Traditionally, German law is very sensitive when it comes to matters of privacy law. Therefore, the enactment of new data privacy law rules is practically very important, as they bring the national law in line with the European General Data Protection Regulations. Dr. Daniel Hund and Dr. Anja Branz will reveal all the details.

Dr. Bernd Borgmann and Tom Stiebert take a look into the crystal ball: Will German labor law cope with the needs which arise from digitization and work 4.0? Find out here!

Finally: Our Advisory Board is expanding further. We are glad that Thomas M. Hirner (Daimler) and Volker Stück (ABB) have joined the club.

Sincerely yours,

Thomas Wegerich
A missed chance

Germany enacts new data privacy laws to adapt to the GDPR

By Dr. Daniel Hund, LL.M. and Dr. Anja Branz

In an attempt to adapt national data privacy laws in the employment relationship to new European standards, the German parliament passed a new bill on April 27, 2017. These new standards derive from the General Data Protection Regulation (GDPR) enacted by the European Union in 2016 and due to take effect on May 25, 2018 in all Member States. Given that the GDPR regulates the processing of personal data of employees by employers and imposes fines of up to 4% of the total revenue of a group or company per year in the case of any violations, it has attracted a great deal of attention from compliance officers, HR managers and legal counsel.

Processing personal data

The GDPR lays down certain principles relating to the processing of personal data. Personal data shall be lawful, fair and transparent (Article 5 1. (a)); collected for specified, explicit and legitimate purposes only and not be processed in a manner that is incompatible with these purposes (Article 5 1. (b)); adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (Article 5 1. (c)); accurate and kept up-to-date (Article 5 1. (d)); stored for no longer than necessary for the purpose for which they are processed (Article 5 1. (e)); and processed confidentially while ensuring data integrity (Article 5 1. (f)). Employers will be held accountable for complying with these principles and will be required to document compliance accordingly (Article 5 2.).

Moreover, the GDPR gives those employees that are subject to the processing of personal data certain rights, for instance the right to obtain information about the use of their personal data (Article 14) as well as the right to have their personal data erased under certain circumstances (the right to be forgotten, article 17) and the right to data portability (Article 20).

It also requires employers to assess the impact of any planned data processing on the protection of their employees’ personal data and consult with regulatory authorities when such assessment indicates that the processing would result in a high risk (Article 36).

Compliance and noncompliance with GDPR

In cases of noncompliance with the GDPR, the regulatory authorities can
impose fines of up to 4% of the total annual revenue of the relevant group or company. It is however not yet clear what precise measures must be taken by an employer in order to be 100% compliant. Many employers in Germany had hoped that the German legislature, which has to some extent the power to specify requirements, would provide more clarity and legal certainty, but this has not been the case.

While the new bill refers to the principles and requirements laid down in the GDPR, it does not elaborate on them and does not give any further guidance for employers on how to comply with the GDPR. Essentially, the general structure of employees’ data protection will remain unchanged.

In a nutshell, employees’ personal data may only be processed if

- necessary for a decision regarding the formation, execution or termination of the employment relationship;
- allowed by collective bargaining or works council agreements;
- the employee has consented; or
- facts indicate that an employee has committed a crime during the course of his or her employment.

While it has been established by case law already that employees can give their consent to the processing of personal data in the employment context, the new law states this expressly. Yet the degree of dependency and the circumstances of the consent must be considered when assessing whether the consent was actually given voluntarily. According to the new law, the employee can consent in particular to the processing of his or her personal data in the employment context where he or she gains a legal or financial benefit from said processing or where the employer and employee share the same interests. While this new clarification constitutes an improvement, it will remain a challenge for practitioners to determine on a case-by-case basis whether the employee consented voluntarily or not.

**Summary**

The German regulations concerning the processing of personal data in the employment context will not change significantly under the new bill. Given that German legislators failed to clarify new obligations under the GDPR, it will essentially be a matter for regulatory authorities and the courts to provide such guidance. In the meantime, employers can only hope that any reasonable efforts to comply with the GDPR will be taken into consideration. Until then, employers would be well advised to informally consult with regulatory authorities where the mandatory data protection impact assessment indicates that the processing of personal data will result in a high risk for employees’ data. It is difficult to imagine that measures taken by the employer and approved (or at least tolerated) by the regulatory authorities will result in significant fines in practice.
Mediation in labor relations concerning IT

Alternative dispute resolution

By Dr. Alexander Insam, M.A. and Nikolai Fritsche

Introduction

Digitization determines almost every aspect of our professional lives, with most companies effectively beholden to IT. This digital world has now been enshrined in the (German) Works Constitution Law (Betriebsverfassungsgesetz).

Many companies face the challenge of introducing new IT systems on the one hand while resolving the conflicting interests of the management and the works council on the other.

Whereas the works council represents and protects the interests of the employees, for example personal rights and data protection rights, the management must focus on productivity, efficiency and effectiveness. In the event of a dispute, the management or works council often takes the matter up with the arbitration committee (Einigungsstelle). Since the final decision rests with the chairperson of the committee, the risk with arbitration proceedings is that the result fails to meet the expectations of either party. This often leads to difficulties for the implementation of IT framework agreements that are part of daily professional life. Moreover, most IT agreements become nigh on unreadable legal documents containing innumerable obligations and rights for both parties that essentially hamstring new IT programs and even updates. Yet time is always of the utmost importance, as almost every process relies on smooth-running IT systems.

Therefore, mediation can be a successful alternative to conclude a works council agreement that is suitable and understandable for both parties. In contrast to arbitration proceedings, in mediation procedures the decisions are taken not by the mediator but by common accord (between the management and the works council). Therefore, mediation can result in cooperation that is built on trust, saving time and safeguarding IT operation.

