

Introduction and application of IT systems from an employment and data protection law perspective - practical implementation and best practice

Introduction & Outline

Speakers



Dr. Charlotte Sander, LL.M.
Employment & Pensions
Attorney at law | Specialist for Employment Law
Partner

Tel.: +49 511 30755 9536
Email: csander@deloitte.de

Relevant consulting experience

- Advice on the introduction of framework company agreements IT and company agreements on MS 365, Workday, SAP HR and other IT systems at establishment, enterprise and group level
- Negotiation of numerous company agreements on working time models, mobile work, whistleblower systems in accordance with the German Whistleblower Protection Act (Hinweisgeberschutzgesetz, HinSchG) and the German Supply Chain Act (Lieferkettensorgfaltspflichtengesetz, LkSG, remuneration systems, etc.
- Conceptual design of the cross-border outsourcing of IT services of a DAX company in the food sector



Linda Krüpe
Digital Law
Attorney at law
Partner

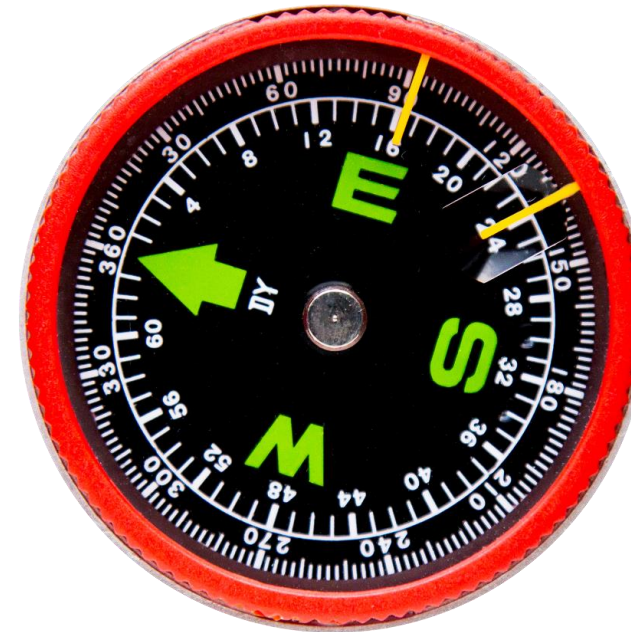
Tel.: +49 30 25468 5515
E-mail: lkrupe@deloitte.de

Relevant consulting experience

- Advising national and international companies on the conceptual design and implementation of data protection and compliance management systems (in particular processes and structures)
- Development and implementation of e.g. electronic whistleblowing systems, tool-based eLearning platforms
- Drafting and negotiating company agreements in the context of the introduction, application and expansion of IT systems

