Works Constitution in Germany

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The concept of works council participation has a long tradition in Germany, dating back to the Weimar Republic following World War I. Information and consultation rights for employee representatives were introduced by the Works Councils Act 1920 (*Betriebsrätegesetz*). After World War II, the German government built on this tradition by passing the Works Constitution Act 1952 (*Betriebsverfassungsgesetz 1952 – BetrVG 1952*), which also granted extensive information and consultation rights to works councils. The rights of works councils have since been significantly strengthened by the Works Constitution Act 1972 (*Betriebsverfassungsgesetz 1972 – BetrVG*), which governs cooperation between employers and works councils. Unlike previous legislation, it gives works councils not only information and consultation rights, but also co-determination rights.

1. The Works Constitution Act – an initial overview

1.1 General

The Works Constitution Act, together with other legislation, provides for a complex system of employee representative bodies and a broad catalogue of rights for these bodies. The works constitution cannot be overridden by information and consultation agreements between the employer and employees. Even where an agreement on information and consultation procedures has been concluded, it cannot prevent the establishment of works councils and other representative bodies which can exercise all the rights conferred by the statute. For this reason, agreements setting out practical arrangements for informing and consulting employees play little role in Germany.

1.2 Works councils

By far the most important representative body under the Works Constitution Act is the works council (*Betriebsrat*).

Works councils are formed at the level of an operation (also known as site or plant), i.e. an organisational unit that carries out an economic activity on an ongoing basis. German law is based on the assumption that the majority of business decisions, which may have an impact on employment relationships, are normally taken at the level of the relevant operation rather than with effect for all the operations of a company. Employees must therefore be represented where the employer usually makes its decisions.

A works council can be set up in any operation with at least five permanent employees aged over 16, provided that three of them are over 18 and have been employed in the operation for at least six months or have worked mainly as homeworkers (*Heimarbeiter*) for the operation. The establishment of a works council is not compulsory. In particular, the employer does not have to take the initiative to set up a works council. The initiative must come either from the employees or from the trade union(s) represented in the workplace. Neither a quorum nor a majority of the workforce is required to support the establishment of a works council. The election process leading to the establishment of a works council can begin if three employees or a trade union already represented in the workplace support the establishment of a works council.

However, in some industries (such as the IT sector) the level of works council representation is remarkably low. Works councils are much more common in the more 'traditional' industries (e.g. automotive or chemicals).

1.3 Joint works council

Where a company has more than one operation, works councils are usually set up for each operation with five or more employees. In companies with more than one works council a joint works council (*Gesamtbetriebsrat*) must also be set up.

The formation of a joint works council is compulsory. Each works council delegates members to the joint works council. The joint works council is responsible for matters that affect the whole company or more than one operation, and so by definition cannot be dealt with by individual works councils in their own operations. In addition, the works councils can refer certain matters to the joint works council.

In practice it is not always easy to determine which works council is responsible for dealing with a particular co-determination issue.

Example

If a company wants to install a telephone system in all its operations, either the local works council or the joint works council may be the competent body. If the company wants to use the same type of telephone equipment in all offices, but with different features and different conditions of use in each operation, the local works council is the competent body to negotiate with. If the telephone equipment is to be used to collect data to be compared with other operations, the joint works council is the competent body.

1.4 Group works council

Where companies form a group of companies, the joint works councils may elect a group works council (*Konzernbetriebsrat*) on a voluntary basis. The group works council is responsible for matters that affect the whole group or several companies in the group.

1.5 Economic committee

In companies with regularly more than 100 employees the works council must set up an economic committee (*Wirtschaftsausschuss*). The economic committee has no co-determination rights but must be informed and consulted on a range of economic issues affecting the company.

1.6 Executives' committee

While works councils do not represent executives (*leitende Angestellte*), these employees with managerial tasks can elect their own representative body, the so-called executives' committee (*Sprecherausschuss*). Among other things, this committee must be informed and consulted when an executive is to be dismissed.

