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The Legal Platform – Part of Deutscher AnwaltSpiegel Group

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→ In this issue:

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IntellectualProperty

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Editor
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Dear Readers,

Today, we are excited to introduce GermanLawInternational, our new umbrella brand that marks the launch of the first English-language legal portal focused on German business law. For a decade, we have been publishing English-language online magazines on various legal topics: BusinessLawMagazine, LaborLawMagazine and GoingDigital. The trio has evolved into a quartet, with the translation of IntellectualProperty, previously available only in German, into English.

We have consistently published these magazines across German-speaking and international markets, issuing four editions annually for each title. The new format GermanLawInternational will maintain the same publication frequency, content structure, high-quality standards, layout, and practical focus that you've come to expect. However, by consolidating four complementary subject areas, we aim to enhance the informational value for our readers and further elevate our visibility among our core audiences in corporations and law firms.

My editorial colleagues Karin Gangl, Dr. Thomas R. Wolf and I are very much looking forward to your opinion on our new publishing concept. Your comments will reach us at redaktion@deutscheranwaltspiegel.de.

Sincerely yours,

Thomas Wegerich

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Artificial intelligence – Asterix' magic potion and a leveler of lawyers?

You know the story: the small village of Asterix the Gaul who – thanks to a magic potion – is able to vigorously resist the Romans' constant attempts to conquer it. But why this comparison?

If we take a step back and look at the legal market, we can make out the following rough developments: law firms are professionalizing themselves and are increasing in size, legal departments are further emancipating themselves and are retrieving work that was originally outsourced, the internet is democratizing knowledge and the fight over resources is being intensified. And now the next extension stage has come with a double whammy. With the help of artificial intelligence, average lawyers are becoming specialists too, and writing competence is not a differentiating factor any longer. And clients are doubly satisfied: they can do even more themselves, and external costs will decrease thanks to increasing competition among legal service providers. Or, to transpose it to the story of Asterix, with the magic potion all the villagers, even the oldest, Geriatrix, are suddenly equally strong!

Adapting to the evolving legal landscape

This development is likely to affect lawyers with more seniority less since they have not only enriched their brains by learning and work in the past but have also sensitized their gut feeling over the course of all their decades in the profession. They also practice a culture of independent critical thinking. In this way, they possess precisely those strengths that are expected from legally trained business consultants when providing strategically circumspect support today. There is reason to fear, however, that the numbers of this kind of consultant are dwindling. This observation is relevant to all those who possess less "intrinsic value" and who are being upgraded by AI in one fell swoop and levelled off against each other.

This begs the question of how, in the future, can uniqueness be created in competition if legal expertise is increasingly useless for this very purpose? To ensure that it can be done all the same, the following approaches will be important: repositioning in strategy, business models (e.g., multi-disciplinary partnerships), customer-relevant knowledge, non-legal expertise, social skills and service. Which, in turn, leads to further questions. What kind of employees will be in demand and what further training should they be given?

It is advisable to initiate the change process early on in order to ensure that crisis management will not be required.

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Deforestation: Essential steps for compliance by December 2024

Nine months to go until mandatory supply chain transparency

By Stefanie Beermann, Dr. Julia Hörnig and Max Jürgens

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Regardless of whether companies are directly or indirectly affected by the EUDR as a non-EU company, it is advisable to create a risk analysis and risk management to organize the collection and analysis of information that will be needed along the supply chain in the future.

Regulation 1115/2023 (EU) on deforestation and forest degradation (EUDR) has been in force since June 2023. Obligated companies must implement the EUDR by 30 December 2024 (small and medium-sized enterprises (SMEs) by 30 June 2025). After a first round of FAQs in June 2023, the European Commission published further FAQs in December 2023 and provided access to the Forest Observatory.

Non-EU companies wishing to import relevant products into the EU should be prepared for extensive requests for information from their European customers.

The EUDR applies to relevant raw materials, including cattle, cocoa, coffee, palm oil, rubber, soy, wood and the products listed in Annex I of the regulation. This essentially means that numerous key industries are affected by the regulation. The EUDR also covers cross-border transportation of relevant products between production sites in the EU and abroad.

Import/export and trade ban in the event of non-compliance

From 30 December 2024 (from 30 June 2025 for SMEs), companies may only place relevant products on the EU market, make them available on the EU market or export them from the EU market if these products meet the requirements of the EUDR. The EUDR distinguishes between companies that import, produce and export relevant products in the EU (operators) and companies that make these products available on the market, i.e., sell them (traders). The EU Commission has now clarified that (special) customs procedures other than "release for free circulation", such as the customs warehousing, inward processing and temporary admission, are not subject to the EUDR. Re-imports are considered to be imports.

To be EUDR-compliant, products must be deforestation-free or degradation-free and produced in accordance with the relevant legislation of the country of production. In addition, a Due Diligence Statement (DDS) must have been submitted.

Due Diligence Statement and the information system

Companies, i.e., non-SME traders and operators, must submit a DDS to the information system provided by the European Commission. According to the European Commission, a DDS can be amended or deleted within 72 hours. However, a subsequent amendment or deletion is not possible if the DDS has been used in the meantime (e.g., by other participants in the downstream supply chain). It has also been clarified that frequently used data cannot yet be stored for future reference. The EU Commission has announced that it will complete the test phase for the information system by the end of January 2024. However, it is already clear that there will be different input screens for traders and operators. In the DDS, companies must provide the geolocation data of the land on which the relevant raw material was grown and harvested or, in the case of cattle, where the cattle were kept. With regard to complex production situations, the EU Commission has stated that all relevant plots of land must be indicated, even if this means that in individual cases (e.g., in the case of bulk soy from various sources) more than 100 plots of land must be indicated. In addition, the DDS must confirm compliance with the due diligence obligations in accordance with the EUDR. Evidence and information in this regard does not have to be submitted via the information system, but should be documented by companies in the event of an official inspection into compliance with due diligence obligations.