Outline

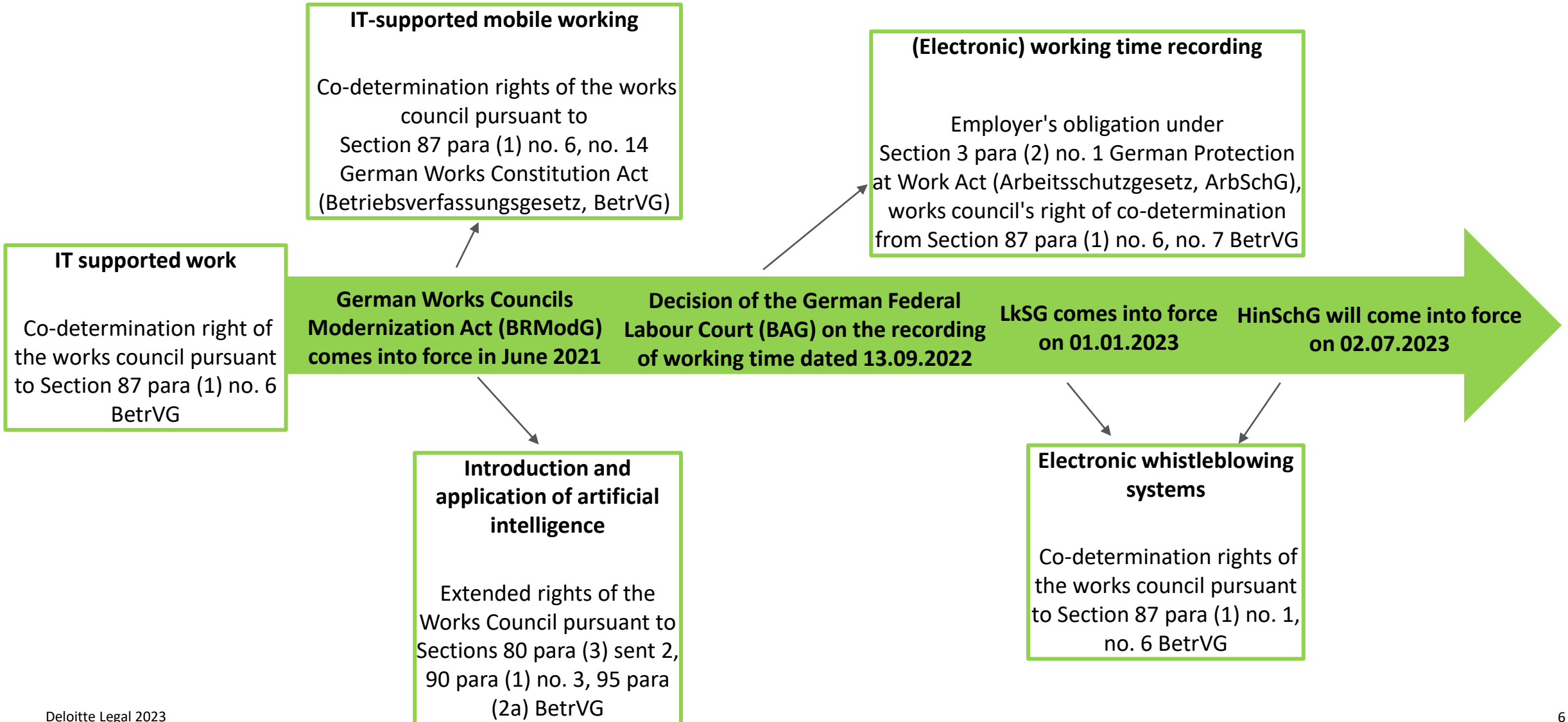
- I. Co-determination rights of the works council in the introduction, application and expansion of IT systems
- II. Requirements for companies when introducing, applying and expanding IT systems from the perspective of data protection law
- III. Implementing the requirements of the works constitution and data protection law
- IV. Q & A



Co-determination rights of the works council in the introduction, application and expansion of IT systems

I. Co-determination rights in the introduction, application and expansion of IT systems

Progressive digitization of work processes and operational procedures



I. Co-determination rights in the introduction, application and expansion of IT systems

The essential co-determination rights according to BetrVG

The main rights of co-determination in the introduction, application and expansion of IT systems



Co-determination pursuant to Section 87 para (1) no. 6 BetrVG

(Introduction and application of technical equipment designed to monitor the behavior and performance of employees).

Co-determination pursuant to Sec. 87 (1) no. 1 BetrVG
(co-determination in matters relating to the order of the and the conduct of employees in the establishment)

Co-determination pursuant to Sec. 87 (1) no. 7 BetrVG
(co-determination on health protection within the framework of statutory regulations)

Co-determination pursuant to Sec. 87 (1) no. 14 BetrVG
(co-determination in the design of mobile work performed by means of information and communication technology)

Co-determination pursuant to Sec. 94, 95 BetrVG
(co-determination in personnel selection and principles of assessment)

Co-determination pursuant to Sec. 111, 112 BetrVG
(co-determination in the event of operational changes)