1.7 Youth and trainee representation

In operations with at least five employees who are below 18 years of age or employed as apprentices, a special youth and apprentice representative body (*Jugend- und Auszubildendenvertretung*) must be set up. This body represents the interests of young employees and apprentices vis-à-vis the works council.

1.8 Representatives of severely disabled employees

Representatives of severely disabled employees (*Schwerbehindertenvertretung*) are elected in operations with at least five permanent disabled employees. In addition to joint works councils or group works councils, joint and group representatives of severely disabled employees can be elected. These representatives not only have the right to attend all meetings of the respective works councils, joint works councils and group works councils, but also have their own information and consultation rights on all matters relating to severely disabled employees.

1.9 European works council

A European works council can be set up in a company based in Germany which has at least 1,000 employees in member states of the European Union, including at least 150 employees in each of at least two member states. Unlike the other bodies mentioned above, the European works council does not play a major role in practice. Its rights are limited to information and consultation on the economic situation and prospects of the company or group of companies.

1.10 Alternative concepts of works constitution

Alternative works council structures can be set up under certain conditions. In particular, local works councils may be set up at company level rather than at operational level. In companies

organised along product or project lines, works councils may be set up for each business unit instead of local works councils if this approach facilitates proper employee representation. Similarly, other representational structures may be used if they promote effective and appropriate representation of employees' interests.

Such alternative structures can be established through a collective agreement to be agreed with the relevant trade union. To some extent, alternative representational bodies can also be set up through collective agreements with works councils or, if there is no works council in the company, by a majority decision of the employees. So far such alternative representation bodies are rare in practice.

2. Works Council

2.1 Election of a works council

Works councils are elected every four years. A formal election procedure is set out in the Works Constitution Act and in an additional Election Code (*Wahlordnung*).

2.2 Election committee

The election is organised by an election committee appointed by the works council or a joint or group works council. If there are no such bodies, or if they have not appointed an election committee, it can also be set up by a meeting of employees on the initiative of three employees in the workplace or by a trade union represented in the workplace. Elections take place during working time and the costs are borne by the employer.

2.3 Elections

All employees of the establishment aged 16 or over have the right to vote. Employees are eligible to stand for election once they have reached the age of 18 and have been with the operation for at least six months or have primarily worked for the operation as homeworkers.

The details of the election process depend on the number of employees in the operation.

- In operations with between five and 100 employees there is a simplified election procedure. The election committee must draw up a list of candidates during a (first) employees' meeting. At the end of the meeting, the election committee issues the election order, which sets out the main points of the election procedure. Candidates or lists of candidates can then be proposed to the election committee. A second employees' meeting is then held to elect the members of the works council.
- In operations with between 101 and 200 employees, the election committee and the employer may agree to use this simplified election procedure.
- In operations with more than 200 employees, the election committee publishes the list of candidates after the employees' meeting. It then issues the ballot paper. Lists of candidates can be submitted to the election committee for a certain period of time. The committee then checks that the lists meet the legal requirements. Depending on the number of candidate lists (one list = majority vote, more lists = proportional representation), the election takes place without a meeting of all employees.

2.4 Members of the works council

The number of works council members depends on the number of employees in the operation. For example, in operations with five to 20 employees, only one works council member is to be elected. If there are 21 to 50 employees, the works council will have three members. In an establishment consisting of 7,001 to 9,000 employees, 35 works council members must be elected.

Members of the election committee, candidates on the lists, members and substitute members of the works council all enjoy special protection against dismissal. The same applies to the first six employees to call an employees' meeting or

the first three employees to request the appointment of an election committee.

For example, members of the election committee can only be dismissed for good cause and with the consent of the labour court (for the first election) or the works council (for subsequent elections) from the time they are nominated for the election committee at the employees' meeting. The same applies to unsuccessful candidates from the date of their nomination. They remain protected from dismissal for six months after the election results are announced and can only be dismissed for good cause. During this period, however, the consent of the labour court or the works council is no longer required.