Initial situation

In many companies, disputes and conflicts between the management and the works council are commonplace and integral to the role of both parties. They are known as structural conflicts that occur regardless of who is acting for the management or the works council. Some conflicts escalate and have a negative effect on both the company’s resources and its future goals. These are known as dysfunctional conflicts and they cost companies both time and money (see also: Konfliktkostenstudie: Die Kosten von Reibungsverlusten in Industrieunternehmen (https://www.kpmg.de/Publikationen/11479.asp); Konfliktkostenstudie II: Best Practice – Konflikt(kosten)-Management 2012 – Der wahre Wert der Mediation (https://www.kpmg.de/Publikationen/30558.asp)).
Many structural and dysfunctional conflicts between the management and the works council result from the method of communication. If parties only communicate via email and not face-to-face, and make their concerns and requests known to parties not directly involved, misunderstandings occur and conflicts escalate. In the worst-case scenario, this leads to additional interpersonal conflicts and increased costs. In such situations, cooperation and mutual trust between the management and the works council are all but impossible. The result is often multiple arbitration proceedings and increasing difficulty in resolving and regulating complex issues in a mutually constructive way. And the costs of the conflict escalate too.

One example for a complex issue is the conclusion of a (framework) works council agreement for IT applications. The reasons for conflict surrounding new IT system applications are as follows:

- they may impose higher requirements for day-to-day work, both physically and mentally.

Mediation can help find a constructive solution to such conflicts.

**The mediation approach**

The aim of mediation is to achieve a mutual agreement that is voluntarily concluded by the parties and not imposed by the mediator. The mediator is omnipartial, supports both parties, helps the parties negotiate and facilitates the conflict resolution process without judgment.

At the beginning of every mediation process, it is necessary to take stock and look at which facts are disputed and which are undisputed. It is quite interesting to note that visualizing the undisputed and disputed facts of a case will often bring new insights to both parties. Then targets, goals and the interests of both parties will be discussed and evaluated. Again, both parties will clearly see where they agree and where they disagree.

For the next step, it helps if the parties ask themselves how they would solve the conflict from the other party’s point of view. This enables both parties to see the case from another standpoint and facilitates a better understanding of the other party. Then the mediator can sum up and evaluate the options together with the parties and determine if one of the options fulfills more interests of both parties than their best alternative to a negotiated agreement (BATNA), which is normally an arbitration committee or labor court. If the BATNA test is successful, both parties know that they have found a better solution and can agree on it.

All in all, the aim of mediation is to engage both parties to look for creative ideas to resolve their conflicts and to find solutions that build long-term cooperation between the management and the works council.

**Framework works council agreements for IT systems**

During one of our practical case studies, the parties – the management and the works council – agreed to modify a complex and very long framework works council agreement of 18 pages and 20 sections to a new version with only seven pages and 12 sections.

How did we do it? In a first step, the existing concept of the framework works council agreement was modified so that not every possible disagreement is defined in detail. We focused instead on agreeing on a modus operandi for handling conflict in the event of a disagreement. An important cornerstone here was to establish a permanent working group that consisted of two members of the management and two members of the works council.

To deal with existing IT systems and the implementation of new IT systems, it was important for both parties that the working group was able to reach mandatory decisions. The parties agreed that a unanimous working group decision would be accepted as binding by both parties.

The parties also agreed on communication in person first, then via telephone and only as a last resort via email. Furthermore, they agreed on regular meetings between the management and the works council as well as working groups regarding the different IT issues. In the case of disputes within the working groups, the parties agreed that they would use mediation before considering arbitration or legal action.

Moreover, the parties agreed that all current and future IT systems should be placed in one of three categories:
(1) green IT systems that do not violate the codetermination rights of the works council or the personal rights of employees, (2) yellow IT systems that need to be monitored to determine if they violate codetermination rights or personal rights and (3) red IT systems that clearly violate codetermination rights or personal rights.

Categorizing all IT systems together with the parties helped to build trust and erased the fear of the unknown.

The main reason the new works agreement came to fruition was that it was legally defined as a mediation agreement that did not replace the old works agreement. A mediation agreement is only effective during the mediation process and may be terminated or discontinued at any time. This flexibility helped convince the parties to see the positive outcome of trying this approach. After three months, both parties found that using the working group resolved all their conflicts and that they did not need to fight each other if they could talk openly about their conflicting interests. In addition, the mediation agreement helped them overcome their fear of the unknown or unwanted surprises.

After another three months of successful evaluation, they formally agreed to replace the old works agreement with the mediation agreement and now new works agreement.

**Conclusion**

This practical example shows that there are cases in which alternative communication methods or other approaches like mediation can produce close cooperation between the management and the works council. They can help reduce conflict costs, save time and form a basis for constructive cooperation in the future.

Short framework agreements are beneficial, as the need for communication between the parties builds trust and ultimately increased confidence in each other, instead of strictly observing detailed regulations. It is essential to create processes in which parties and people talk directly to each other and take the time to do this beyond mediation. We believe in trusting the parties to trust themselves.”

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Dr. Alexander Insam, M.A.
Partner, CHRO
Rechtsanwalt, Fachanwalt für Arbeitsrecht, Mediator
KPMG Rechtsanwaltsgesellschaft mbH, Frankfurt
ainsam@kpmg-law.com

Nikolai Fritsche
Rechtsanwalt, Fachanwalt für Arbeitsrecht, Mediator
KPMG Rechtsanwaltsgesellschaft mbH, Nürnberg
nfritsche@kpmg-law.com

www.kpmg-law.com
Do good – and be obliged to talk about it?