Meaning of the provision

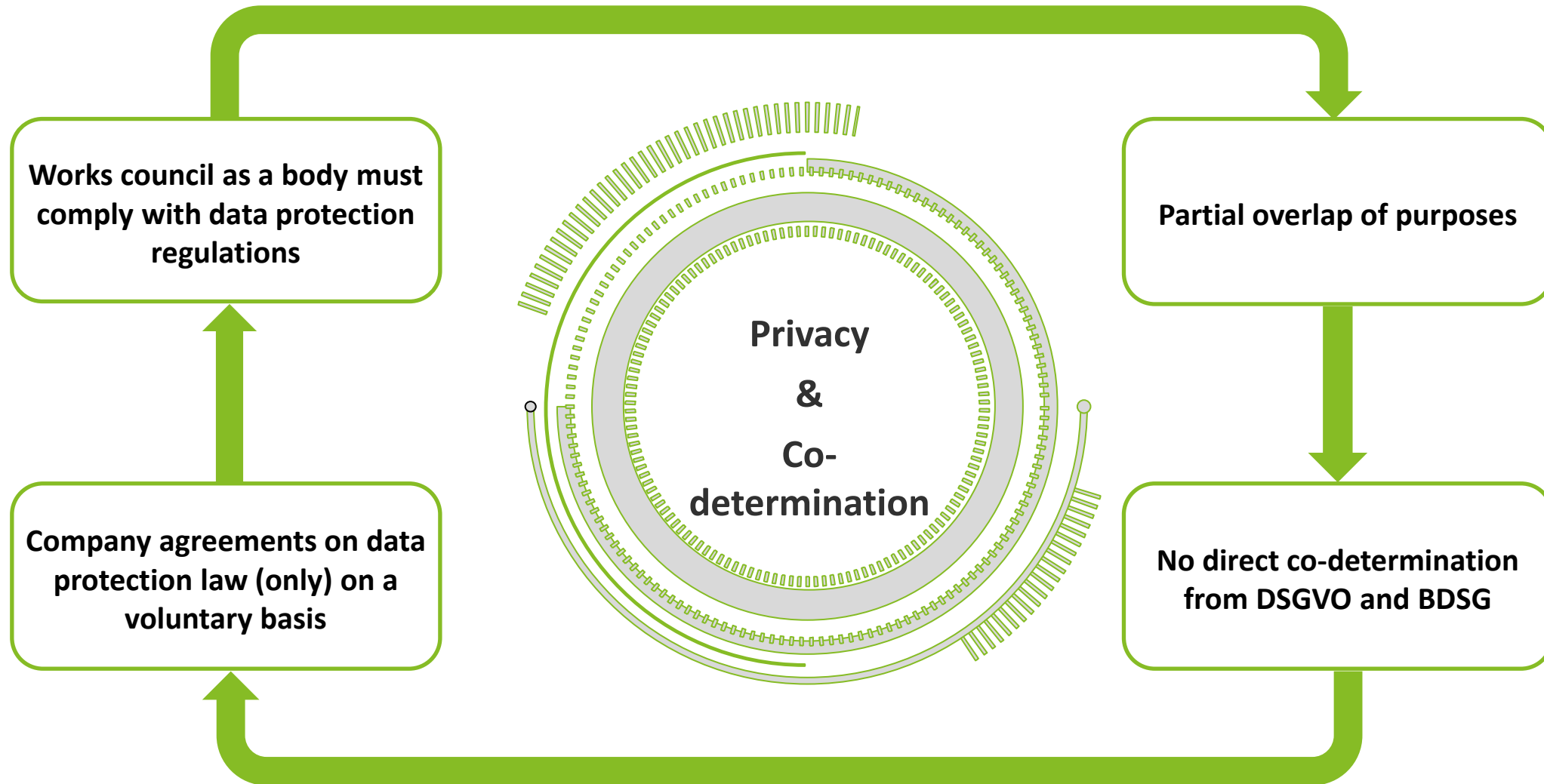
Requirements for application

Jurisprudence examples

Design options

I. Co-determination rights in the introduction, application and expansion of IT systems

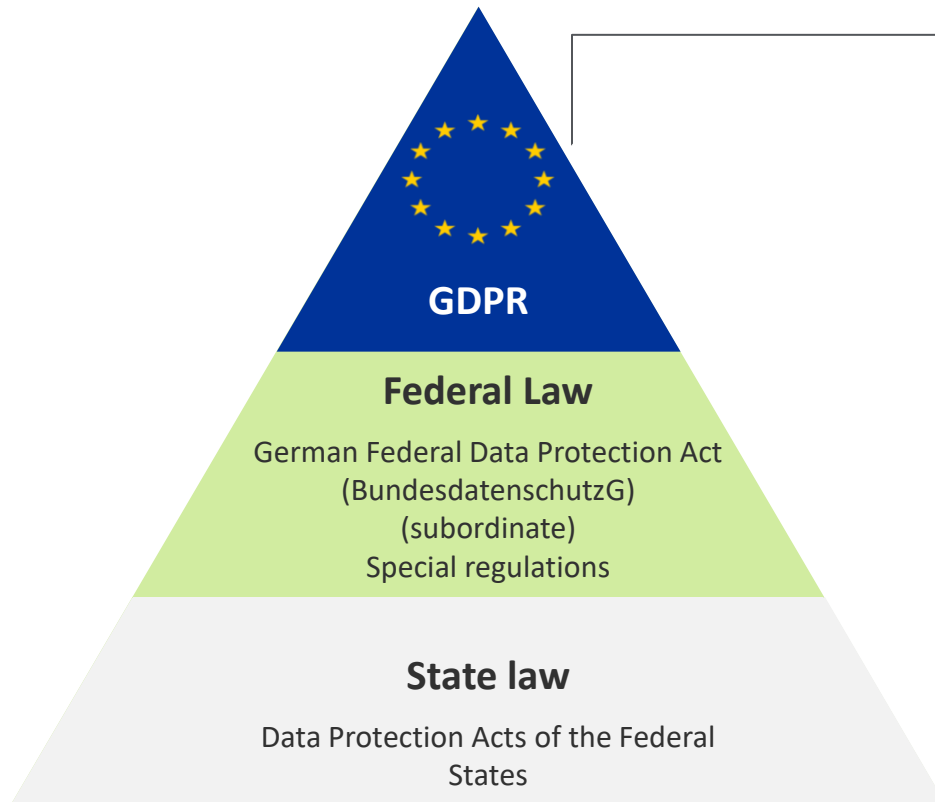
Data protection and co-determination



Requirements for companies when introducing, applying and expanding IT systems from the perspective of data protection law

Data protection law in the operational context

Introduction



Art. 88 para (1) GDPR: "Member States may, by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context [...]"



High fines, Art. 83 GDPR

- Up to €10 million or 2% of annual global turnover for simple violations
- Up to €20 million or 4% of annual global turnover for serious violations

35.3 million euros fine - H&M

Spying on private living conditions of employees

10.4 million euro fine - notebooksbilliger.de

Video surveillance of employees without legal basis



Strict liability, Art. 82 GDPR

- Liability and right to compensation against the controller or against the processor
- Personal liability of managing directors/board members (in conjunction with Sec. 43 para (2) German Act on Limited Liability Companies (GmbHG), Sec. 93 para (2), 91 para (2) German Stock Corporation Act (AktG))

Company agreement according to the DSGVO

A closer look



Company agreement as basis for permission, Art. 88 para (1) DSGVO, Section 26 para (4) sent 1 BDSG

Works agreement as basis for permission for operational data processing generally possible.

- Exception e.g. if consent is required.



Requirements for regulatory content, Art. 88 para (2) DSGVO, Section 26 para (4) sent 2 BDSG