Comprehensive due diligence obligations

According to Article 8 of the EUDR, companies are obligated to collect comprehensive information, carry out a risk analysis, take risk mitigation measures and document all measures taken. The EU Commission clarifies that the due diligence obligations must be fulfilled regardless of the expected country-specific risk of deforestation.

> "The complexity of this new supply chain due diligence regulation demonstrates the need for reviewing and amending internal risk management processes and monitoring current legislation projects."

As a first step, companies must collect information. This concerns the aforementioned geolocation data and general information about the raw materials and products, such as HS code, weight and dimensions, as well as the date/duration and scope of production. The EU Commission emphasizes that every relevant product entering the European market should be traced back to its origin and – in the case of bulk goods – must not be mixed with non-compliant products. The information collected must show that the products are free from any links to deforestation or, in the case of timber, also free from any links to degradation and have been produced in accordance with the relevant legislation of the country of origin.

The extent of deforestation and forest degradation on a plot of land can be determined by the Forest Observatory, which the European Commission made available in December 2023. The EU Commission emphasizes that the Forest Observatory is non-binding and non-exhaustive. The database, which consists of satellite images and other information, shows in particular whether deforestation has taken place in an area after 31 December 2020. The EU Commission has clarified that forest degradation means a structural change in the forest – usually a conversion to plantations. The Forest Observatory specifies different types of forest change, e.g., due to fire or disturbance. Due to the complexity of the information, companies should familiarize themselves with it at an early stage.

> "The information collected must show that the products are free from any links to deforestation or, in the case of timber, also free from any links to degradation and have been produced in accordance with the relevant legislation of the country of origin."

Although the list of relevant legislation of the country of production under Article 2 (40) EUDR is extensive and abstract, the EU Commission has not yet defined it comprehensively. Instead, the EU Commission has announced that detailed guidelines will be made available in due course. Furthermore, the EUDR only contains a "non-exhaustive list of legal provisions"; however, all provisions should be assessed in relation to the production sector. According to the Commission, environmental protection refers to the "protection of forests, the reduction of greenhouse gas emissions or the protection of biodiversity". The Commission emphasizes that in particular, for example, official records, court decisions, permits, contracts and official papers should be collected as evidence of compliance with the relevant legislation.

The EU Commission has made it clear that certification systems are useful to cover information needs – i.e., to ensure the chain of custody. However, they should only be seen as a supplement to compliance with the EUDR. Nevertheless, in order to enable a seamless transfer of information, the use of certificates is recommendable.

In a second step, the information collected must be subjected to a risk analysis to determine whether there is a risk that the EUDR has not been complied with. Operators and traders will only be EUDR compliant, if they can rule out a non-negligible risk. Similar to the German Supply Chain Due Diligence Act (LkSG), this means that relevant supplier information should be linked to risk indicators. Companies should consider using AI-based tools to assess relevant risk-related information.

In a third step, risk mitigation measures must be taken. This includes a risk management system with a responsible compliance officer – similar to what German companies already know as a human rights officer from the LkSG.

Your next steps

EU companies may be directly obligated under the EUDR. As suppliers of relevant raw materials and products, non-EU companies can be contractually obliged to provide and procure the necessary information. The consequences of the EUDR therefore extend far beyond the borders of the EU.

In order to prepare as effectively as possible for the requirements of the EUDR, companies should clarify whether the EUDR affects them. Companies should review the tariff numbers of their goods and compare them with Annex I of the EUDR to identify relevant products. In case of doubt, companies should consider legal advice for the specific customs classification of their goods. An application for Binding Tariff Information (BTI) may be recommendable.

Regardless of whether companies are directly or indirectly affected by the EUDR as a non-EU company, it is advisable to create a risk analysis and risk management to organize the collection and analysis of information that will be needed along the supply chain in the future. Companies should combine supply chain due diligence expertise with foreign trade expertise. The complexity of this new supply chain due diligence regulation demonstrates the need for reviewing and amending internal risk management processes and monitoring current legislation projects. ←

The Foreign Subsidies Regulation...

…has teeth as it benefits from its significant legal consequences

By Dr. Jonas Brueckner, M. Jur. (Oxford)

Companies receiving subsidies from member states of the Union can distort competition. The "Foreign Subsidies Regulation" (FSR) in force since 12 July 2023, attempts to close this regulatory gap.

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Companies receiving subsidies from member states of the Union can distort competition. Comparable effects can also arise from third-country companies, as well as from companies that, although based in the EU, have received aid from third countries. European subsidy law and WTO rules have not addressed these cases. The "Foreign Subsidies Regulation" (FSR) in force since 12 July 2023, attempts to close this regulatory gap and imposes extensive documentation requirements on companies that have received foreign aid. In the event of a violation, sanctions in the form of fines and, even more important, significant legal uncertainty, such as the voidness of a transaction or its possible reversal, can be threatened.

Points of reference for the FSR

The FSR is applicable in case of M&A transactions or participation in procurement procedures. Both activities may

trigger notification obligations in a separate examination procedure with the European Commission. A transaction has had to be notified since 12 October 2023, if the target company is established in the European Union and achieved a turnover of at least €500 million in the previous financial year, and the companies involved have received third-country aid totaling at least €50 million in the last three financial years. In connection with public procurement procedures, the submission of certain offers is subject to notification to the European Commission if the contract value exceeds €250 million and the bidder, including its affiliated companies (and possibly even including the main subcontractors and main suppliers), has received third-country financial aid totaling at least €4 million in the last three financial years. In addition to this, the European Commission may also examine market situations ex officio.

