Top Secret?
Initial Contours of the Right of Access under Art. 15 GDPR

INTRODUCTION

It has now been almost a year since the General Data Protection Regulation (GDPR) has come into effect. Since then, the focus of the employment law disputes before the courts has edged over more and more to the **Right of Access under Art. 15 GDPR**. Under this provision, each person affected by data processing (that is, each employee) has a claim against the controller (that is, his or her employer) for information on his or her personal data and to information concerning (among other things) the purpose of the processing, the categories of processed data, the recipients of the data, the duration of storage and concerning the existing right of erasure and the right to lodge a complaint. The information must be provided within one month in writing or in another (electronic) form and generally free of charge. Furthermore, the controller must also provide a copy of the personal data which are the subject of processing.

Even though the replaced German data protection law in Sec. 34 Federal Data Protection Act was familiar with at least a similar disclosure claim, there has been a perceptible increase in the number of cases before the labor courts in which this kind of information request is being litigated since the GDPR has come into effect, which is not least of all due to the presence of this topic in the media during the recent years. It has since become less than rare that employees will use the disclosure claim under Art. 15 GDPR to procure information for further litigation with the employer or to just to be as much of a nuisance as possible, particularly in conflict situations and settlement negotiations.

DECISION OF THE SUPERIOR LABOR COURT OF BADEN-WUERTTEMBERG OF 20 DECEMBER 2018 (AZ. 17 SA 11/189)

Just recently, as far as we can see, the Superior Labor Court of Baden-Württemberg was the first employment law appeals court that has had the opportunity to discuss the provisions of Art. 15 GDPR more closely. The backdrop of the specific case is a conflict that has been carried out over many years with various employment law tools between a globally operating car manufacturer located in the Stuttgart region and a lawyer working for the company in its legal department. The details of this conflict do not play any role here.

Of relevance, however, is the fact that the plaintiff in the proceedings has raised a claim to disclosure of the data related to his performance and conduct which has been stored by the defendant. The core argument with which the defendant is defending its actions is that a disclosure is impossible, given the background of the **justified interests of third parties** as the defendant is obliged **to protect anonymous whistleblowers** reporting irregularities. Information concerning data disclosing the identity of the relevant whistleblower or which would allow for inferences concerning this person thus may not be provided because the defendant is specifically obliged to warrant the protection of the interests of the whistleblower under the scope of its duties of protection and mindfulness (particularly the protection of general rights of privacy and personal integrity).

The legal starting point for this argumentation is **Sections 34 (1), 29 (1) sentence 2 German Federal Data Protection Act** under which the right of access under Art. 15 GDPR does not exist to the extent the disclosure would divulge information that must be kept secret under a legal regulation or according to its nature, particularly **due to the overriding justified interests of a third party**.

Despite this legal restriction and the argument of protecting whistleblowers, which was presented by the employer, the Superior Labor Court ordered the employer in the present case to make the disclosure. It particularly noted in this context that a disclosure under the rules of the Federal Data Protection Act is only excluded "**to the extent**" overriding interests of a third to maintain secrecy existed.

This would mean that there would have to be a **weighing of the interest of the employee in information, on the one hand, and the secrecy interests of the third party, on the other**. The court explicitly states here that it could indeed envision a legitimate interest in the secrecy of a source of information if an employer promises anonymity to whistleblowers for the purpose of investigating inner-company misconduct. However, even with the existence of such a promise, cases are conceivable in which the employee's interest in information nevertheless prevails.

In order to put the court in the first place in a position to weigh these interests, it was argued by the Superior Labor Court that the employer must submit a specific set of facts in the proceedings on the basis of which the court may review whether or not the disclosure was in fact restricted by the rights and freedoms of other individuals. In any event, it does not suffice that the employer refers in a quite blanket manner, as in the present case, without providing more detailed grounds.

APPEAL TO THE FEDERAL LABOR COURT HAS BEEN ALLOWED

It remains to be seen how this litigation and similar ones will develop. It is to be welcomed that the Superior Labor Court had admitted the second appeal of its decision to the Federal Labor Court. It is explicitly stated in the grounds of the judgment that both the **scope of the right of access** of an employee under Art. 15 GDPR and the possible **limitations under Sec. 34 (1) Federal Data Protection Act** are questions of fundamental importance that have not yet been settled. It is to be expected that the parties will continue the litigation before the Federal Labor Court and one can only hope that the Federal Labor Court will use this chance to at least provide some more clarity concerning this still controversially discussed questions.

RECOMMENDED ACTION

One (not quite serious) recommendation for action that follows from the decision could be to avoid employing lawyers. As this cannot always be warranted everywhere and even non-legal personnel has since begun to avail itself of the opportunities under Art. 15 GDPR, companies should take care, above all, that **solid HR processes** have been installed to be able to react appropriately to requests for information under data protection law.

There are, indeed, certain **strategic and formal levers** to stop and take the air out of tactical information requests relating to heated (contentious) termination protection scenarios. Furthermore, the decision of the Superior Labor Court of Baden-Wuerttemberg illustrates that counter-rights of the employer (such as in the form of an interest in maintaining secrecy) can, indeed, form **solid arguments** for practitioners. However - and the present decision also illustrates this - numerous detailed legal questions on the scope of the information request and the possible counter-rights of the employer or the requirements on the burden of substantiation and proof that will apply here have not yet been **clarified sufficiently**. It may be that the Federal Labor Court will provide for a somewhat more reliable orientation in the next instance.

Despite all of the procedural and substantive defensive arguments, the fulfillment of the information request remains a statutory duty that is to be taken seriously and, in the end, must also be complied with appropriately. Practitioners have shown here in past years that an advanced, clearly defined HR process on how to react to such requests is absolutely necessary for a level-headed reaction to such information requests in pressing and materially heated conflict situations and to let this tactic fizzle out.

On the other hand, actual practice has also shown that the introduction and implementation of such processes are not "**rocket science**" and that the legal requirements also leave a certain amount of discretionary leeway that must be used appropriately. This applies particularly for all businesses that have already undertaken more than a few efforts during the introduction of the GDPR and the new, flanking Federal Data Protection Act to adapt their internal data protection regimes to the new requirements. In almost every case this is a good base to build on.

Given the current developments, one cannot assume, in any event, that the requests for information under data protection law, particularly as a tactical tool, will decrease as time goes on. **This means: be prepared!**

Please do not hesitate to contact us if you have questions on this topic. We would be very happy to include you on the list of subscribers to our free newsletter in which we also regularly discuss topics relating to compensation. Just send us a brief **Mail** with your request.

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