Similarly, during their four-year term, works council members can only be dismissed for good cause and with the prior consent of the works council. If the works council refuses to give its consent, the labour court can overrule this decision on the employer's application. Former members can only be dismissed for good cause for a period of one full year after the end of their term of office or resignation from the works council. Again, the works council's consent is not required during this period.

Employees who take steps to prepare for the establishment of a works council and have made a notarised declaration of their intention to set up a works council can also only be dismissed for good cause. However, they are only protected against dismissal for a maximum of three months.

Substitute members of the works council are also protected against dismissal for a period of one year after they have replaced a regular member.

Exceptions to this only apply if the operation or a business unit of it is closed down.

Note

In operations where there is no works council representation, employees who become aware of impending redundancies may be encouraged to start an election process immediately. In the worst case scenario, all employees could then stand as candidates for the works council. In such a case, all employees are entitled to special protection against dismissal for a period of six months after the election, meaning that they can only be dismissed for good cause. Employees who are then elected to the works council have additional protection from dismissal for the duration of their term of office and for one year thereafter. However, the employer has the option of applying to the labour court to have the extraordinary dismissal confirmed.

2.5 Court disputes

A works council election can be challenged in a labour court if fundamental rules on the right to vote, eligibility or the election procedure have been violated, unless the violation could not have affected the result. If the election is not challenged by at least three employees with the right to vote, the employer or a trade union represented in the operation within two weeks of the announcement of the results, the election is deemed valid. Very serious violations can also invalidate the election.

2.6 Obstruction of works council activities

It is a criminal offence to obstruct or prevent the establishment of a works council or its activities, or to influence the election of a works council member, or to treat a works council member unfairly because of their membership of the works council. Such an offence is punishable by up to one year's imprisonment.

2.7 Participation rights of the works council

The works council has a range of participation rights of varying strength. Information and consultation rights are the weakest forms of participation. The stronger forms, particularly co-determination rights, usually include the right of the works council to receive timely and adequate information.

(a) Information and consultation

Scope

The employer must inform the works council of any relevant measures he intends to take that could affect the works council's responsibilities. The works council has the right to review any documents or other information relevant to the proper performance of its duties. The works council can also obtain information by visiting the workplaces of individual employees.

In principle, the employer must only provide information that is in his possession. He is not obliged to collect data for the works council's exclusive use. The question of whether and when the employer must obtain information from its parent company in order to pass it on to the works council remains to be clarified. The works council must be informed proactively and in good time before the employer carries out a co-determination measure.

Areas

The works council can request any information relating to its general responsibilities, including:

- ensuring that laws, collective bargaining agreements and other provisions for the benefit of employees are fully respected by the employer;
- recommending to management measures that would benefit the operation and its employees;
- considering and reporting back to management on any suggestions made by employees;
- promoting the integration of the disabled and other such protected groups;
- promoting the integration of foreign workers into the workforce and promoting good relationships between them and their German colleagues.

Example

The works council can, at any time and for any reason, review the payroll data showing the gross remuneration paid to all employees (excluding executives). These payroll data must include all payments (including fringe benefits) made by the employer to employees. This will enable the works council to determine whether the applicable collective agreements or the principle of equal treatment have been infringed.

The employer must also inform and consult the works council on health and safety, accident prevention and environmental measures to be implemented in the operation.

The works council also has information and consultation rights on general personnel matters affecting all employees, such as:

- human resources planning, in particular current and future staffing needs;
- measures to safeguard and promote employment, such as flexible working hours, promotion of part-time work, new forms of work organisation, changes in work procedures and alternatives to outsourcing work;
- employee questionnaires/surveys;
- guidelines for the selection of personnel to be recruited, transferred and dismissed;
- training.