The broad scope of application

The concept of aid is broader than that of a subsidy. It can range from the transfer of funds or liabilities, to the waiver of otherwise due revenues, or the granting of special or exclusive rights, to the mere provision or acquisition of goods or services. All relations with third-country actors must be identified by companies in anticipation of a possible notification obligation in the context of a transaction or participation in a tender and be checked for their relevance. In the event of a transaction or participation in a public procurement procedure, all financial grants must be taken into account – regardless of whether they may have to be disclosed in the context of an examination procedure, and regardless of whether they will be significant for the assessment of a possible distortion of competition. In addition, the period of 36 months before the event means a significant amount of information is required. As a consequence, the internal assessment of whether the thresholds are met cannot be event-driven but will need to be executed in advance. And relevant information will have to be collected on a continuous basis.

"All relations with third-country actors must be identified by companies in anticipation of a possible notification obligation in the context of a transaction or participation in a tender and be checked for their relevance."

Ultimately, only those companies that can categorically exclude that they will ever be concerned by the scope of application of a transaction covered by the threshold will be able to refrain from doing so. In any case, many small and medium-sized companies will not be able to do so, at least not in a sales scenario. The same applies to participation in tenders. The threshold for the tender volume may seem high, but a main bidder will require clear confirmations from its subcontractors – sometimes small and medium-sized companies – regarding their third-country subsidies, in order to be able to participate in the tender procedure without running the risk of making wrongful statements.

The enforcement power of the FSR

The FSR has teeth as it benefits from its significant legal consequences: Transactions that fall within the scope of application must not be consummated before clearance. If a transaction that is subject to notification has already been completed and if market-distorting effects of third-country subsidies are determined, the European Commission can require the reversal and dissolution of the transaction. The European Commission can also impose fines of up to 10% of a company's total annual turnover if it fails to comply with the obligations of the FSR. It is also authorized to impose fines on companies of up to 1% of global turnover and regular penalty payments of up to 5% of the average daily total turnover for each business day of delay if companies provide false, incomplete, or misleading information. And here too, the Commission can also act ex officio if it believes that a company should have made an FSR-filing.

What needs to be done?

The requirement for the continuous collection and evaluation of data and information requires companies to establish internal processes to continuously monitor financial contributions from non-EU countries. Continuous protocols for obtaining information should be implemented, which should also enable relevant information from co-investors and limited partnerships. The FSR will be relevant throughout the transaction process, especially in due diligence but also for the negotiations on the purchase agreement. In case of substantial subsidies, where a

preliminary assessment suggests that an impact on competition cannot be ruled out, the timeline will also be significantly affected. The duration of a review, which may include pre-notification discussions, may be hardly foreseeable without further experience. There may be delays of up to 150 days, which must be taken into account in the determination of a long-stop date. The Commission will provide assistance in critical cases. The risk of making an uncertain forecast can be mitigated, for example, by (informal) consultation with the Commission in advance. Conversely, in simpler cases, the effort of notification can be reduced through waivers.

Conclusion

Apart from the cases that actually need to be notified to the Commission, the FSR will require companies to provide a great deal of documentation and make a high level of evaluation effort in the future. This is the flip side of the politically understandable goal of protecting the internal market from competition-distorting contributions from third countries. German and European companies, with international reference points, even if only through sales to third countries, will have to find a pragmatic approach to avoid disproportionate effort on the one hand and on the other, be prepared for a quick determination of whether their transaction or tender participation may trigger a filing requirement. ←

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Lawyers and artificial intelligence

"The end of the world as we know it"

By Dr. Matthias Birkholz, LL.M.

When it comes to AI, it is quite common for lawyers to take a stand against perceived hype, to urge calm and to confidently refer to supposedly fixed core legal competences with a perceived guarantee of eternity.

Talking to lawyers about the topic of AI, one generally encounters a palpable fascination and a general willingness to try it out, as well as internal law firm task forces and legal tech labs that are experimenting with AI. This is usually followed by a general statement about how impressed they are with the capabilities of AI and its potential to make our work easier and potentially increase efficiency. But the high-end creativity of our legal advisory business cannot, so the common understanding among most lawyers, be replaced by machines, and certain human skills (empathy, negotiating skills) will certainly not become superfluous due to AI either. So don't be afraid! At the same time, these discussions are usually quickly followed by the story of the danger of AI hallucinations and that the whole thing is not yet ready. In general, this attitude towards the topic of lawyers and AI is prevalent: AI makes us lawyers more efficient, but doesn't replace us. Or: It's not AI that replaces us, but the lawyer who uses AI. Most of the comments made by the panelists at last December's "class reunion of the legal market in Germany", the InhouseMatters conference in Frankfurt, went in this direction (see **review**). And Bruno Mascello, in

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his outlook on the key trends in the legal market in 2024 in issue #01/2024 of Deutscher AnwaltSpiegel, is not worried that lawyers will be replaced by AI, but is more concerned about legal professional secrecy and advises using 2024 to consolidate (see here).

Lawyers may face the same fate as translation service providers

There is no reason for such confidence. In reality, the current discussion about law and AI mostly misses the core of the problem. The old world of lawyers and law firms will be over in the foreseeable future. We lawyers haven't really realized this yet. In reality, lawyers are in a similar position to providers of translation services in times of DeepL. They are in danger of becoming obsolete to a large extent.

