

## The Matrix in Works Council Elections – BAG Ruling on the Treatment of Matrix Employees

### INTRODUCTION

The thought of matrix structures is sure to cause headaches for more than one of the election committees managing the regular works council elections in 2022. However, help is on the way, for the case law regarding the employment law aspects of matrix structures has been developing step by step. After the 1<sup>st</sup> Senate of the Federal Labor Court (“BAG”) set an initial, audible exclamation point regarding the integration of matrix managers under Sec. 99 Works Constitution Act in its judgment of June 12, 1999 (1 ABR 5/18), this was followed by the next guidepost in the judgment on May 26, 2021 (7 ABR 17/20) which serves as an orientation for election committees, works councils and employers.

### THE FACTS

The 7<sup>th</sup> Senate of the BAG was presented with a case which is anything but unusual for many businesses. As is often the case with matrix structures, the functions of a group of employees were headed up by a matrix manager who was located at a different operation (Operation H) than the matrix employees (Operation S). The group for whom the employees worked, was functionally organized according to brands. According to the submissions of the employer, the organizational duties were performed by managers who headed up teams located at several operations. The matrix employees and matrix manager to whom the litigation pertained worked exclusively for Brand C. According to the employer, personnel and social matters, however, were handled “across all brands” by a uniform service organization; the matrix managers only provided “functional input”. It had not yet been determined in the 3<sup>rd</sup> instance if the matrix managers were authorized to give functional directives.

The works council at Operation H then filed the motion to establish, among other things, whether or not it was entitled to certain rights of participation with regard to the matrix employees, whether a particular works agreement applied to these employees and if the

employees were allowed to attend works assemblies in H.

Both the Labor Court in Hannover (order of December 6, 2018, 4 BV 14/18) and the Higher Labor Court of Lower Saxony (order of November 19, 2019, 11 TaBV 7/19) ruled that the matrix employees belonged to Operation H.

### GROUNDINGS OF THE BAG DECISION

The BAG set aside the judgment of the Higher Labor Court and referred the matter back to this Court. The BAG made reference to its established case law under which an employee belongs to the operation in which they are organizationally integrated. The deciding factor is whether the employer is pursuing the purpose of the business with the labor of the employee.

In a further step, the BAG applies this criterion to employees who pursue a uniform purpose in teams located at different operations – as is often the case in matrix structures. If a single business purpose is being pursued through the labor of employees at several operations, an essential indication of integration is in which operation the employees perform their work, i.e. in which offices the employees work with the resources provided by the employer. This approach serves the purpose to be inferred from Sec. 4 (1) Works Constitution Act of allowing for local representation.

Of note here is the clarification of the BAG that this can also argue *against* the integration of employees in another operation in which the same purpose is being pursued. Although it is possible that an employee could belong to several operations, the BAG explicitly states that the issue of functional directives alone does not establish the affiliation to the operation from which an employee receives directions.

Finally, the BAG emphasizes that the participation in the works council elections in H as such does not establish any allocation to Operation H.

### CONCLUSIONS

For now, this decision is good news for election committees. With this guiding principle of allowing for local representation and having matrix employees remain affiliated, in the normal case, with a single operation, much should remain as it was. Matrix structures do not “steal” any employees from operations. However, too many cracks in this surface are not allowed. As the BAG again clearly stated, the affiliation with dual operations is conceivable, for instance, if a matrix employee also manages employees in another operation. Whether or not this means that they also have dual active or passive voting rights has not been decided. Similarly, the issue of how to handle employees who work from home, a work model that was anything but unusual in multinational matrix structures even before Corona was not a subject of the litigation.

Another important issue involves the question of which works council has responsibility for certain matters, such as in the case of the dual operational affiliation of matrix manager. The ruling of the BAG on May 26, 2021 has established an awareness of this problem when it stated that this must be individually examined for each co-determination right.

Please feel free to contact us at any time if you have questions regarding any aspects of matrix structures.

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