Remedies

In order to enforce its rights to information and consultation, the works council can file a claim with the labour court. It can sue for disclosure of information withheld by the employer. In certain circumstances the works council can obtain a preliminary injunction requiring the employer to stop implementing

a measure without properly informing and consulting the works council. The employer must pay all the costs of such proceedings, including lawyers' fees, regardless of the outcome.

(b) Co-determination rights

Scope

The strongest form of participation is known as "enforceable co-determination". Certain rules or policies can only be introduced or changed by the employer with the consent of the works council. The works council can also take the initiative and try to introduce a rule or policy.

If the employer and the works council cannot reach an agreement, either party can take the matter to a conciliation board (*Einigungsstelle*). A conciliation board is a joint decision-making committee with equal representation from the employer and the works council and a neutral chairperson appointed by mutual agreement between the two sides or by the labour court. The conciliation board will continue to negotiate the matter in dispute. The conciliation board will then make a binding decision, with the neutral chairperson having a casting vote, if the two sides still cannot reach an agreement.

The conciliation board shall decide at its own discretion, taking into account the interests of the operation and the employees concerned. The decision of the conciliation board must be (i) either recorded in writing and signed by the chairperson or recorded in electronic form and provided with the qualified electronic signature of the chairperson, and (ii) communicated to the employer and the works council. The decision shall be properly implemented and enforced by the employer. If the employer or the works council considers that the conciliation board has exceeded its discretionary powers in reaching its decision, they may request that the decision be reviewed by the labour court.

Until an agreement is reached or replaced by a decision of the conciliation board, the employer is prevented from implementing the planned measures.

All the costs of the conciliation procedure, in particular the remuneration of the chairman of the conciliation board and the fees of the works council's external advisers, must be borne by the employer.

Areas

The works council has extensive co-determination rights regarding so-called social matters where these are not covered by collective bargaining agreement or legislation. Social matters include:

- the internal order and behaviour of employees within the operation (e.g. dress code, restrictions on alcohol consumption, sanctions for misconduct);
- the beginning and end of daily working hours including breaks, and the distribution of working hours over the different days of the week, in particular shift work;
- the temporary reduction or extension of normal working hours (in particular overtime arrangements);
- the time, place and manner of payment of remuneration;
- general rules for holidays and the determination of holidays for individual employees where they cannot be agreed with the employer;
- the introduction and use of technical devices to monitor the behaviour and performance of employees (e.g. time clocks or lock-in computer programs);
- health and safety (rules on accident prevention, prevention of occupational diseases and health promotion);
- the administration of social welfare matters, in particular pension or welfare and

support funds at operational or company level;

- the conclusion and termination of leases for company housing between the company and individual employees;
- remuneration policies (salary system, performance bonuses, commission, bonus schemes) and voluntary payments by the employer (e.g. the common “13th month” salary payment);
- principles regarding suggestions for improvement;
- principles regarding group work (Gruppenarbeit), and
- the organisation of mobile work using information and communication technology.

Examples

The works council's right to co-determine the introduction of overtime is one of its strongest rights. If there is no collective agreement, the works council can block any work that exceeds normal working hours. Even if an individual employee volunteers to work overtime, the works council's consent is still required.

With regard to the introduction of new technical equipment, the right of co-determination does not only apply if the employer actually intends to monitor the behaviour or performance of employees. It is sufficient that the equipment contains features that could be used for such monitoring purposes. Consequently, the introduction of computer systems, computer software and telephone systems will always require the works council's consent.

The employer is obliged to inform and consult a works council on any changes in the organisation of the workplace, work processes and the working environment, in particular on the planning of

- new construction, alteration and extension of production, administration and other work areas
- technical installations;
- work procedures and work flow, including the use of artificial intelligence;
- the workplace.

If the proposed changes impose a significant burden on employees, the works council can demand measures to eliminate, reduce or compensate for the burden. If the employer and the works council cannot reach an agreement, the conciliation board will make a binding decision.