Richard Susskind may still be right when he states that the short-term impact of AI on lawyers is greatly overestimated. But above all, he is right when he goes on to say that the long-term impact of AI on lawyers is greatly underestimated (for example, see here). He refers to Ray Kurzweil's statement that the performance of neural networks doubles every 3.5 months, i.e., in six years it will be 300,000 times greater than it is today. Anyone who has tried out Microsoft Copilot and its already impressive performance with regard to the Outlook, Word, PowerPoint and Excel programs bundled in MS Office 365 can imagine that exponential increases in the performance of AI will then not leave much room for human improvements to the results obtained by AI.

What does this mean for lawyers? At present, the strength of AI, at least in Germany, does not yet lie in answering legal questions. It still lacks sufficient training with the necessary data. However, AI can already be used surprisingly well by lawyers in certain core areas of their work, namely document creation.

Attorney-client privilege and data protection are, of course, issues that must be kept in mind. Uploading non-anonymized data to ChatGPT is out of the question without appropriate safeguards. However, today this is already not an insurmountable hurdle. For example, when using Microsoft Azure, it is possible to ensure that the relevant data is not used for general training purposes. And with the right partners, the necessary agreements on confidentiality protection with regard to § 43e (3) BRAO and on commissioned data processing can already be concluded today. If such contractual safeguards are in place, AI may then be used by lawyers even on non-anonymized data sets.

Impressive increase in efficiency thanks to AI

Summarizing, translating and comparing documents are the least impressive achievements of AI. Things get more interesting when it comes to analyzing documents with the help of AI. In this way, data points can already be easily extracted from documents and used for further processing. Draft contracts from the other party can be compared with the company's own standard in its own playbook in seconds.

Even more impressive is the assistance that AI can already provide today when drafting documents. For example, I can already use the AI functions of the PatternBuilderMax program from NetDocuments to create a customized draft based on a template or similar document from my sample collection if I only specify a few key points that I want to have reflected. A reasonably tech-savvy notary may probably already have 95% of their notarization preparation work done by AI in this way.

Efficiency gains will not benefit lawyers commercially

However, anyone who primarily emphasizes that AI makes lawyers' work easier and more efficient has not heard the shot. Even at a superficial level, AI will be a bitter disaster for lawyers' business models. Notaries may be able to pocket efficiency gains because they charge according to the (for the time being) compulsory statutory fee schedule. However, under the rule of the billable hour, lawyers do not commercially benefit from efficiency gains (if they honestly record and bill the work involved). Instead, such gains end up with their clients who are billed for less legal work.

It gets even worse. Things become really tense for lawyers if you ask the question differently and change your perspective. Instead of asking what AI means for lawyers, what does AI mean for their current clients? From their perspective, not only will legal advice become cheaper in view of the efficiency gains described above, but they will also ask themselves whether they still need a lawyer to

answer legal questions and draft contracts at all. And the answer is clear. In view of the expected exponential increases in the performance of AI and assuming sufficient training under German law, this will no longer be the case for a large proportion of the work currently performed by law firms. This is already beginning to emerge with regard to the involvement of external lawyers by corporate legal departments. In the not-too distant future, contracts will only be drafted by external law firms in exceptional cases. The same applies to consumer law. Soon hardly any consumers will need to ask a lawyer the question: What is the legal situation? What should I do? Instead, people will ask AI. And get an answer that is at least as good, but certainly faster and cheaper.

Privileged treatment of lawyers in the Legal Services Act must be abolished

At best, one may argue about when this point will be reached. Will it be in one year, three years or five? That will to a large extent depend on how quickly the existing hurdles in Germany are removed. One such obstacle is the German Legal Services Act which prohibits non-lawyers from providing legal advice. Answering legal questions relating to individual cases using AI undoubtedly constitutes legal advice and would under the current legal rules be reserved for lawyers as a result. There will no longer be a reason for this privilege in the future if AI is superior to lawyers. Secondly, in order to be able to answer legal questions with sufficient certainty using AI in Germany, we need a sufficient data basis. This makes free online availability of court rulings essential. The days in which only a small percentage of court rulings are available online, as is the case today, and a large proportion of these are only accessible after overcoming access barriers such as beck online and Juris, must come to an end as quickly as possible.

Legal protection from hallucinations caused by AI?

What remains? Perhaps we lawyers will still be needed to check the plausibility of the results obtained by AI. Here too, however, skepticism is warranted. Presumably, we will only be called upon for a short transitional period to validate the results obtained using AI and to protect people from AI hallucinations. In view of the prospective capabilities of AI, the question will tend to be the other way round. It will then be like autonomous driving. In reality, humans are worse drivers than AI-driven cars without human drivers. In the foreseeable future, AI will not answer legal questions worse and in a more error-prone manner, but better and many times faster than most lawyers. It will then no longer be a question of whether the use of AI in legal advice constitutes professional negligence. Rather, we will find ourselves confronted with the claim that answering legal questions and preparing contractual documentation without the aid of AI is professionally negligent per se.

People may also continue to instruct us because they merely want to have a liable party in the event that something goes wrong. In the future, however, this will be more the domain of insurance service providers than of lawyers who will merely be middlemen in this regard.

Little consolation from remaining fields of activity

Of course, there will still be areas in which the involvement of lawyers remains necessary, either as a legal requirement or out of factual necessity. For example, notaries will probably succeed in defending the existing notarization requirements for a few more years without any material justification. The obligation to be represented by a lawyer in court may also continue to exist. The time will soon come, however, when the question arises as to whether and to what extent court proceedings can be replaced by AI-driven dispute resolution procedures. This is likely to be the case with the mass litigation proceedings that are currently felt to be overburdening the courts.