The implementation of the EU Directive on corporate social responsibility into German law

By Prof. Robert von Steinau-Steinrück and Stephan Sura

In 1961, German writer and journalist Georg-Volkmar Graf Zedtwitz von Arnim, who was also one of the first public relations officers in Germany, published his personal guidelines for goodwill advertising under a title which hence became a key principle for every undertaking’s public relations work: “Do good and talk about it”. Nowadays, this maxim is omnipresent, since corporate social responsibility issues have become a major task for every large enterprise. In 2014, the European Parliament and Council enacted Directive 2014/95/EU, the “CSR Directive”, regarding the disclosure of non-financial and diversity information of certain large undertakings and groups. With a little bit of delay, this Directive has recently been implemented into German law and now actually constitutes a legal obligation for affected undertakings to reveal their “good things”.

Background

On April 11, 2017, the CSR Directive Implementation Act (CSR-Richtlinien-Umsetzungsgesetz) was announced and came into effect (German Federal Law Gazette I 2017, p. 802). The underlying EU Directive 2014/95/EU obliges certain large undertakings to include information about their CSR activities in their management reports and therefore to disclose them, e.g. respect for workers’ rights or environmental matters. Originally, the Directive was to be implemented into domestic law prior to December 2016; a first draft for concrete implementation in Germany by the Federal Ministry of Justice (Bundesministerium der Justiz und für Verbraucherschutz, BMJV) had already been drawn up in April 2015. Due to controversial discussions during the legislative process, in particular concerning the limitation of its scope to large capital market-oriented undertakings, the corresponding exclusion of medium-sized companies and the intensity of audits by supervisory boards, the Act’s timelines were rendered unachievable.

In the end, the Directive was adopted almost word for word, mainly through changes in the German Commercial Code (Handelsgesetzbuch, HGB). With the implementation of the Directive, the legislator incorporates the social demand for sustainable and transparent responsibility of corporations into the legal framework: large undertakings as well as certain credit institutions and insurance companies now also have to account for their non-financial issues. At the same time, they should already...
be more aware of their responsibilities and take them into account when making internal decisions.

**Scope of application**

Although the Act’s implementation was delayed, its provisions will apply retroactively to all fiscal years beginning after December 31, 2016. Above all, the new obligations for non-financial disclosures only apply to a certain circle of major undertakings. Due to the new Section 289b (1) German Commercial Code, these are all corporations, limited liability partnerships (pursuant to Section 264a German Commercial Code) and cooperatives of public interest that are:

1. ‘large’, meaning having an annual balance sheet of more than €20 million or revenues of more than €40 million in the twelve months before the reporting date (Section 267 [3] 1 German Commercial Code),

2. capital market-oriented according to Section 264d German Commercial Code, and

3. employing an annual average of more than 500 employees.

The size criteria have to be met for two successive fiscal years. Pursuant to Section 315b (1) German Commercial Code, parent companies also have to publish a non-financial report if they are not already obliged to publish a group report containing this information (Section 11 Disclosure Act [Publizitätsgesetz, PublG]) and if they match the size criteria, except that being “large” is defined for them by balance sheets and revenues exceeding the threshold values of Section 293 (1) 1 no. 1 and 2 German Commercial Code in their consolidated financial statement. Furthermore, company groups can be released from an individual disclosure when their relevant non-financial activities are already covered by the non-financial disclosure of the group management report.

Regardless of their capital market-orientation, all credit institutions and insurance companies with more than 500 employees have to extend their management report with the non-financial report. For 2017, the total number of affected undertakings will be around 550, containing approximately 50% of non-capital-market-oriented banks and insurance companies.

**Forms**

Non-financial disclosure must accompany the (group) management report. A sustainability-serving perspective appears alongside the disclosure of the financial development with the purpose of reviewing the business activities’ consequences on non-financial aspects. As an element of the main management report, the non-financial disclosure is intended for the same addressees, which means not only investors, but also employees, customers, suppliers or the public at large. Becoming part of the management report also implies that the non-financial disclosure is committed to the regulations of the German accounting standards (Deutsche Rechnungslegungsstandards, DRS), which demand, for example, completeness, reliability, balance, clarity, structure and essentiality in a management report (DRS 20).

The Implementation Act opens up three different ways to disclose non-financial information: their integration into different sections of the management report, the grouping of all non-financial details in a separate chapter, or issuing an entire individual non-financial activity report. The same options are available for the non-financial disclosure within a group management report, where a parent company can also include its individual disclosure in a potential main group report on non-financial issues, Section 315b (1) 3 German Commercial Code. When creating the non-financial report, undertakings are free to use national or international frameworks of sustainability or corporate reporting such as the German Sustainability Code (Deutscher Nachhaltigkeitskodex), the G4 Sustainability Reporting Guidelines of the Global Reporting Initiative (soon: GRI Standards) or the Integrated Reporting Concept of the International Integrated Reporting Council (IIRC). Here, Section 289d German Commercial Code introduces a principle of “apply or explain”, in which an undertaking has to declare either which framework it has used or why it did not apply one at all.

**Contents**

The CSR Directive and thus its Implementation Act oblige the disclosure of information on certain non-financial activities, for which Section 289c German Commercial Code stipulates minimum contents. Through this framework, undertakings are able to address the relevant information about their activities, while at the same time the provision ensures comparability between the reports. To support the understanding and con-
text of the information, every disclosure has to provide a brief description of the business model, including the significant characteristics of the undertaking such as organizational structures, market sectors, location(s), products and services or distribution processes. In diversified groups or undertakings, a description of all the different businesses and their potential connections is evident. Undertakings using IIRC- or DRS 20-standards for their reporting will satisfy the requirements in any case.

According to Section 289c (2) German Commercial Code, the concrete non-financial information then has to contain, at the very least, details on:

1. environmental matters (such as the consumption of water or air pollution caused by production processes),
2. workers’ issues (such as safety regulations or gender equality within the undertaking),
3. social concerns,
4. respect for human rights and
5. measures to combat corruption and bribery (such as prevention instruments).

