Case C-34/21

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

20 January 2021

Referring court:

Verwaltungsgericht Wiesbaden (Germany)

Date of the decision to refer:

21 December 2020

Applicant:

Hauptpersonalrat der Lehrerinnen und Lehrer beim Hessischen Kultusministerium

Other party:

Minister des Hessischen Kultusministeriums (as head of the ministry)

Subject matter of the main proceedings

Legislation of the *Länder* on staff representation, specifically: legal basis of data protection in the processing of employee data

Subject matter and legal basis of the request

Interpretation of Article 88 of Regulation 2016/679; Article 267 TFEU

Questions referred

1. Is Article 88(1) of REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation – GDPR) to be interpreted as meaning that, in order to be a more specific rule for ensuring the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context within

the meaning of Article 88(1) of REGULATION (EU) 2016/679, a provision must meet the requirements imposed on such rules by Article 88(2) of REGULATION (EU) 2016/679?

2. If a national rule clearly does not meet the requirements under Article 88(2) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, can it nevertheless remain applicable?

Provisions of EU law cited

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, in particular Article 88, and also Article 5 and Article 6(1)(b) and (f)

Provisions of national law cited

Hessisches Datenschutz- und Informationsfreiheitsgesetz (Law of *Land* Hessen on the protection of data and freedom of information; 'the HDSIG'), Paragraph 23, in particular the first sentence of subparagraph (1), and also subparagraphs (4) and (5)

Hessisches Beamtengesetz (Law of *Land* Hessen on civil service; 'the HBG'), Paragraph 86(4)

Brief summary of the facts and legal background

1 The parties are in dispute as to whether the introduction of live streaming lessons by means of video conferencing systems also requires – in addition to the consent of the parents for their children or of the pupils who have reached the age of majority – the consent of the respective teachers, or whether the data processing which takes place in that context is covered by the first sentence of Paragraph 23(1) of the HDSIG, and they are also in dispute as to whether a right of co-determination or merely a right of participation exists under the relevant staff representation rules of the *Land* Hessen.

2 The national legislature intended that Paragraph 23 of the HDSIG and Paragraph 86 of the HBG should be 'more specific rules' within the meaning of Article 88(1) of the GDPR.

3 Paragraph 23(1) of the HDSIG, which corresponds to Paragraph 26(1) of the Bundesdatenschutzgesetz (Federal Law on data protection; 'the BDSG'), reads:

> *'Personal data of employees may be processed for the purposes of an employment relationship where this is necessary for the decision on the establishment of an employment relationship or, after the establishment of the employment relationship, for the implementation, termination or administration thereof, as well as for the implementation of internal planning, organisational, social and personnel measures. This also applies to the exercise or discharge of the rights and obligations arising from the representation of employees' interests and laid down by law or a labour agreement or works or service agreement (collective agreement). The personal data of employees may be processed for the purpose of detecting criminal offences only where factual indications, which must be documented, give rise to the suspicion that the data subject has committed a criminal offence in the context of the employment relationship, the processing is necessary for the detection, and the legitimate interest of the employee or employees in precluding the processing is not overriding – in particular, the nature and extent of the processing are not disproportionate, having regard to the reason for the processing.'*

4 In the present context, reference should also be made to subparagraphs (4) and (5) of Paragraph 23 of the HDSIG. They provide as follows:

> *'(4) The processing of personal data, including special categories of personal data of employees, for the purposes of an employment relationship is permitted on the basis of collective agreements. In so doing, the negotiating parties shall comply with Article 88(2) [of the GDPR].*
>
> *(5) The controller must take appropriate measures to ensure that, in particular, the principles for the processing of personal data set out in Article 5 [of the GDPR] are complied with.'*

5 The explanatory memorandum to the draft legislation states, with regard to Paragraph 23(1) of the HDSIG, that *'Subparagraph (1) regulates the purposes for which and the conditions under which personal data may be processed before, during and after the employment relationship where this is necessary for the purposes of the employment relationship. In that context, the employer's interests in the data processing and the personality rights of the employee must be carefully balanced in such a way that both sets of interests are taken into account to the greatest extent possible.'*

6 In so far as the second sentence of Paragraph 23(7) of the HDSIG refers to the HBG, the first sentence of Paragraph 86(4) of the HBG must be taken into account in the present case. That sentence provides as follows:

> *'The employer may collect personal data on applicants, civil servants and former civil servants only if this is necessary for the establishment, implementation, termination or administration of the employment relationship or for the implementation of organisational, personnel and*

social measures, in particular for the purposes of personnel planning and deployment, or if it is permitted by a legal provision or a service agreement. …'

Brief summary of the basis for the request

7 The referring court has doubts as to whether the first sentence of Paragraph 23(1) of the HDSIG and the first sentence of Paragraph 86(4) of the HBG are provisions that are to be regarded, in each case, as a more specific rule in respect of the processing of employees' personal data pursuant to Article 88(1) and (2) of the GDPR, since the requirements set out in Article 88(2) of the GDPR have not been met either in the respective provisions themselves or by supplementary requirements imposed on those provisions elsewhere in the respective laws. This is because both the first sentence of Paragraph 23(1) of the HDSIG and Paragraph 86(4) of the HBG merely cite 'necessity' as the legal basis for the processing of the data of employees and civil servants, respectively.