Art. 88 para (2) GDPR: *"Those rules shall include **suitable and specific measures** to safeguard the data subject's [(Data) protection], 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.**"*

1. Imperative of the processing principles according to Art. 5 DSGVO

- Section 26 para (5) BDSG → Take appropriate measures to comply with processing principles

2. Determination of permissible processing purposes

- Determination of the purposes that are in the employment context

3. Measures regarding the transparency of data processing

- Transparency regarding scope of the data processed, processor, TOMs (role and authorization concept), reference to deletion concept, etc.

1. Processing in fairness
2. Purpose limitation
3. Data minimisation
4. Accuracy
5. Storage limitation
6. Integrity and confidentiality

Principle: The more precise the company agreement, the more legally secure

But: From operational point of view, there are (partial) limits to the level of detail

Legal Update: Revision of the employee data protection

ECJ: No general clauses in employee data protection

*ECJ Judgment from March 30, 2023 - C-34/21: **National provisions** that regulate data processing in the employment context but are **not "more specific" within the meaning of Art. 88 para (1) GDPR**, i.e. merely repeat the conditions for the lawfulness of the processing of personal data exhaustively regulated in Art. 6 GDPR and the processing principles laid down in Art. 5 GDPR, **must remain inapplicable (prohibition of norm repetition)**.*



Section 26 para (1) sent 1 BDSG inapplicable
ECJ Judgment 30.3.2023 - C-34/21



Comprehensive revision of employee
data protection



Key issues paper planned
(BMI and BMAS)