Providing further voluntary information in addition to the minimum contents is always possible; nevertheless, additional issues can also be required when they are substantial for the undertaking’s particular business model. Pursuant to Section 315c (1) German Commercial Code, these specifications also apply to all non-financial disclosures on a group level.

The concrete details which have to be disclosed for each non-financial aspect are settled by Section 289c (3) German Commercial Code: For every single non-financial activity, all pursued concepts (including due diligence processes), their (current) results, corresponding significant risks including approaches to deal with them and the most important non-financial performance indicators to measure attainment have to be specified. Especially disclosing the concepts of non-financial activities covers a main reporting issue, as undertakings are obliged to declare their goals and the procedures to achieve them. If the undertaking does not pursue any aim for one of the aforementioned non-financial fields, maybe because it has no bearing on the business model, it has to explain why (“comply or explain”). On the other hand, certain concepts can also refer to more than one field.

In general, the disclosure has to state all relevant information that is necessary for understanding the business performance, the operating results, the undertaking’s situation and the activities’ consequences for the non-financial aspects. If necessary, it should also contain the related values within the annual financial statement. In this respect, the provision limits the duty to report to its relation with business development and therefore partly reflects the obligations already existing according to Section 289 (3) German Commercial Code. Back-to-front, information only concerning the understanding of the consequences of business activities on non-financial issues is not part of the minimum requirements regarding non-financial disclosure, even if they can be mandatory in an individual sustainability report.

Alongside the introduction of the obligation to report, the Implementation Act also transforms the Directive’s claim for an extended management declaration on the undertaking’s diversity politics (Sections 289f [2] no. 6 and 315d German Commercial Code).

Unfavorable information

Section 289e German Commercial Code allows rare exceptions for omitting certain unfavorable information in the non-financial report. However, the use of this provision is tied to the restrictive conditions that the related information concerns prospective developments or issues the undertaking is currently negotiating about, that the disclosure of the information can cause a substantial disadvantage to the undertaking, and that the report nevertheless still reflects an actual and reasonable understanding of the consequences of non-financial activities on business performance, the operating results and the undertaking’s situation, even with the exclusion of the concrete information deemed unfavorable. If the reasons for waiving the information no longer apply after the release of the non-financial disclosure, they have to become part of the following year’s report (Section 289e [2] German Commercial Code).

Auditing range

Non-financial disclosure is only subject to formal examination, meaning that an auditor only performs a general check that the disclosure has been made, Section 317 (2) 4-5 German Commercial Code. An explicit content-related auditing duty was not implemented, as the CSR Directive did not contain such an obligation either. That being said, undertakings are able to arrange a voluntary audit of the con-
tents – but if they do so, they also have to publish the results, beginning after December 31, 2018 (Sections 289b [4], 315b [4] German Commercial Code).

Importance is given to a content-related audit by the supervisory board’s monitoring and review duties, Sections 111, 171 German Stock Corporation Act (Aktiengesetz, AktG). Being part of the management report, non-financial disclosure is captured succinctly by these obligations. If the undertaking has chosen to issue an individual non-financial activity report outside of the management report, the board of directors has to submit it to the supervisory board as well (Section 170 [1] German Stock Corporation Act). In this case, the supervisory board cannot rely on the auditor’s examination. Due to the rigorous sanctions of Sections 331 et seq. German Commercial Code, including fines, penalty fees and even imprisonment for the directors or supervisory board members, an external audit pursuant to Section 111 (2) German Stock Corporation Act can be arranged. This option was added subsequently during the Implementation Act’s emergence; it can be assumed that most supervisory boards will make use of it.

Conclusion

Beyond the controversies regarding the scope of the Directive’s implementation, the German legislator has granted high formal flexibility to affected undertakings in how they can frame their non-financial disclosures in detail. As they can fulfill the formal requirements for the disclosure in different ways, administrative effort will not increase unduly when undertakings are already reporting on their CSR activities, especially when they are using official reporting frameworks. In cases where they have not yet done so, they are able to choose the less laborious method for their individual practice. Furthermore, undertakings are generally free to address their essential non-financial issues, only including the downside of very restrictive conditions for concealing unpleasant or unpopular parts of them. The obligations of the CSR Directive Implementation Act therefore represent a Janus-faced duty: Undertakings are now able to present their CSR activities within a more official framework along with their management reports while at the same time the related legal provisions make it harder to embellish unfavorable aspects of them.

Prof. Dr. Robert von Steinau-Steinrück
Honorary professor for Employment & Labor Law at University of Potsdam, Attorney, Specialist Attorney, Partner in Employment & Labor Law, Luther Rechtsanwaltsgesellschaft mbH, Berlin
robert.steinrueck@luther-lawfirm.com

Stephan Sura
Research assistant in Employment & Labor Law
Luther Rechtsanwaltsgesellschaft mbH, Cologne
stephan.sura@luther-lawfirm.com

www.luther-lawfirm.com
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WHITE & CASE
Germany set for massive reform of occupational pension landscape

Introducing DC and opting out to a traditional environment

By Dr. Nicolas Roessler, LL.M. (Notre Dame)

Germany is about to see the biggest reform of its pension landscape since the enactment of the Pensions Act (Betriebsrentengesetz) in 1975. The Act on the Strengthening of Occupational Pensions (Betriebserentenstärkungsgesetz) is expected to be adopted in parliament in June 2017, and to come into force on January 1, 2018.

As the name suggests, this reform aims to strengthen the use of occupational pensions in Germany. Today, occupational pension promises are common in large companies but are not as widespread as they should be in mid-cap and small companies. This is where the reform seeks to make changes.

Introduction of real defined contribution systems

The core element of the reform introduced by the Act on the Strengthening of Occupational Pensions (the Act) is the legal recognition of real defined contribution arrangements (DC) as occupational pension promises under the Pensions Act. For the first time in German history, employers will be allowed to fulfill their obligations under a pension promise by paying contributions. The new DC plans will be introduced alongside the existing traditional defined benefit and hybrid plan designs that have been around in Germany since the beginning of the millennium.