That leaves situations in which classic human skills are required, such as empathy and negotiating skills. However, this is not much consolation for lawyers. In reality, these skillsets often have little to do with the application of the law. In any case, none of these are learnt in law school. And it will never be possible to increase the hourly rate for these remaining activities to such an extent that they can even remotely economically replace the activities that are no longer required.

What can be done? We may regret all these developments, but we will not be able to stop technological progress. We have to say goodbye to our old world and get used to a new, different role instead. We need to discuss what this role might be in the year that has just begun. In this respect, we don't have much time for consolidation. ←

LaborLaw

The European Pay Transparency Directive

Future challenges and risks for employers in Germany

By Konstantin Kühn

The purpose of the European Pay Transparency Directive is to create pay transparency in companies and to detect and prevent gender-based pay discrimination. It will provide a number of new instruments and procedures relating to pay transparency that will be relevant for German employers.

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Introduction

On 6 June 2023, the European Pay Transparency Directive **(EU) 2023/970** came into force, setting new minimum requirements for pay transparency in employment. The purpose of the directive is to create pay transparency in companies and to detect and prevent gender-based pay discrimination. National legislators have until 7 June 2026 to implement the directive. The German legislator will most likely amend the existing Pay Transparency Act (EntgTranspG) for this purpose. It is not yet possible to predict exactly what form the amendment will take. However, the directive itself and the accompanying recitals provide a number of new instruments and procedures relating to pay transparency that will be relevant to German employers. Examples include pay transparency in the application process and an employee's right to information about pay regardless of the number of employees in the company. It is worth taking a look at the key provisions of the directive in order to prepare for the increasing administrative burden in companies. Compliance risks should also be assessed prior to the implementation of the directive in order to be able to react in a timely manner once the directive has been implemented. The following article is not exhaustive and is intended to provide an overview of the key changes to pay transparency.

Art. 4: Equal and equivalent work

An essential factor for the comparability of pay is the obligation to guarantee equal pay for equal work or work of equal value, as set out in Art. 4 (1). These terms are already defined in § 4 (1) EntgTranspG. It is likely that the legislator will expand and specify the list of criteria for determining non-discriminatory pay systems (§ 4 (4) 2 EntTranspG).

It also follows from Art. 4 (2) that the development of instruments and methods for the assessment of pay as an aid for employers and social partners is initially the primary task of the respective member state. It is not yet clear how far-reaching and sophisticated the national pay assessment systems will be. At the same time, however, German employers can test analytical procedures for the evaluation of individual jobs and fields of activity within a company in terms of pay law before the directive is implemented. This is because the directive does not exclude the use of individual pay evaluation systems. These offer the advantage of being individually adaptable to the individual company and the differing comparison groups of employees, thus providing more precise results.

According to Art. 19 (1), the comparability of activities is not only limited to those with the same employer, but also to a single source, provided that this source sets uniform remuneration conditions. According to recital 29, such a source may, for example, be the group parent company if it establishes uniform remuneration rules for subsidiaries and there is no collective bargaining coverage for these. Collective agreements and works council agreements are also likely to qualify as a uniform source. If no actual comparator can be determined, Art. 19 (3) allows recourse to a hypothetical comparator, including any remuneration statistics. This is intended to extend pay transparency to gender-specific fields of activity.

Art. 5: Information about remuneration in the application procedure

The right to information regulated in Art. 5 (1) is not included in the EntgTranspG and shifts pay transparency to the application process. As a result, job applicants have the right to receive information about the starting salary or salary range paid by the target employer before the interview. The literal interpretation of the provision suggests that employers must act independently and provide pay information in accordance with the provision in a job advertisement, before the interview, or in some other way.

Furthermore, in accordance with Art. 5 (2) employers may not ask applicants about their pay history from previous employment as part of a job interview The right to information is not tied to a threshold number of employees and therefore applies to all companies.

According to recital 32, the purpose of the right to information is to avoid a lack of information on the part of applicants and to strengthen their negotiating position. At the same time, the negotiating power of the parties to employment contracts should not be restricted to negotiating a salary outside the disclosed salary range. How the balancing act between the contractual freedom of the parties to employment contracts and gender-neutral, objective salary assessment is to be achieved, however, remains open.

In purely factual terms, the negotiating power of the parties to an employment contract is likely to be limited if the employer cannot base higher pay on objective, gender-neutral criteria. Otherwise, the employer would run the risk of not being able to rebut the presumption of pay discrimination in the event of a subsequent disclosure and review of salaries by third parties.

Art. 7: Right to information in existing employment

Art. 7 (1) provides for a right to information for all employees, irrespective of the threshold, regarding their own individual pay level and the average pay level of other groups of employees, broken down by gender and by individual groups of employees who perform the same or equivalent work. The main difference from § 11 (3) 2 EntGTranspG is that the average number of comparable employees, not the statistical median, is used as the comparative figure.

Furthermore, the directive does not set a time limit for the assertion of the right to information, whereas § 10 (2) EntGTranspG generally provides for a blocking period of two years for the relevant employee after the request for information has been made. In the future, following the implementation of the directive, employers may be subject to repeated requests for information from the same

employees as a result, whereby the legal limits are likely to lie in the assertion of the claim in breach of trust. Employers must inform all employees of the existence of the right to information once a year in accordance with Art. 7 (3). According to Art. 7 (4), employers are obliged to respond to requests for information within two months. Furthermore, according to Art. 7 (5), regulations that prohibit the disclosure of remuneration are inadmissible.