Practice Consequences

If necessary, need to adapt consent texts, data protection declarations, records of processing activities, company agreements that refer to Section 26 para (1) BDSG

Examination of suitable legal bases (e.g. Art. 6 para (1) GDPR) when introducing new IT systems, taking into account current developments

Observation of the supervisory authorities and the adapted statutory standardizations by the German legislator

Implementing the requirements of the works constitution and data protection law

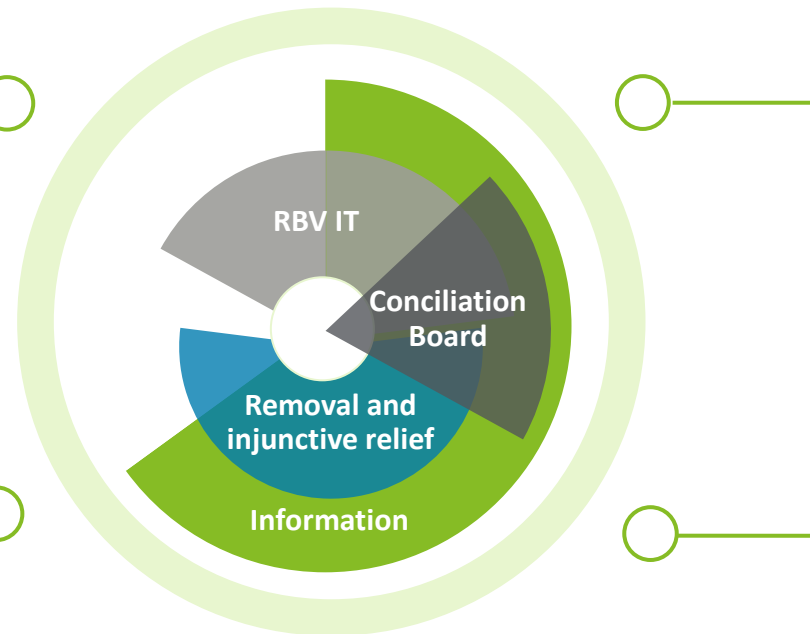
III. Implementing the requirements of the works constitution and data protection law

Framework Works Agreement IT (RBV IT)

- Framework for the introduction, application and expansion of IT systems
- If necessary: additional company agreements on special IT systems
- RBV IT is customary in the market, preserves co-determination rights and creates legal certainty

Conciliation Board

- The conciliation board replaces a lack of agreement between the employer and the works council
- Establishment of a conciliation board can only be enforced for a specific IT system; not, however, for a RBV IT



Removal and injunctive relief

- Exists in the event of violation of the co-determination rights under Section 87 para (1) BetrVG
- Enforcement possible in court, also by interim injunction

Information of the works council

- The works council has a right to information within the scope of its duties
- When IT systems are introduced and applied, it must be informed comprehensively about the IT system and the relevant data processing

Q & A

Thank you for your attention!

Your Contact



Dr. Charlotte Sander, LL.M.
Employment & Pensions
Attorney at law | Specialist for Employment Law
Partner

Tel.: +49 511 30755 9536
Email: csander@deloitte.de



Linda Krüpe
Digital Law
Attorney at law
Partner

Tel.: +49 30 25468 5515
E-mail: lkrupe@deloitte.de

Deloitte Legal

Experience the future of law, today

An introduction to Deloitte Legal

Deloitte Legal is

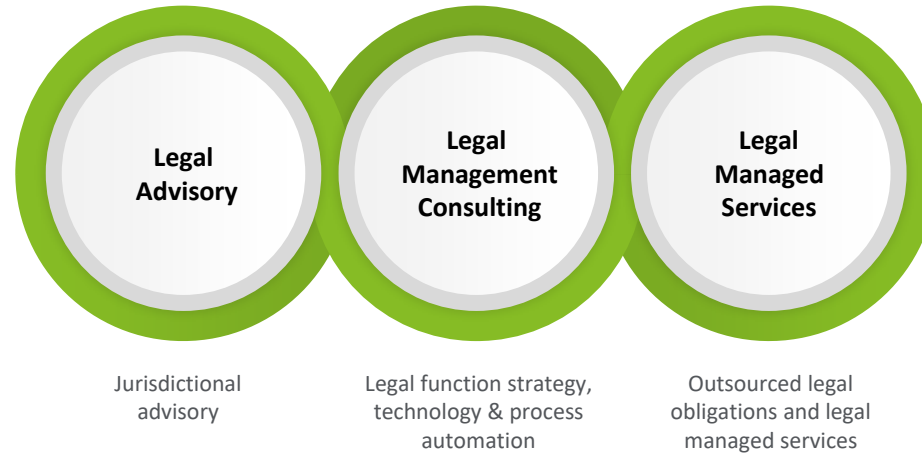
more than **2,500** legal professionals
operating in **75+** jurisdictions



