LEGAL UPDATE ARBEITSRECHT

IT co-determination updates

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Ongoing digitalisation, developments in the field of AI and the introduction of IT systems pose key challenges for companies. Employers are frequently thwarted in implementing corresponding projects by the co-determination rights of the Works Council in accordance with section 87 (1) (6) of the German Works Council Constitution Act (Betriebsverfassungsgesetz, BetrVG). This is not least due to the fact that the Federal Labour Court (Bundesarbeitsgericht, BAG) has interpreted the scope of application of this provision to be very wide. The Works Council accordingly also has a right of co-determination with regard to IT systems and technical equipment which only directly or even unintentionally collect performance and behaviour data, or merely store such data, without having to have collected it themselves (cf, for example BAG, decision dated 13 December 2016 – 1 ABR 7/15 "Social media channels"; decision dated 8 March 2022 – 1 ABR 20/21 "Office 365"; decision dated 23 October 2018 – 1 ABN 36/18 "Excel").

Some literature and some of the lower instance courts have criticised this interpretation for being too broad, but this has to date not influenced the BAG. In two recent rulings the Federal Administrative Court (Bundesverwaltungsgericht, BVerwG), which is responsible for the corresponding questions on co-determination law in public services, took a new approach which could lead to a significant restriction on IT co-determination. The court held that the co-determination right in the Staff Representation Act (Personalvertretungsgesetz), which contains basically the same content as section 87 (1) (6) BetrVG, should only come into consideration if the use of the technical equipment gives rise to actual 'monitoring pressure'.

The broad understanding of the BAG

Objective suitability to store performance data is sufficient

In accordance with section 87 (1) (6) BetrVG the Works Council has a right of co-determination in relation to the introduction and use of technical equipment which is intended to monitor the behaviour or performance of employees.

The BAG broadly interprets the phrase 'technical equipment intended to monitor'.

It uses the argument that for monitoring with the assistance of technical equipment it is not necessary that the technical equipment records the data itself or automatically. Rather, manual input of the data and its mere storage by the technical equipment is sufficient (BAG, decision dated 13 December 2016 – 1 ABR 7/15). The BAG considers that for the phrase 'intended to monitor" it is sufficient for the technical equipment to be objectively likely to record infor-

mation about employees' behaviour or performance. It is not relevant whether the employer subjectively intends to monitor its employees (BAG, decision dated 10 December 2013 – 1 ABR 43/12).

This broader interpretation results in basically any IT system falling under the application of section 87 (1) (6) BetrVG because these generally are able to record certain user and access data.

The new restricted approach of the BVerwG

Actual monitoring pressure

In two recent decisions the BVerwG did not follow the wider interpretation of the BAG, thus restricting the scope of application of IT co-determination (BVerwG, decision dated 4 May 2023 – 5 P 61/21; decision dated 4 May 2023 – 5 P 2/22). The subject of these decisions was whether the Staff Councils had a right of co-determination in the case of social media channels being operated by the Deutsche Rentenversicherung Bund [umbrella organisation of German pension insurance companies] in accordance with section 80 (1) (21) of the Federal Staff Representation Act (Bundespersonalvertretungsgesetz, BPersVG) and a Facebook page being operated by a University hospital in accordance with section 88 (1) (32) of the Hamburg Staff Representation Act (Hamburgisches Personalvertretungsgesetz, HmbPersVG). Both the aforementioned provisions contain the same content as section 87 (1) (6) BetrVG or are at least comparable.

The BVerwG, however, did not adopt the even narrower interpretation of the lower courts which held that there was no right to co-determination, as the data was only collected manually and therefore lacked an independent, automatic performance by the technical equipment (Hamburg Higher Regional Court (Oberverwaltungsgericht OVG), decision dated 31 January 2022 – 14 Bf 201/20.PVL). There was no technical equipment involved, but merely a technical tool (Berlin-Brandenburg OVG, decision dated 4 August 2021 - OVG 62 PV 5/20).

Instead, the BVerwG interpreted the co-determination circumstances in a restrictive way, ruling that the existence of a co-determination right depends on whether the staff were actually subject to monitoring pressure in the circumstances in question. The BVerwG held that it depends on whether, when objectively considering the actual case at hand, there is sufficient likelihood that as a result of using the technical equipment the behaviour and performance data has been stored to an extent that the staff are under threat of monitoring pressure generated by the storage of such data and any evaluation by the employer. In the specific matter at hand the BVerwG found that there were insufficient indications for monitoring pressure and rejected the existence of a right of co-determination. With employer-run social media accounts it is unknown whether and how frequently third parties are able to make comments containing behaviour or performance related information on individual members of staff. It is not to be expected that user comments are made to the high extent required for monitoring pressure and thus does not result in a co-determination right.

Contrary to the BAG, which had upheld a co-determination right in a comparable case (cf. BAG, decision dated 13 December 2016 – 1 ABR 7/15), the BVerwG held that the mere objective suitability for collecting performance and behaviour data was insufficient, but rather a certain amount of quantitative and qualitative data is required. Employers may therefore be able to prevent co-determination by taking sufficient precautions to avoid monitoring pressure.

Outlook and practical relevance

It is unclear whether and to what extent the Employment Courts will follow the new restricted approach of the BVerwG. As even before the decisions of the BVerwG, some of the lower instance courts have already looked to a restricted interpretation of section 87 (1) (6) BetrVG (cf., for example the decision of the Düsseldorf Regional Labour Court (Landesarbeitsgericht, LAG) dated 12 January 2015 – 9 TaBV 51/14); there is no way to rule out that the arguments of the jurisdiction of the Administrative Courts will be heard.

In order to avoid legal risks employers should continue to take the usual precautions until the legal situation has been verified, however, and conclude IT framework agreements or have sufficient anonymisation in place.

Unsere Standorte

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