Non-disclosure clauses in employment contracts regarding salary, which are already considered to be ineffective in most cases under current case law, should finally become a thing of the past.

Art. 9: Reporting obligations

Art. 9 (1) provides for far-reaching changes with regard to the reporting obligations on the pay gap for employers. In particular, reports must reflect the gender pay gap and the average gender pay gap, including variable remuneration components. In terms of content, the reporting obligation under § 21 EntgTranspG only covers measures to promote equality and establish equal pay, and information about the average total number of employees and the average number of full-time and part-time employees.

According to § 21 EntgTranspG, only companies with more than 500 employees and that are obliged to prepare a management report in accordance with § 264 and § 289 of the German Commercial Code are required to report. In contrast, the threshold has now been reduced to 100 employees in accordance with Art. 9 (4). The implementation period will be staggered depending on company size and begins for companies from a size of:

- 250 employees with a reporting obligation as of 7 June 2027 and annual reporting intervals;
- 150 to 249 employees with a reporting obligation as of 7 June 2027 and reporting intervals every three years;
- 100 to 149 employees with a reporting obligation as of 7 June 2031 and reporting intervals of three years.

Reports must be made available on the company's website or by other means (Art. 9 (7)).

Companies with fewer than 100 employees may draw up voluntary reports on pay in accordance with Art. 9 (5). According to recital 42, such voluntary reports can be rewarded in the form of a pay transparency label. An employer could then use a pay transparency label to advertise their company in order to show potential applicants that they comply with pay transparency standards, thus increasing the attractiveness of the position. In addition, Art. 9 (5) gives national legislators the option of obliging companies with fewer than 100 employees to provide information about pay.

According to Art. 10 (1), employers are required to carry out a joint pay assessment with employee representatives, if the report according to Art. 9 shows a gender-specific difference of 5% in the average pay level of employee groups that is not justified by objective, gender-neutral criteria, and the employer does not correct pay within six months of the report. The aim of joint pay assessments is to eliminate unjustified pay differences in cooperation with employee representatives.

Financial risks to employers

In the future, employers will have to protect themselves against claims for damages made by employees who have experienced discrimination, fines from the authorities, and exclusion from public procurement procedures.

Art. 16 of the directive contains a right to compensation for breaches of equal pay by employers. Employees will have to be placed in the position in which they would have been if there had been no pay discrimination. This includes, in particular, material and non-material damages as well as interest on arrears. In the past, claims for damages due to pay discrimination were based on § 15 AGG.

In addition, Art. 18 (1) provides for a shift in the burden of proof to the employer in cases of pay discrimination, if an employee credibly establishes facts that demonstrate that there has been pay discrimination. According to Art. 18 (2), it should be sufficient for the burden of proof to shift if an employer does not comply with its obligations under Art. 5, 6, 7, 9 or 10. This employer would then have to prove that the breach was obviously unintentional and minor. The BAG (ruling of 21 January 2021 – 8 AZR 488/19) has so far applied § 22 AGG to pay discrimination. Following the implementation of the directive, this provision is likely to become more important with regard to breaches of duty by employers under the directive.

Furthermore, "dissuasive" fines will be implemented in accordance with Art. 23 (1). The legislator will most likely introduce various administrative offenses for violations of the above provisions. The EntgTranspG does not yet contain such sanctions.

In addition, Art. 24 (2) of the directive provides for exclusions from public procurement procedures. The directive thus specifies that violations of equal pay fall under § 124 (1) 1 of the Act against Restraints of Competition (GWB) and can constitute a reason for exclusion.

> "The complexity of pay transparency systems and the associated legal hurdles require a certain lead time for proper implementation."

From a compliance perspective, employers who prepare reports on a voluntary basis should pay attention to the fact that by preparing a report on the gender pay gap, any pay discrimination could be uncovered for the first time and a factual basis for claims for damages and fines could be created.

On the other hand, a voluntary report following a successful exclusion from public procurement procedures may constitute exculpatory grounds pursuant to § 125 (1) No. 3 GWB. It should be considered whether reporting is appropriate on a case-by-case basis.

Remuneration transparency is also likely to play a greater role in employment law due diligence in the future. If irregularities are discovered in this respect during due diligence, this may have an impact on purchase price negotiations. In this context, corresponding indemnities, representations and warranties in the company purchase agreement will also become relevant.

Conclusion

It will be interesting to see how the directive actually is implemented by the legislator. However, due to the significant deviations from the EntgTranspG, employers must already be prepared to adapt their remuneration systems accordingly. The complexity of pay transparency systems and the associated legal hurdles require a certain lead time for proper implementation. As a result, it would be advisable to introduce pay transparency systems before the directive is implemented. These can then be gradually evaluated and optimized. When the worst comes to worst – the implementation of the directive – companies will be better prepared for the new requirements. Failure to do so could result in fines, claims for damages and exclusion from public procurement procedures. Particular attention should also be paid to documentation requirements. If employers are diligent in preparing reports, the above risks can be minimized. This is because the relevant reports will be the flip side of the pay structure in the respective company and will show whether there is possible pay discrimination. ←

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The co-determination rights of works councils

A practical view on the German Whistleblower Protection Act

By Dr. Mark Zimmer

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The German Whistleblower Protection Act obliges employers with more than 50 employees to set up an internal reporting center. The idea of having the works councils act as an internal reporting office, which is sometimes suggested, should be strongly discouraged.