The works council also has wide-ranging rights in relation to economic matters, particularly business reorganisations. Such measures include

- the reduction or closure of an operation or a significant part of it;
- the relocation of an operation or a significant part of it;
- the separation or merger of several operations into one;
- substantial changes in the organisation, principal purpose or technical facilities of the operation;
- the introduction of fundamentally new working methods and production processes.

In companies with more than 20 employees, the employer must inform the works council of any plans to carry out such reorganisation. The information must be given in time for the works council to influence the outcome during the information and consultation process. Changes are described as "planned" and as such trigger information and consultation rights if there is a management decision on the broad measures, even if the necessary approval of the supervisory board has not yet been given. Information is not given in good

time if all the necessary company bodies have already approved the specific measure. The works council must always be able to influence implementation and propose alternatives.

After providing information, the employer must attempt to reach an agreement with the works council on the organisational implementation of the operational change (reconciliation of interests – *Interessenausgleich*). In this agreement the parties agree whether at all, when and how the change will take place. The works council cannot force the employer to conclude a particular reconciliation of interests. However, if the employer does not negotiate (or, in the case of a dispute, does not take the matter to the conciliation board), the works council can try to stop the proposed reorganisation by getting a preliminary injunction from the labour court. As some labour courts in Germany (depending on the region) will grant such a preliminary injunction, failure to try to reach an agreement can result in considerable delay.

Irrespective of whether a reconciliation of interests has been negotiated or agreed, the works council can also require the employer to conclude a social plan (*Sozialplan*). This is an agreement under which the employees affected by the reorganisation receive compensation for the financial disadvantages they have suffered (usually in the form of severance payments). If the works council and the employer cannot agree on the content of such a social plan, the conciliation board decides on both the budget of the social plan and its distribution.

The economic committee also plays an important role in relation to operational changes and other economic matters. The employer must inform the economic committee about a range of economic matters relating to the company, in particular the economic and financial situation of the company, production and sales figures, production and investment programmes, consolidation projects, production and working methods, issues relating to the company's environmental protection and planned changes to the company as mentioned above.

Remedies

If the employer violates the works council's co-determination rights by taking action without the works council's consent (or without the consent being replaced by a decision of the conciliation board), the works council can block all such action by obtaining a preliminary injunction. Some German labour courts will order the employer to stop implementing measures without the works council's consent, even if the employer's conduct cannot be regarded as a serious breach of the works council's rights. If the employer then fails to comply with the court order, the labour court can impose a fine on the employer.

If the employer does not negotiate with the works council to achieve a reconciliation of interests or deviates from the terms of the agreement, individual employees may also be entitled to statutory severance payments.

Example

A company is planning to split up its production facility and transfer it to another company. Without informing the works council, the company offers termination agreements to individual employees. The works council could apply for a preliminary injunction to stop the company from taking these measures. In addition, those employees who have already signed a termination agreement could be entitled to a (possibly higher) statutory severance payment.

(c) Other co-determination rights

The works council has special co-determination rights with regard to individual personnel matters.

Hiring and relocation

In companies with more than 20 employees the works council has a strong position on recruitment and relocation. If the employer intends to hire a new employee or to relocate an employee to a different job or location, he must inform the works council in good time, providing the relevant documents (e.g. application forms) and any other relevant information requested. The works council can then give its consent or withhold its consent on certain grounds (e.g. if the hire or relocation deviates from a general policy on human resources planning or if it results in the unfair dismissal of another employee).

If the works council refuses to give its consent, the employer can take the matter to the labour court. A positive decision by the court replaces the works council's consent. However, it usually takes months for a court to make such a binding decision. In urgent cases, the employer can provisionally hire or relocate the employee, subject to the court's confirmation at a later date.

Dismissals

If the employer intends to dismiss an individual employee, he must formally inform and consult the works council on the dismissal one full week before the notice of dismissal is given. The information to be provided must include the employee's personal data, details of the employment contract and detailed information on the reasons for dismissal.