Today, the closest to a real DC setup that is recognized as a pension promise under German pensions law are the contribution-oriented defined benefit plans and defined contribution with guaranteed minimum payout plans. The investment risk lies with the employer in both scenarios.

Under the new defined contribution setup, the beneficiaries will have legal entitlements exclusively against a third-party financing vehicle. DC promises can be financed through Pensionskassen, German pension funds, or direct insurance contracts. The old German way of financing pensions internally through book reserves (in practice often backed up by contractual trust arrangements) will not be available for DC plans.

Different from today, there will be no secondary liability for the employer; any entitlements under a DC promise will vest...
immediately. No lump-sum payout will be allowed (benefits under a DC promise must be paid out as annuities). In order to provide additional security, employers will be obliged to pay a security premium on top of actual contributions.

The amount of benefits payable to the employee will depend exclusively on the investment performance. It can, therefore, vary during the payout phase, and there is no room for indexation. While the respective financing vehicles will have significant freedom to invest, they will be bound by certain regulatory limits.

The legislative process debated long and hard whether to offer the combination of a DC setup with a guaranteed return. In the end, the introduction of tariffs with a guaranteed minimum return was abandoned.

Tariff parties to play key role in occupational pensions

In the belief that the constitutional balancing of interests between employer organizations and unions will lead to just and sustainable results, the Act specifies that details of DC plans are to be agreed in collective bargaining agreements. The legislator assumes that tariff partners are better placed to tailor solutions to their respective industries than statutory provisions. It is also expected that tariff partners will set up most of the financing vehicles to be used for DC plans.

The biggest industries in Germany are already familiar with joint establishments between unions and employer associations. If the tariff partners decide to use external existing financing vehicles, the Act obliges them to exert proper influence on the decision-making process (by securing seats on the supervisory board or comparable bodies, for example).

The possibilities for individual employers to set up DC plans are rather restricted; so is their ability to design such plans. Employers that are not bound by collective bargaining agreements will be able to use the systems set up by the tariff parties either by means of agreements with works councils or by reference to the respective collective bargaining agreements in individual employment contracts. These approaches will also be necessary to open the DC plans up to nonunion employees.

Employers will only be allowed to refer to the applicable tariff rules. Whether a non-tariff employer or employee can use the funding vehicle used by the tariff parties is subject to the funding vehicle’s discretion. The current draft of the bill does not foresee an obligation to contract.

Opting out of deferred compensation plans

Another new feature in the German pensions landscape will be the possibility for tariff partners to provide opting-out rules in collective bargaining agreements (the introduction of mandatory deferred compensation rules in collective bargaining agreements that give employees the right to opt out of such programs). To opt out, an employee needs to expressly declare that he or she objects to the conversion of certain parts of his or her salary into pension rights. The legislator expects that only a small number of employees will actually object and, therefore, this feature will significantly help to increase the number of individuals with occupational pension rights.

Deferred compensation arrangements can be combined with DC plans. Since the deferred amounts up to certain statutorily defined limits are free of social security contributions and employers would save their share thereof, the Act provides for a mandatory top-up of the deferred amounts used for a DC plan by at least 15%. The Act specifies that the privileged deferred compensation amount will be increased from 4% to 8% of the social security contribution ceiling.

Dr. Nicolas Roessler, LL.M. (Notre Dame), Rechtsanwalt, Partner, Mayer Brown LLP, Frankfurt

nroessler@mayerbrown.com

www.mayerbrown.com
If personnel cutbacks are to be carried out on operational grounds, a company will nearly always have a vital interest in retaining the ‘right’ employees. This is of course decisive for the continued economic success of the company.

This understandable wish of a company to remain strong even after personnel cutbacks is often at odds with the principles of social selection as laid down by Germany’s Protection Against Unfair Dismissal Act (Kündigungsschutzgesetz, KSchG). Although in principle employers are indeed free under German labor law to make the business decision to downsize their business operation, if a number of different people from a group of comparable employees are possible candidates for dismissal, employers are not free to decide who is to be dismissed. Because the impact of job loss on a person can vary greatly depending on their situation, German labor law specifies that primarily social criteria must be taken into account when selecting candidates for dismissal.

Social selection under Sec. 1 (3) Protection Against Unfair Dismissal Act

The exact meaning can be found in section 1 (3) KSchG: Under this provision, a termination is socially unjustified and thus void if the employer does not sufficiently take into account the following social criteria when selecting an employee:

1. his or her seniority;
2. his or her age;
3. existing support payment obligations to dependents, and
4. any severe disability.

This means that a decision must take social aspects into account when selecting the person to be dismissed. For instance, if an employer is planning to have only five instead of ten employees in the future for a certain function in the business, they must first document and compare the social data of the ten relevant employees (and perhaps other comparable employees). Older employees who would generally have greater difficulties finding a new job deserve a greater level of protection than younger employees. Employees who must support spouses and children deserve greater protection than those employees who only have...
to provide for themselves, etc. In the case of difficult individual questions, the employer does have some discretionary leeway (for example if an older, childless employee is competing with a younger employee who must provide for a family).

In its purest form, social selection will always tend to result, however, in the termination of young employees with less seniority, while older employees, who often have more years of seniority, will keep their jobs. This can result in the loss of the more innovative and ‘hungry’ younger generation and may be in blatant contradiction to the interests of the company.

Opportunities to mold the social selection

Despite this, German labor law does offer some opportunities to influence the results of social selection to correspond with the wishes of the company or to at least make social selection as legally watertight as possible. Some of these opportunities will be briefly presented here.