8 With regard to the question as to the extent to which those provisions permissibly constitute more specific rules for the purposes of Article 88(1) and (2) of the GDPR, the national case-law, in particular that of the labour courts, proceeds on the assumption that the provision in the first sentence of Paragraph 26(1) of the BDSG, which corresponds, at the federal level, to the provision of *Länder* legislation in the first sentence of Paragraph 23(1) of the HDSIG, is applicable to any handling of employee data, going beyond the actual contractual relationship – that is to say, not only with regard to data processing that is necessary in connection with a relationship under an employment contract, which is already regulated in Article 6(1)(b) of the GDPR.

9 Article 6(1)(f) of the GDPR requires that the processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.

10 Consequently, for any processing of employee data that goes beyond that required solely within the framework of the employment contract, there must be a balancing of interests with regard to the further processing of the employee data, that is to say, a balancing of interests that goes beyond mere 'necessity', as provided for by the first sentence of Paragraph 23(1) of the HDSIG and by Paragraph 86(4) of the HBG. This is because the fundamental rights and freedoms of the data subject – in casu, the employee or civil servant – must be balanced against the legitimate interest pursued by the controller – in casu, the employer.

11 The referring court takes the view that, as regards, specifically, the processing of employees' personal data in the employment context at issue here, the national transposition legislation does not make provision for such a balancing exercise. The Bundesarbeitsgericht (Federal Labour Court, Germany; 'the BAG') takes a different view on this at national level. In an order of 7 May 2019, the BAG held

that, with the first sentence of Paragraph 26(1) of the BDSG (which corresponds to the first sentence of Paragraph 23(1) of the HDSIG at issue here), the federal legislature made use of the saving clause in Article 88 of the GDPR in a permissible manner.

12 Contrary to the view taken by the BAG, the referring court is of the opinion that merely stating, in Paragraph 23(5) of the HDSIG (which corresponds word for word to Paragraph 26(1) of the BDSG), that the controller must comply in particular with the principles set out in Article 5 of the GDPR does not meet the requirements of Article 88(2) of the GDPR. This is because Article 5 of the GDPR does not provide for any special protection for the fundamental rights and interests of employees specifically. Thus, the reference to that provision of the GDPR in the national provision on the protection of employee data (Paragraph 23 of the HDSIG or Paragraph 26 of the BDSG) does not achieve anything.

13 The referring court takes the view that Article 88(2) of the GDPR has therefore not been transposed into the national provisions. Pursuant to that second paragraph, the more specific rules of the Member States, in this case Paragraph 23(1) of the HDSIG (or, at Federal level, Paragraph 26(1) of the BDSG) and Paragraph 86(4) of the HBG, are to include suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity and monitoring systems at the work place. However, the inclusion of only the principle of 'necessity' in the national transposition legislation does not amount to the provision of more specific rules for the requirements contained in Article 88(2) of the GDPR.

14 Although the legislature has in principle recognised and considered Article 88(2) of the GDPR in that it requires compliance with that provision in collective agreements, it has not addressed or fleshed out the list of requirements set out in paragraph 2, either in the law itself or in the explanatory memorandum to the respective statutory provisions.

15 The view that a national provision should be interpreted in the sense that Article 88(2) of the GDPR must be taken into account by the controller with regard to the requirements mentioned in that provision is mistaken in so far as the regulation requires that the rules themselves are to include within their scope suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights, which also include monitoring systems at the work place. Accordingly, Article 88(2) of the GDPR requires necessary compliance in the respective national rules by the national legislature and is not merely a legal provision that must be additionally complied with by those who apply a national provision. This is because those who apply such provisions are not the addressees of Article 88(2) of the GDPR.

16 In that context, the referring court is also unable to recognise that Article 88(1) of the GDPR in conjunction with the first sentence of Paragraph 23(1) of the HDSIG constitutes a *lex specialis* for the first sentence of Article 6(1)(b) of the GDPR in respect of the implementation of the employment relationship, since Article 88(1) of the GDPR was clearly not taken into account in its entirety in the determination of the content of Paragraph 23 of the HDSIG.

17 Therefore, the question that arises for the referring court is whether or not the first sentence of Paragraph 23(1) of the HDSIG and Paragraph 86(4) of the BDSG – also taking into account the further provisions of the respective laws – meet the requirements of Article 88(1) and (2) of the GDPR or whether they remain applicable despite a breach of those requirements.

18 If the first sentence of Paragraph 23(1) of the HDSIG and Paragraph 86(4) of the BDSG do not form a legal basis for the measure planned by the other party to the proceedings (Minister des Hessischen Kultusministeriums – Minister of the Hessen Ministry of Education) for handling employee data in video conferencing systems, such a legal basis would have to be created. Such a legal basis could be the conclusion of a service agreement between the parties to the proceedings pursuant to Paragraph 23(4) of the HDSIG.