Anti-Terror Lists of the EC: Data Protection and Co-Determination Problems

Issue

Under Regulation (EC) No. 881/2002, as last amended by Regulation (EC) No. 1102/2009 of November 16, 2009 against Osama bin Laden, Al Qaeda and the Taliban, which applies directly in Germany, and under Regulation (EC) 2580/2001 against other persons and organizations suspected of terrorism, companies in the EC are subject to extensive screening obligations. The purpose of these obligations is to ensure that persons and organizations named in the aforementioned regulations do not receive funds or other assets, either directly or indirectly. Among other things, employers are prohibited from paying wages or salaries to persons named in the so-called sanction lists. To avoid violations resulting in criminal or administrative penalties, the question has recently arisen whether employee screenings comparing employee data with data of the sanction lists are lawful and to what extent such screenings are subject to co-determination rights of the works council:

Justification of Data Comparison

Whether such data comparisons are lawful depends on the requirements of the Federal Data Protection Act (*BDSG*; "FDPA").

It is controversial whether the EC Regulations themselves justify a data comparison within the meaning of the FDPA. Ultimately, this issue is however mostly academic in nature. For it is likely that the FDPA itself justifies such a data comparison, either by virtue of FDPA § 28 para. 1 no. 2 or FDPA § 32 para. 1 sentence no. 1, which took effect on September 1, 2009.

Even after amendment of the FDPA, there are stronger arguments for the proposition that a processing of data in the course of employment or during the hiring phase can, now as before, be justified through FDPA § 28 para. 1 no. 2. The relevant standard here is whether the employer has a rightful interest in processing the data. In light of the clear requirements of the EC Regulations, this can however hardly be called into question. Even if courts should find that the FDPA § 28 para. 1 no. 2 is inapplicable in this context, the processing of data may nonetheless be justified under the new section of the FDPA, § 32.

Involvement of Works Council

That the works council must be informed of the planned data comparison would appear to be beyond question in light of Works Constitution Act (*BetrVG*; "WCA") § 80 para. 1 no. 1 alone. What is not so clear is whether such a data comparison is also subject to co-determination by the works council:

Since such a data comparison would usually involve the use of technical equipment, the works council may have co-determination rights under WCA § 87 para. 1 no. 6. According to this provision, both the introduction and application of technical equipment which is intended to monitor the employee's performance or conduct, are subject to the works council's co-determination. For example, screenings which correlate employee data with data of suppliers are, by some, considered conduct- or performance-related screenings. This view is however rejected by the prevailing opinion in the literature on this em-

ployment law issue, which argues that WCA § 87 para. 1 no. 6 is not applicable to a mere comparison of two different lists with names, account numbers and bank routing numbers because such a comparison can theoretically also be manual, so that use of electronic data processing equipment has no "independent controlling effect." This view appears especially compelling if a comparison with data of the sanction lists is involved, which hardly permit any inferences as to the conduct of employees. Ultimately, such a comparison merely involves a status determination.

Overall, there are good arguments in support of the view that such data comparisons are not subject to co-determination by the works council under WCA § 87 para. 1 no. 6. Whether a court would reach the same result can however not be reliably predicted, in light of the fact that WCA § 87 para. 1 no. 6 is at times interpreted rather broadly by German courts.

Practical Advice

In terms of data protection law, it appears that the first opinions expressed in the literature since the effective date of the FDPA § 32 correctly hold that the necessary data comparison is lawful now as before. It is therefore unlikely that such a comparison will require any special consent from the data subject. The same is also true for the hiring phase. It is however important that the data comparison should minimize any infringement of employees' privacy rights.

Quite apart from the above, it may also make sense to enter into a voluntary works agreement regarding a data comparison, since this would create another basis justifying the processing of data. The successful negotiation of such a works agreement will, to a large extent, depend on the employer's skillful communication of the matter to the works council.

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