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The German Whistleblower Protection Act (Hinweisgeberschutzgesetz, or HinSchG) has been in force since last summer. This Act obliges employers with more than 50 employees to set up an internal reporting center. Neither the underlying EU directive nor the Act address the involvement of works councils. As a result, the co-determination of works councils can only be derived from general works constitution law.

What does the German Works Constitution Act say?

It is surely beyond dispute that employers must inform works councils of the establishment of an internal reporting center under § 80 of the German Works Constitution Act (Betriebsverfassungsgesetz, or BetrVG). In addition, approval rights for any hires or transfers may arise if the

internal reporting office is not outsourced but – despite various disadvantages that this entails – is staffed with the company's own employees. The works council may also have to be involved to the extent that the company's own employees designated for this purpose will be taught the specific knowledge required by law during in-house training courses.

> "The co-determination of a works council is not strictly necessary when implementing the German Whistleblower Protection Act if the employer has no obligation to report violations."

The issues just mentioned generally should not pose any problems in practice. The question of whether co-determination rights exist regarding the organization of internal reporting channels, however, is more controversial. This is highly relevant because the measure is otherwise invalid under individual employment law. This results from what is called the theory of effectiveness requirement. If the reporting center is deemed to be a technical facility for monitoring the performance or behavior of employees, co-determination rights result from § 87 (1) 6 BetrVG. However, we do not believe this is the case. A reporting center does not do any monitoring itself; instead this is done by the persons who process the reported facts. The law does not consider this case.

Order or organization of the company

It is questionable whether the regulation of an internal reporting office is a matter of the order of the company. For such a matter, § 87 (1) 1 BetrVG provides for co-determination. In this context, the Federal Labor Court ruled on 22 July 2008 (1 ABR 40/07) that this is the case if an employer wishes to commit its employees to report certain facts.

The co-determination of a works council is not strictly necessary when implementing the German Whistleblower Protection Act if the employer has no obligation to report violations. For a similar case, namely the staffing of a complaints department pursuant to § 13 of the General Equal Treatment Act, the Federal Labor Court explicitly ruled on 21 July 2009 (1 ABR 42/08): The works council has no right of co-determination when organizing the complaints department in more detail and staffing it, since this does not concern the order, but the organization of the company. This also applies when arranging the internal reporting office so that a right of co-determination will lapse here.

Organization of the notification procedure

The question that follows is whether the organization of the reporting procedure is subject to co-determination. This should certainly not be the case if the employer has decided at its own discretion to transfer the internal reporting office to a service provider outside the company. This removes the issue from the company sphere, and in turn eliminates the right of determination. The Federal Labor Court has only assumed a right of co-determination if the position is located within the company (1 ABR 42/08).

No compulsion to use anonymous reporting channels

An employer cannot be forced by the works council or by a conciliation committee to allow anonymous reporting. This is expressly regulated in § 16 (1) 5 HinSchG. Due to this clear legal provision, no obligation to provide anonymous reports can be established by a conciliation committee. This already follows from the introductory sentence of § 87 of the Works Constitution Act, according to which a right of co-determination does not apply if a statutory regulation exists.

Voluntary involvement of the works council advisable

A voluntary works agreement with the works council to implement the Whistleblower Protection Act may be advisable in any case, regardless of whether the works council has any co-determination rights. This has several advantages. First, it promotes acceptance among the workforce. Second, it reduces the risk of legal proceedings or the judicial appointment of a conciliation committee. Finally, it can form the basis under data protection law for measures taken by the employer if these are not yet covered by law.

Works council unsuitable as an internal reporting center

The idea of having the works council act as an internal reporting office, which is sometimes suggested, should be strongly discouraged. Apart from the fact that the aptitude required by law is unlikely to be present everywhere, it does not have the necessary independence required by law to fulfil its statutory mandate.

> "Works council members do not have a statutory right to refuse to testify – unlike doctors, lawyers, or similar persons subject to professional secrecy."

There is also the further problem that the works council has no right to refuse to testify with regard to the facts that are communicated to it by the workforce – often with the presumption of confidentiality. However, in the event of official proceedings, for example before the public prosecutor's office or court, the works council must testify about what employees have confided to it. Works council members do not have a statutory right to refuse to testify – unlike doctors, lawyers, or similar persons subject to professional secrecy. This fact is often misjudged. ←

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Towards an inclusive workplace culture

Companies are facing regulatory changes and labor law challenges

By Matthew Devey, Samantha Cornelius and Hendrik Bier

While it is undeniable that DE&I is a positive force for change within organizations, there are still legal and regulatory challenges that organizations face as they evolve toward a more inclusive workplace culture.

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Whilst Diversity, Equity & Inclusion (DE&I) may have historically been considered a matter for the Human Resources Department, we are increasingly seeing it being elevated to a board and management level issue, along with ESG and sustainability issues.

Although employees may still from time-to-time express views such as: "We don't have a DE&I problem here," and "DE&I is at odds with our meritocracy," there is ever more recognition by company leaders that diversity brings true benefits to businesses. It offers different opinions, ideas, ways of working, life experiences, social backgrounds and cultures for businesses to draw from. As a result, any employer that wants to truly maximize the potential of its workforce, ensure talent retention and encourage innovation must embrace DE&I initiatives.

Business benefits aside, there are also regulatory changes, which are forcing companies to focus on DE&I.

Regulatory changes at EU Level

The European Commission's **Gender Equality Strategy** frames the Commission's work on gender equality and sets out policy objectives and key actions, including legal measures to criminalize violence against women and ensure pay transparency, and greater gender balance in business and politics.