Removal of top performers from social selection

Section 1 (3) KSchG specifies that top performers whose continued employment is in the justified interest of the company due to their know-how, abilities and performance, can be removed from social selection. According to the German Federal Labor Court, the business interests of the employer in removing certain top performers from social selection must be weighed against the interests of employees who enjoy greater protection from keeping their employment. This will always require a review of the individual circumstances. It is generally not possible to exclude larger parts of the workforce from social selection because they are top performers. However, this rule does lend itself as a tool for saving individual employees who are important to the business.

Social selection according to age groups

Section 1 (3) KSchG also specifies that employees can be exempt from social selection if this is in the justified interests of the company to secure a balanced personnel structure. This can open up the possibility, for instance, of categorizing the employees to be included in the selection according to age groups and then making the personnel cutbacks proportionally within the individual age groups. It is thus possible to ensure that the overall workforce does not age and that the prior age structure is maintained. However, it must be clearly stated that a rejuvenation of the workforce as a result of a cutback in personnel is not possible. When drawing up the age groups, one must bear in mind the controversial issue of age discrimination.

Volunteer programs

If the aforementioned opportunities are not sufficient to guard against the loss of key employees under the principles of social selection, one should consider conducting a volunteer program. This enables a company to directly offer a termination to individual employees who are deemed to have social protection but who are considered to be less important for the success of the business. One must clearly realize in this situation that economic incentives, particularly in the form of severance payments, must be offered to motivate these employees to voluntarily leave the company. If there is a works council, it must generally be involved in the modeling of the volunteer program.

The selection guideline (“Auswahlrichtlinie”)

As far as the reduction of risk in the event of subsequent legal action against a dismissal is concerned, it can make sense to negotiate a selection guideline with the works council. This guideline lays down how the governing social aspects are to be evaluated in relationship to one another. Although this type of guideline will not make social selection obsolete, it will at least allow a labor court, in the event of legal action against a dismissal, to concentrate its review of the decision on possible gross errors. A selection guideline can thus at least result in a perceivable increase in legal certainty and a significantly reduced risk of litigation.

Reconciliation of interests with list of names (“Interessenausgleich mit Namenliste”)

In the event of broader measures to cut back personnel, for which the conclusion of a reconciliation of interests with the works council is required by law, there is the opportunity under section 1 (5) KSchG to designate the employees who will be terminated. A reconciliation of interests with list of names also offers the advantage that social selection will only be subject to a limited judicial review of gross errors in the event of litigation. The list of names will also make the selection more legally watertight. In practice, however, works councils often refuse to negotiate a list of names because they do not want to get their hands dirty. It will take some convincing and maybe
some compromises to persuade works councils to cooperate in drawing up a list of names.

**Conclusion**

The fact that social criteria have priority under German labor law when selecting employees to be terminated under job cutbacks is often at odds with the wish of the employer to keep the best employees. However, the law offers some scope to model and influence this selection process. If personnel cutbacks are imminent, employers should review in detail at an early stage what measures can be applied to ensure that the company will have an overall strong workforce following the cutbacks to guarantee its future success. ←

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**Dr. Henning Reitz**,  
Rechtsanwalt, Partner,  
JUSTEM Rechtsanwälte, Frankfurt am Main  
h.reitz@justem.de

**www.justem.de**
Improving immigration flexibility

New immigration rules for intra-corporate transferees to Germany

By Marius Tollenaere

Implementation

In May 2014, the Council of the European Union adopted the European Intra-Corporate Transferees Directive (ICT Directive) that will apply in all EU Member States except Denmark, Ireland and the UK. On August 1, 2017, the ICT Directive will come into force in Germany.

The ICT Directive outlines and regulates the mobility of third-country (non-EU) nationals to the EU under an intra-company transfer (ICT) and aims to provide greater immigration flexibility for companies with temporary assignments of non-EU nationals.

More specifically for Germany, the ICT Directive will introduce two new immigration categories for intra-corporate transferees and new rules on short-term labor mobility of up to 90 days in Germany.

With the ICT Directive, the European Union had aimed to fulfill its obligations as a member of the World Trade Organization (WTO) in the context of GATS Mode 4, which governs the presence of a natural person in other WTO Member States for cross-border trade. As a member of the WTO, Germany already follows these rules and will not face substantive changes to its system of governing the entry, stay and work rights of third-country nationals who are assigned from an entity abroad to an entity of the same corporate group in Germany. However, it does introduce new options for intra-EU mobility, which could prove to be strong compliance tools and may lead to new developments in the wider corporate migration spectrum.

The new ICT rules will only apply to third-country nationals: Citizens of EU and European Economic Area Member States are not affected, as they enjoy free movement in Germany. More favorable rules may still apply to intra-corporate transferees who can make use of the best friends immigration category (Australian, Canadian or United States citizens). The EU Blue Card rules will also remain unchanged. A German EU Blue Card may still be used as a work permit for an assignment as long as the employment contract with the sending entity is put on hold and a new German employment contract is issued by the receiving entity.

ICT Card (ICT-Karte)

The most important new work permit category is the ICT Card, which will be regulated under the German Residence Act (Aufenthaltsgesetz). The ICT Card will be issued for assignees in a specialist, manager or trainee position who are transferred from an entity of their company outside the EU to an entity in Germany for a period of more than 90 days.
days and less than three years (one year for trainees). For the first time, the terms ‘specialist,’ ‘manager’ and ‘trainee’ have been defined by law. This will not necessarily result in more clarity, particularly as it remains unknown whether the Federal Employment Agency (FEA) will change its current practice for the definition of a specialist. To ensure an appropriate level of seniority regarding qualification, all assignees must have been employed for at least six months with the same employer prior to the assignment. This is a change from the current scheme in which 12 months of company tenure is required.