collaborating seamlessly
across borders and with other Deloitte
business lines

Deloitte Legal practice areas

We are organized into three intersecting market offerings, enabling us to serve our clients when, how, and where we can help them achieve their visions.



We apply perspective to deliver value

Deloitte's cross-disciplinary approach enables us to provide globally integrated services that are:



Consistent
with your enterprise-wide vision



Tailored
to your business units and geographies



Technology-enabled
for improved collaboration and transparency

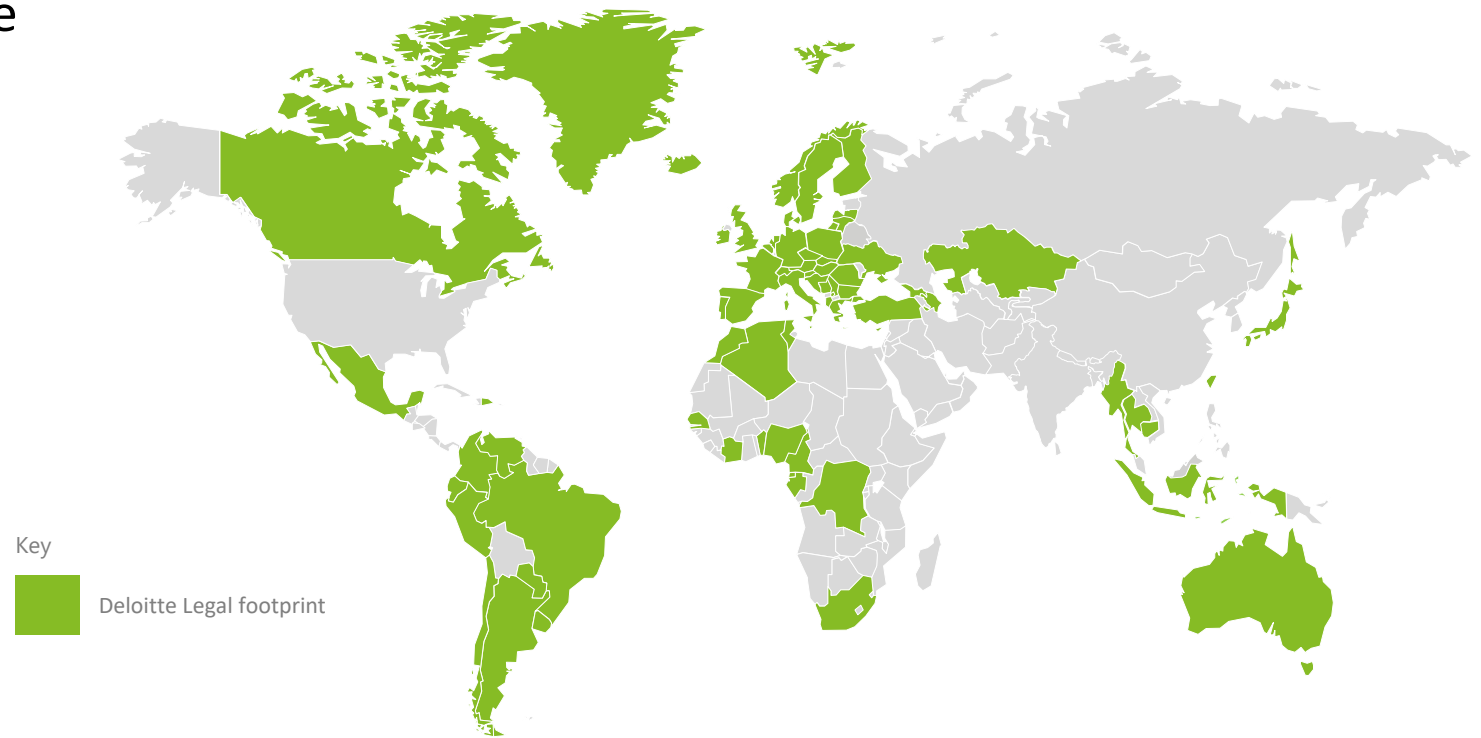


Sensitized
to your regulatory requirements

Cross-border coordination and a single point of contact

It can be enormously challenging to manage numerous legal services providers around the world and issues can slip into the cracks.