The employer does not need the works council's consent to dismiss an employee. In fact, the employer can dismiss even if the works council has objected or raised concerns. But if the employer fails to involve the works council properly or fails to present relevant facts to the works council, the dismissal is invalid from the outset. In fact, many dismissals fail in the labour courts for this very reason.

2.8 Time off for works council members

In operations with 200 or more employees one or more members of the works council must be given full time off work. If there are between 200 and 500 employees, one member will carry out works council duties only and will continue to be paid. In larger operations the number of members released in this way increases proportionately. The individual members to be released are chosen by the works council after consultation with the employer.

In smaller operations all works council members must continue to carry out their duties. However, they must be given time off without loss of pay if this is necessary for their works council activities. In other words, they must be given time off to attend works council meetings, employee meetings, meetings of other representative bodies, training, consultations and other duties. The same applies to members in larger operations who are not fully released from work.

The works council itself allocates duties and tasks to its members. A works council member is required to take time off from work and to report back when the task has been completed. However, the works council member is not obliged to reveal the nature of the task.

The employer's obligation to give works council members time off work goes beyond simply allowing them to leave their workplace: The employer is also obliged to reduce a works council member's workload accordingly.

Since it is a requirement that works council members should not suffer any financial disadvantage as a result of being released from work, their continued entitlement to payment of wages includes other general payments such as gratuities, bonuses, increases, etc. The works council member must not be disadvantaged in terms of career progression as a result of being fully or partially released from work.

If necessary, works council activities must be carried out outside working hours. The employer must then compensate the works council member with equivalent time off.

2.9 Reimbursement of costs

The works council cannot insist on a specific budget from the employer. The employer must bear all "reasonable" costs of the works council's activities. Reimbursement is due for all costs and expenses that are objectively necessary for the works council to carry out its tasks properly. The costs must be proportionate to the importance of the task. Of course, disputes about this are not uncommon.

The material costs of the works council's activities include the following

- premises, office staff, materials for meetings, consultations and day-to-day administration (e.g. desks, stationery, information and communication technology, printed legislation, legal books);
- training courses (provided by trade unions or independent organisers); including travel and accommodation costs;
- legal fees incurred in clarifying difficult or complex issues of works constitution law and/or in the event that the works council has to assert its rights in the labour courts.

3. Rules and practical solutions for a successful cooperation with the works council

3.1 General

The broad scope of works council rights in Germany raises the question of whether companies are still in a position to decide at their own discretion on operational and business issues that could affect their employees. Who really runs the company? Is it still the employer? Or is it really the works council?

On the whole, the current system works well where the employer and the works council see themselves as partners working together in a spirit of mutual trust. Experience shows that any attempt to circumvent the rights of the works council will not produce the desired results. On the contrary, in such cases the works council will not only enforce its rights but also use its strong position in other areas to put pressure on the employer.

Working with the works council in a spirit of trust does not mean that the company always has to make concessions. It is important that both sides follow the rules of cooperation for the good of the company. If disagreements have to be settled by conciliation boards or labour courts, both sides must strive to resume a policy of cooperation after the proceedings, regardless of their outcome.

3.2 Creating a cooperative environment

The creation of a cooperative working environment is a prerequisite for the pursuit of a constructive information and consultation culture.

(a) Election procedure

Cooperation starts with the employer supporting the election process. As explained above, the employer must not hinder or influence the establishment of a works council. As no majority or quorum of employees is required to set up a works council, it is almost certain that an initiative by at least three employees or a trade union will ultimately lead to the establishment of a works council.

However, some employers, particularly those with no experience of works councils, try to delay the election by withholding information such as the list of employees eligible to vote. Other employers use rumours or Chinese whispers to promote the view that works council representation is not wanted by the company. Such tactics almost always lead to conflict with the trade union, the election committee and the new works council, and

can often influence the outcome of the election to the detriment of the company.