The assignment may not last for more than three years. There is also a question surrounding initial assignments to Germany that are less than 90 days’ duration, as they are not eligible for the ICT Card, which only applies to assignments of more than 90 days. It is also not applicable for a short-term notification, as a longer initial assignment to another Member State would be required. Also, not all assignments of up to 90 days are business trips and therefore require permission to work, as they do not fall under any of the business visitor exception clauses. A solution may be for these assignments to be administered under the German GATS ICT rules, which are the current basis for ICT permits.

Once an assignment is completed, the individual must serve a cooling-off period of six months before becoming eligible to obtain a new ICT card.

One reason for rejection of an ICT Card application is when the receiving entity has been founded for the sole purpose of serving as a receiving entity. It is unclear how this will be interpreted by the immigration authorities considering that some industries, such as IT services and outsourcing, tend to be built on a strong international workforce with only a few administrative local staff in Germany.

The ICT Cards, as with other permits that require the approval of the FEA, cannot be used for contracting staff out to clients. Employers always need to make sure their client engagements do not constitute labor leasing (Arbeitnehmerüberlassung) and are always services rendered for the client with responsibility for the assignee remaining with the employer.

**Short-term work trip notification**

The bill introduces a notification system for work trips of up to 90 days for ICT Card holders of other EU Member States to Germany. Once the intention to send an employee to Germany has been confirmed, the sending entity in the first Member State must notify the German Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge, BAMF) of the assignment to Germany in advance of the trip. The BAMF will forward the notification to the local immigration office responsible for the assignee’s future place of work in Germany. The immigration office can deny the assignment within 20 days of receipt of the notification from the BAMF. This notification assumes that the conditions of the assignment in Germany are legal and the assignee may start working immediately. After the 20 days, the entire stay will be deemed legal.

This short-term mobility right is an alteration to the Schengen short-term travel regulations, which only allow third-country nationals who are in possession of a work and residence permit of an EU Member State to stay in all other EU Member States for up to 90 days within a combined 180-day period. ICT permit holders, however, can stay for up to 90 days within 180 days in any Member State if they are traveling for work purposes. For example, while an EU Blue Card holder from France may only have a business trip to Germany for 90 days before they must return to France, their colleague with an ICT permit may travel to Belgium for another 90 days after their stay in Germany.

The German ICT bill makes the BAMF the receiving authority of the short-term mobility notification. The BAMF is a new player in the field of corporate immigration processes that so far have primarily been handled by the Federal Employment Agency (FEA). The FEA has long-standing experience of the peculiarities of assignments and short-term work trips and its expertise will be available to the notification process. However, the FEA will only be part of the process once a notification has been forwarded to the relevant immigration office and only if that immigration office decides to involve the FEA for expertise that neither of the other authorities has. In light of the 20-day deadline, this is a long way to go. It may lead to many notifications running into the 20 days without the option for detailed scrutiny of the legality of the underlying assignment.

On the other hand, the notification may develop into a strong tool for ensuring business traveler compliance throughout the EU. It will for the first time enable employers to both legally and easily process work assignments without having to start lengthy work permit processes, which makes it more attractive to have...
employees perform professional activities as a business visitor without a work permit. This may lead to a new approach whereby the default position of any business traveler follows the notification process.

**Mobile ICT Card (Mobile ICT-Karte)**

For long-term intra-EU work mobility, a second ICT permit will be introduced, called the Mobile ICT Card. This permit assumes that an individual has first been assigned to an entity in another EU Member State and will then move to Germany for a second assignment while still being primarily assigned to the entity in the first Member State. If the second assignment is scheduled for more than 90 days, a Mobile ICT Card can be obtained for Germany. This permit may not be issued for a period longer than the initial assignment. If that were the case, Germany would have to issue an ICT Card instead.

Mobile ICT Card is duly filed, receipt of the application by the immigration authority will also lead to a legal fiction permitting working in Germany for up to 90 days.  

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**Marius Tollenaere, Rechtsanwalt, Fragomen Global LLP, Frankfurt**

mtollenaere@fragomen.com

www.fragomen.com

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Dr. Guido Zeppenfeld, LLM
Employment & Benefits

Friedrich-Ebert-Anlage 35-37, 60327 Frankfurt am Main

+49 69 7941 2241

Königsallee 61, 40215 Düsseldorf

+49 211 86224 0

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Digitization and the German government’s Work 4.0 white paper

Shaping the legal landscape of tomorrow: Is German labor law prepared for the future?

By Dr. Bernd Borgmann, LL.M., and Tom Stiebert

The importance of Work 4.0

Times change, as does the way we work. It all started with Work 1.0 back in the 18th century: Fewer big companies, less regulation. Many changes came with Work 2.0 during industrialization: Companies got bigger and bigger, with more and more employees, but there was still very little regulation. This caused a lot of social problems and employees fought for their rights and social security. Finally, Work 3.0 connected with a social market economy and employees achieved many rights and a high standard of social security.

Now Work 4.0 will bring the next big step: Employees and work itself becoming more flexible, more digital and certainly more connected. The new working standards demand flexibility regarding working time and place of work. Home office replaces factory work, the smartphone replaces the office computer. This is both an opportunity and a risk. On the one hand, employees can work wherever and whenever they want, but on the other, the boundaries between private life and professional life vanish to a point where employees may be forced to work at any time and without any limits on availability or defined periods of rest.

But how does the law respond? Looking at the German labor laws, more or less unchanged for decades, one could say that the law thus far has not recognized that there is such a thing as Work 4.0 at all. We have Work 4.0 but no law for it. German legal literature, academics and practitioners alike have recognized this and begun to shape the legal landscape of tomorrow. The 2016 national conference for the legal profession (71. Deutscher Juristentag 2016) raised the topic of “Digitization of the working world - Challenges and need for regulation” as one of the six main themes that were widely discussed. Similarly, in April, 2017, the Employment Institute of the International Bar Association (IBA) compiled a report entitled “Artificial Intelligence and Robotics and Their Impact on the Workplace” (the IBA AI Report), which put forward proposals for lawmaking in the future.