As one of the global leaders in legal services, Deloitte Legal works with you to understand your needs and your vision, and to coordinate delivery around the world to help you achieve your business goals.



Deloitte Legal practices

- | | | | | | |
|---------------|------------------------|--------------------------|-----------------|------------------|--------------------|
| 1. Albania | 15. Chile | 29. Gabon | 43. Kazakhstan | 57. Peru | 71. Thailand |
| 2. Algeria | 16. Colombia | 30. Georgia | 44. Kosovo | 58. Poland | 72. Tunisia |
| 3. Argentina | 17. Costa Rica | 31. Germany | 45. Latvia | 59. Portugal | 73. Turkey |
| 4. Australia | 18. Croatia | 32. Greece | 46. Lithuania | 60. Romania | 74. Ukraine |
| 5. Austria | 19. Cyprus | 33. Guatemala | 47. Malta | 61. Senegal | 75. Uruguay |
| 6. Azerbaijan | 20. Czech Rep. | 34. Honduras | 48. Mexico | 62. Serbia | 76. United Kingdom |
| 7. Belgium | 21. Dem Rep of Congo | 35. Hong Kong SAR, China | 49. Montenegro | 63. Singapore | 77. Venezuela |
| 8. Benin | 22. Denmark | 36. Hungary | 50. Morocco | 64. Slovakia | |
| 9. Bosnia | 23. Dominican Republic | 37. Iceland | 51. Myanmar | 65. Slovenia | |
| 10. Brazil | 24. Ecuador | 38. Indonesia | 52. Netherlands | 66. South Africa | |
| 11. Bulgaria | 25. El Salvador | 39. Ireland | 53. Nicaragua | 67. Spain | |
| 12. Cambodia | 26. Equatorial Guinea | 40. Italy | 54. Nigeria | 68. Sweden | |
| 13. Cameroon | 27. Finland | 41. Ivory Coast | 55. Norway | 69. Switzerland | |
| 14. Canada | 28. France | 42. Japan | 56. Paraguay | 70. Taiwan | |



Deloitte Legal means the legal practices of Deloitte Touche Tohmatsu Limited member firms, their affiliates or partner firms that provide legal services.

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited (“DTTL”), its global network of member firms, and their related entities (collectively, the “Deloitte organization”). DTTL (also referred to as “Deloitte Global”) and each of its member firms and related entities are legally separate and independent entities, which cannot obligate or bind each other in respect of third parties. DTTL and each DTTL member firm and related entity is liable only for its own acts and omissions, and not those of each other. DTTL does not provide services to clients. Please see www.deloitte.com/de/UeberUns to learn more.

Deloitte is a leading global provider of audit and assurance, consulting, financial advisory, risk advisory, tax and related services; legal advisory services in Germany are provided by Deloitte Legal. Our global network of member firms and related entities in more than 150 countries and territories (collectively, the “Deloitte organization”) serves four out of five Fortune Global 500® companies. Learn how Deloitte’s approximately 345,000 people make an impact that matters at www.deloitte.com/de.

This communication contains general information only, and none of Deloitte Legal Rechtsanwaltsgesellschaft mbH or Deloitte Touche Tohmatsu Limited (“DTTL”), its global network of member firms or their related entities (collectively, the “Deloitte organization”) is, by means of this communication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser.

No representations, warranties or undertakings (express or implied) are given as to the accuracy or completeness of the information in this communication, and none of DTTL, its member firms, related entities, employees or agents shall be liable or responsible for any loss or damage whatsoever arising directly or indirectly in connection with any person relying on this communication. DTTL and each of its member firms, and their related entities, are legally separate and independent entities.