Example

A subsidiary of a US corporation has announced that it does not want works council representation in its German operations. It has threatened that if a works council is set up, the parent company may well decide to close its German operations. The trade union involved in the election process was unimpressed by this announcement and ignored it. Nevertheless, the employer's message had an impact on the candidates who had originally agreed to be nominated. Those who were interested in "smooth" cooperation with the employer have now withdrawn their candidacy. So in the end the works council consists only of so-called "hardliners" or "troublemakers" with an extremely negative attitude.

Finally, it should be remembered that obstructing the election of a works council or influencing such an election by causing or threatening to cause detriment or by giving or promising to give advantage is a criminal offence punishable by one year's imprisonment or a fine. The same may be imposed on the employer for obstructing or interfering with the works council's activities or for discriminating against or unlawfully favouring a works council member.

(b) Meetings with the works council and employees

The regular meetings of the works council are not open to the public or the employer. It is reasonable and advisable for the employer to hold regular joint round-table meetings with the works council (e.g. once a month).

A joint approach between the employer and the works council is also advisable when it comes to employee meetings. German law requires the works council to hold such a meeting once a quarter and to report on its activities. Although the employer is invited to these meetings and has the right to speak, some employers do not make use of this opportunity. They prefer to inform employees in separate meetings or use other means of communication. However, such a strategy could cause unrest among the workforce.

Works council meetings are normally held in person. Meetings by video and teleconference are legally permitted only if (i) the conditions for such participation are set out in the works council's rules of procedure, with priority given to face-to-face meetings, (ii) at least one quarter of the works council members do not object within a period to be determined by the works council chairperson, and (iii) it is ensured that third parties cannot gain knowledge of the content of the meeting.

(c) Treating the works council seriously

Constructive cooperation with employee representatives requires that the works council be treated as a business partner.

The Head of HR (for important issues), or at least a senior HR manager, should be the main point of contact for the works council.

Involving the works council can be very time-consuming. It may be necessary to discuss a range of alternatives proposed by the works council with its members or delegates. During these discussions, the works council should at least feel that some of its proposals are being examined and seriously considered, even if there is no doubt that the company will ultimately follow its own proposal without any changes.

Requests for (further) information should be treated with due respect. It is not always advisable to limit the provision of information to the minimum required by law.

Disputes over the reimbursement of the costs of works council activities should be avoided as far as possible. As a business partner, the

works council should be able to work under the same conditions as the HR department itself. In particular, the employer should not refuse to reimburse reasonable training costs. It is often more effective to work with representatives who are fully aware of the scope (and limits) of their rights than with inexperienced negotiators. Moreover, a lack of training is likely to be time-consuming if the employer is trying to implement measures quickly and at short notice.

Example

A company has decided to close its offices in Hamburg and move them to the headquarters in Frankfurt. It has informed the works council in detail about the economic reasons for the move, the likely development of the company's prospects after the move and the impact on employees. It then intends to consult the works council and negotiate a reconciliation of interests. The works council has so far rejected all offers to consult and negotiate. It argues that the works council members, who have only been in office for three months, need training before any negotiations can take place. The works council is also demanding the services of a financial advisor to be paid for by the employer. Both proposals were rejected by the employer. Instead, the employer declared that the negotiations had failed and asked the court to set up a conciliation board.

Months later, however, the labour court rejected the employer's request and supported the works council's position. In the end, the employer wasted almost a year before being able to move the office.

3.3 Influencing the level of representation

As described above, the Works Constitution Act distinguishes between the responsibilities of the (local) works council and the joint works council. Only matters that affect the whole company or more than one operation and cannot be dealt with locally fall within the remit of the joint works council.

However, the employer can influence the level at which negotiations take place by shaping the proposed measure and its purpose in one way or another.

Example

A company with more than one operation wants to implement a new IT system. Ultimately, the employer wants all operations to use the same system. If the employer prefers to negotiate with a local works council, he must limit its business decision to the introduction of the system in that particular operation. If the employer wants to negotiate with the joint works council, he must decide to introduce the system in at least two operations at the same time, emphasising that the sharing of data requires the use of identical equipment.