Even the legislature is taking action. The German Federal Ministry of Labor and Social Affairs published a white paper in March, 2017 (www.bmas.de/EN/Services/Publications/a883-white-paper.html) that raised the question of what work will...
look like in the future and also tried to answer it with the help of social partners, associations, businesses and academia as well as members of the public.

This article is intended to provide an overview of some of the key issues in this area and summarizes the various blueprints for possible solutions.

**Typical practical issues and potential solutions**

As mentioned already, many industries are seeing tasks for their staff become increasingly independent. Digitization means that it is often unnecessary to have a permanent workplace, a fixed working time or a permanent team.

**Temporal independence**

However, the German labor law is intended to protect the employee. In particular, the Working Hours Act (Arbeitszeitgesetz) imposes strict limits on working time. It limits maximum working hours (8 hours per day, section 3 (1) Working Hours Act; in special cases 10 hours per day, section 3 (2) Working Hours Act) and calls for an uninterrupted minimum period of rest after finishing a day’s work (11 hours, section 5 (1) Working hours Act). But nowhere does this law stipulate a distinction between working hours and rest time. It is simply clear that they are mutually exclusive (section 2 (1) Working Hours Act) and limit flexibility. Since the intention is to protect the employee, a deviation is not possible.

Taking the law literally, any short period of work would restart the period of rest again. For this reason, it would be impossible to work during the rest period. Even reading and writing an email on a smartphone or taking a call at home would restart the period of rest. A brief interruption would nullify the whole rest period. But would a change in the law help here? The answer is clearly no. It is not possible to regulate this issue by law because the legislature would have to define those interruptions that are adequate and those that are not – 1 minute, 5 minutes, 15 minutes? There can be no strict boundary. A better option is to keep the law as it is and apply a de minimis rule. An interruption should only be relevant if it is considerable. Here it is not the legislature but the courts that determine when this is the case. With this flexible approach, all new problems could be handled under the current law.

Another form of temporal flexibility is less relevant in Germany. The high level of worker protection prevents zero hour contracts or similar types of flexible contracts being implemented on a large scale. A German Federal Labor Court ruling from 2005 upheld a minimum income for employment contracts and said that the employer is responsible for paying, regardless of whether work is available or not (BAG, December 7, 2015 - 5 AZR 535/04). Just 25% of employment can be negotiated on an ad hoc basis. The employee is thus adequately protected.

**Location independence**

Dislocation leads to the introduction of new forms of work such as crowd working, cloud working or click working. Employees work together in different groups with the traditional business often ceasing to exist. This leads to the question of whether the traditional concept of being an employee still applies for this kind of work at all. However, the concept of the employee (Arbeitnehmer) is very openly formulated. Employees have to be distinguished from the self-employed. An employee must have a private contract with the employer and must be dependent on the employer and subject to his or her instructions. This definition, which is now also contained in section 61a German Civil Code (Bürgerliches Gesetzbuch), is more than 100 years old and applied all the time because of the flexibility of the courts in dealing with it. This is, however, not the same in other jurisdictions which, according to the IBA AI Report, seem to be less open to adaptation to new forms of collaboration and apply a defined number of legal structures that require amendment if a new form of collaboration does not fit.

This need not change because of digitization. Even if it means that some workers are not employees, this is acceptable. Work 3.0 did not give every worker employee protection, so there is no reason to extend protection in Work 4.0. This may continue to mean that not every worker is protected as an employee, but protection under labor law was never conceived for all scenarios. If a crowd or cloud worker is completely free in his or her work and not subject to directives and time restrictions, then he or she cannot be regarded as an employee and is instead considered a self-employed person. It is only necessary to carefully examine whether he or she is dependent or not. This is not a problem for Work 4.0 either. In Work 3.0 too, there are low-income self-employed people who are not covered by the law. Again, it is useful to leave the individual cases to the courts.

However, the changed structure of the company leads to another problem:  →
Employees can organize themselves into companies and elect a works council. The works council is then responsible for the employees of this company. But if the structures of the companies change and the employees are more flexible, the assignment becomes more difficult. For this reason, the problems of such matrix structures are frequently discussed (Kort, NZA 2013, 1318; Witschen, RdA 2016, 38). But these problems are not new: In general, the works council represents the workforce of a company. Thus, if employees are employed by several companies, for example as temporary workers, it is always necessary to clarify which works council they are allied to in a specific case. Several works councils may also be responsible for an employee, but never in the same matter. Ultimately it will depend which works council is closer to the subject matter.

Again, this shows that the problems of Work 4.0 are not new in essence, merely in guise. They can therefore be easily solved with existing tools and the help of the courts.

**Conclusion**

The law should only be amended on a selective basis, as suggested in the white paper. For example, the Working Time Choice Act (Wahlarbeitszeitgesetz) proposed a sensible step: to allow deviations from the working time legislation where necessary and offer choices to employees as well. Other useful changes to the law are also proposed.

Law 1.0 is in principle good and powerful enough to handle the problems of Work 4.0. Flexibility is the big advantage of the openly formulated laws but a major task for lawyers advising in these areas. The adaptation to Work 4.0 can largely be left to the courts without excluding any necessary changes. They can react much faster to new developments and legislative changes. Otherwise the legislature would always lag behind reality and law would be much more old-fashioned than it is now.

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**RA Dr. Bernd Borgmann, LL.M.**
Rechtsanwalt, Fachanwalt für Arbeitsrecht, Partner, DLA Piper, Köln
Bernd.borgmann@dlapiper.com

**RA Tom Stiebert**
Rechtsanwalt, Lehrbeauftragter für Arbeitsrecht an der Fachhochschule für Ökonomie und Management (FOM), Associate, DLA Piper, Köln
Tom.stiebert@dlapiper.com

www.dlapiper.com