.

Judgment

p style="margin-right:-30px">The BAG decided that the employer is obliged to allow the works committee to inspect the non-anonymized payroll lists. In support of this decision, the Court stated that the works council must, among other things, review and monitor compliance with applicable laws and collective agreements. This also includes the employer's obligation to comply with the general principle of equal treatment as set forth in Section 75(1) BetrVG. The works council needs concrete information on the remuneration paid to the employees in order to be able to assess compliance with, and implementation of, internal wage justice. These findings could not be made on the basis of an anonymous list.

p style="margin-right:-30px">The right of the works council or works committee to inspect the non-anonymized remuneration lists is not prohibited by data protection regulations. The granting of access to the lists constitutes processing of personal data within the meaning of the GDPR and the BDSG. However, this is permissible under Section 26(1) BDSG because granting access to payroll records is ‘necessary’ in order to fulfil a statutory claim of the works council. The BAG also had no reservations under European law. By enacting Section 26 BDSG, the German legislature had made admissible use of the opening clause in Article 88 GDPR. According to this provision, the Member States of the European Union may, by means of legislation, provide for more specific regulations to ensure the protection of rights and freedoms in the processing of personal data of employees. Finally, the right to inspect non-anonymized payrolls does not violate the right to informational self-determination. This fundamental right of the employees concerned was sufficiently taken into account by the provisions of the BDSG.

Commentary

p style="margin-right:-30px">The decision of the BAG is not surprising. There was already a broad consensus that the employer must list the employees by name in the remuneration lists to be submitted to the works council for inspection. It is now certain, however, that this obligation on the part of the employer will continue to exist under the normative regime of the

new European data protection provisions. The requirement of data economy derived from it in particular regarding employee data does not limit the right of the works council to inspect remuneration lists according to Section 80 paragraph 2 BetrVG in this respect.

p style="margin-right:-30px">According to the reasons for the decision, the BAG assumed that the works council is the recipient to whom personal data is disclosed. Whether persons or positions within a company can be considered recipients is disputed. The decisive factor in answering this question is likely to be the extent to which classification as a recipient requires a certain legal independence and whether this is affirmative in the case of organizational units which – like the works council – are legally endowed with special rights and obligations. The Court did not dealt with this issue in the present case.

p style="margin-right:-30px">How the works council is to be classified according to the provisions of the GDPR – whether as a separate responsible body or as a component of a responsible body – is therefore still unclear and is likely to remain the subject of lively discussion even if the BAG's decision described above is taken into account.

Comments from other jurisdictions

p style="margin-right:-7px">*Austria (Andreas Tinhofer, zeiler.partners Rechtsanwälte GmbH)*: In Austria the works council also has the right to inspect pay lists without the employer being able to supply only anonymized data. The lists must contain the regular wages and all other elements of remuneration. The wording of the relevant Austrian legislation is similar to that of Section 80(2) BetrVG and does not explicitly oblige the employer to provide copies of the pay lists to the works council. As in Germany there is older case law here allowing the works council only to take notes of the pay lists.

p style="margin-right:-7px">However, as almost all employers use an electronic system for payroll purposes the question arose of whether the works council can request access to that electronic system. In 2003 the Supreme Court (9 ObA 3/03m) found that there is no such right. In that case the works council was given the printouts of the pay lists each month which in the Court's view was sufficient to enable the control of wages.

p style="margin-right:-7px">Although the decision mentioned above did not address the question of whether the employer could forbid the works council to copy the pay lists it is quite unlikely that nowadays the courts would take such a restrictive approach. Especially in businesses with an electronic payroll system pay lists can be provided in an electronic format without any relevant strain on the employer's resources. Alternatively, the employer could print out the lists and give them to the works council as a hard copy. Against this background it could be considered vexatious if the employer provides the pay lists neither as a file nor a

hard copy but insists that the works council should take notes of the pay lists.

p style="margin-right:-7px">*Finland (Janne Nurminen, Roschier, Attorneys Ltd)*: In Finland, an employer employing at least 20 employees is by law obliged to provide annually the employee representatives of each personnel group with statistical data on the salaries paid to each employee in the said personnel group. However, some collective bargaining agreements might include different provisions which, if applicable, shall be complied with instead. The Act on Co-operation within Undertakings (334/2007, as amended) states that information provided to the employee representatives has to be prepared so that it does not reveal the salary information of an individual employee.

p style="margin-right:-7px">The second statutory right for the employees to access the gross wage data of the other employees is related to regulation concerning the promotion of equal pay for men and women. According to the Act on Equality between Women and Men (609/1986, as amended) employers employing at least 30 employees are obliged to prepare a gender equality plan (at least every two years) which includes a pay survey. However, the Act does not oblige or entitle the employer to disclose the wage of an individual employee and instead the data should be anonymized (except for gender).

p style="margin-right:-7px">The situation in Finland differs from Germany, and the gathering and anonymizing of the information is the employer's obligation rather than just granting the employees access to the gross salary payrolls as they are. For the employer representatives, the monitoring of equal treatment concerning pay is obviously not as precise when the data is anonymized, but the legislator has decided to give more value to the employees' privacy.

Subject: Information and Consultation, Privacy

Parties: Unknown (employer – v – works council)

Court: *Bundesarbeitsgericht* (German Federal Labour Court)

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