Which representative body is the better negotiating partner will vary from case to case. Local works councils are usually more familiar with the circumstances and particularities of their operation. Joint works councils often focus on the benefits for all employees in the company, rather than on the individual problems of employees in a single operation. If the same or similar issues have to be negotiated with different local works councils, it is likely that any agreement reached with one works council will be used as a benchmark by the others. Other works councils are then likely to try to negotiate further improvements for their own operations. If the employer negotiates only with a joint works council, such "competition" between several local works councils can be avoided.

3.4 Timing and influencing the timing of consultation

As a general rule, the employer must inform the works council in good time, i.e. at a stage when the works council can still influence the business decision. A delay in informing and consulting the

works council is seen as a violation of its rights and can have serious consequences.

Communication is key. The company should therefore avoid communicating at an early stage, whether to customers, employees or the works council, that the intended measure is a final 'decision'. Instead, until the works council has been informed, any discussion of the intended measure should be classed as 'pre-planning'. Immediately before informing the works council, management should take and record a formal business decision stating that the company has now entered the detailed planning stage. To emphasise that no binding decision has been taken, it is advisable to include any alternative options in the minutes.

Example

A company is planning to close its production site in Germany and lay off its entire workforce. It has decided that all future production will take place in Romania. Before informing the works council, the project team produces a series of memos and minutes detailing a precise timetable for the closure. It is clear from these documents that a business decision has already been taken. By accident, the documents become available on the intranet and are seen by a member of the works council.

The works council can then block the implementation of the planned closure by obtaining a preliminary injunction. All employees can claim statutory severance payments for the violation of the works council's information and consultation rights.

At the start of any consultation process, the employer should try to agree a timetable with the works council and schedule sufficient dates for further meetings. It is very important to ensure a continuous consultation process, as some measures cannot be implemented until the consultation process has been completed.

3.5 Choosing the appropriate means of communication

The employer should ensure that he can demonstrate that he has provided the works council with correct and adequate information. Where appropriate, the employer should therefore provide the works council with information in writing and ask for an acknowledgement of receipt.

If there is a dispute about the completeness of the information, the employer should provide information about the intended measure in writing, attaching the most important documents. In this letter, the employer should ask the works council to submit a detailed request for further information (e.g. by completing a questionnaire or providing a list of documents) within a specified time limit. The employer should emphasise that after the deadline the works council will be deemed to have been fully informed. This strategy tends to speed up the exchange of information. Of course, a works council that has a lot of documents to go through may reasonably ask for more time.

3.6 Individuals involved in the information and consultation procedure

To avoid the consultation process becoming a series of endless discussions, it is important to limit the number of participants from both the employer and the works council. Depending on the issues in question, an equal number of two to five participants from each side should be nominated. In addition, substitutes should be nominated to ensure the smooth continuation of the consultation if a nominee is unable to attend a meeting for personal or other reasons.

Where appropriate and reasonable, the works council may seek the assistance of external experts (e.g. economic advisers, lawyers), subject to agreement with the employer. When negotiating a reconciliation of interests, the works council can use its own discretion to call in an external adviser if the company has more than 300 employees.

3.7 Works council agreements

In Germany, the consultation process often leads to the conclusion of a works council agreement, which is a special type of contract between the employer and the works council containing general rules on working conditions. Works council agreements have a direct and binding effect on individual employment relationships. Works council agreements must be concluded in writing or by means of qualified electronic signatures. The terms of the works council agreement can, to a certain extent, even modify individual contractual relationships without the consent of the employees.

3.8 Confidentiality obligations for works council members

Works council members and other employee representatives must keep all trade and business secrets which become known to them as a result of their membership of the representative body strictly confidential. However, this obligation not to disclose information applies only to those trade and business secrets which have been expressly designated as confidential by the employer. It is therefore extremely important that any document clearly states that its contents - in whole or in part - are to be treated as confidential.

A works council member who reveals such a trade or business secret commits a criminal offence.

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