The following directives have already been adopted pursuant to this strategy:

- The **Women on Boards Directive** requires (among other things) that, by 30 June 2026, at least 40% of non-executive director positions in listed companies must be held by members of the underrepresented sex. If companies decide to apply the target to both executive and non-executive directors, the target will be 33% of all director positions. Member States have until 27 December 2024 to transpose the Directive into national law.

- Under the **EU Pay Transparency Directive**, EU-based companies with at least 100 employees will be required to provide information about their gender pay gap. The Directive also seeks to: (i) ban terms in employment contracts which prevent employees from discussing salaries or seeking information about the same or other categories of workers' pay; (ii) require Member States to impose penalties on companies in breach of the rules; and (iii) shift the burden of proof in pay discrimination claims from the worker to employers. The Directive also includes intersectional discrimination and will require job vacancies and titles to be gender neutral. Member States have until 7 June 2026 to transpose the Directive into national law.

Companies will need to be prepared for these changes once they take effect in national law.

Employment law challenges

The "Equity" part of DE&I focusses on remedying the fact that certain minority groups may be disadvantaged in comparison to others. Equity goes beyond equal treatment and requires thoughtful consideration of what changes should be made to policies, practices and working environments to ensure that all groups are able to reach their full potential, and may necessitate treating certain groups or individuals differently in order to do so. These DE&I initiatives are often referenced as positive measures or positive action. Examples of positive measures frequently implemented by organizations are mentoring and sponsoring programs for underrepresented talent, as well as targeted recruitment measures.

The implementation of positive measures to attract and retain a diverse workforce needs to be balanced against the risks of positive discrimination under employment laws.

In Germany, employees are protected against discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age, or sexual orientation under the provisions of the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz – AGG). Generally, pursuant to the AGG, any such discrimination is unlawful, particularly if it relates to conditions for access to employment, including selection criteria and recruitment conditions.

However, pursuant to § 5 AGG, unequal treatment of employees is permissible where suitable and appropriate measures are adopted to prevent or compensate for disadvantages arising on the grounds of race or ethnic origin, gender, religion or belief, disability, age, or sexual orientation (so-called positive action).

> "If positive measures are not considered suitable, necessary and proportionate to the purpose, then there is a higher risk of such measures being considered to involve positive discrimination, which would be unlawful."

Mentoring or sponsoring programs and targeted recruitment measures for women and persons from an underrepresented population could therefore be considered suitable and appropriate if they are objectively suitable, necessary, and proportionate overall to prevent or compensate for disadvantages (e.g., if women and persons from an underrepresented population are represented far less frequently in the company than in the population at large.)

If positive measures are not considered suitable, necessary and proportionate to the purpose, then there is a higher risk of such measures being considered to involve positive discrimination, which would be unlawful.

Take as an example a diverse recruitment strategy that requires 50% of the candidates interviewed for a vacant position to be from an underrepresented population. The purpose of the strategy is to contribute to a more diverse candidate pool and to prevent unconscious bias in the run-up to the application process.

> "The implementation of positive measures to attract and retain a diverse workforce needs to be balanced against the risks of positive discrimination under employment laws."

Since the strategy only stipulates that at least 50% of interview candidates must be from an underrepresented population, without making any statement as to who will ultimately be hired, it can be argued that this interview quota has been introduced to provide women and persons from underrepresented populations with additional opportunities to facilitate their career. It is also intended to prevent/compensate for disadvantages due to gender, race or ethnic origin and thus reduce discrimination against persons from underrepresented populations. Accordingly, the strategy creates equal opportunities which are permitted as positive action pursuant to § 5 AGG. Nonetheless, it would still be necessary to ensure that the interview candidates from the underrepresented population actually meet the requirements of the vacant position before they are invited to an interview.

Quotas for the actual hiring of candidates from an underrepresented population have the potential to be more problematic, especially if they are considered to be rigid quotas. German case law has ruled that rigid quotas and unconditional priority rules (i.e., provisions that automatically favor female candidates in a hiring process irrespective of their qualifications) are inadmissible. However, quotas could be considered to be more acceptable if

- the female candidates have the same, equivalent or at least almost the same qualifications as their male fellow candidates;
- female candidates are not given absolute and unconditional priority;
- the selection procedure is transparent and verifiable, and based on objective criteria; and
- all criteria concerning the person of the candidates are taken into account.

Whilst it is undeniable that DE&I is a positive force for change within organizations, as this article demonstrates, there are still legal and regulatory challenges faced by organizations as they evolve on their journey towards a more inclusive workplace culture. ←

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Anti-Semitic activities and political propaganda in works councils

Options for action and limits under Works Constitution Law

By Tobias Grambow

People of different origins and religions come together in the workplace. Tensions arise to which employers must react. Dealing with members of the works council in the event of political propaganda in the company is a particular challenge.

On 7 October 2023, the Palestinian terrorist organization Hamas slaughtered, raped and abducted Jewish men and women, children and babies in an act of unprecedented barbarism. And yet there are demonstrations not only in the Arab world, but also in German cities, at which terror is condoned, justified and explicitly welcomed. This is often accompanied by the desire of such actors to wipe the state of Israel off the map. Even companies are not immune to such actions by their employees. People of different origins and religions come together in the workplace. Tensions arise to which employers must react. Dealing with members of the works council in the event of political propaganda in companies is a particular challenge. This article provides an overview of the options for action, but also of the limits under Works Constitution Law.

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General considerations

The right to freedom of expression also applies in the workplace. However, this right is not unlimited. For example, it may be possible to terminate the employment of an employee whose statements in the company exceed the limits of criminal liability. This may be the case – with regard to the topic dealt with here – in the event of inciting hatred (§ 130 German Criminal Code (StGB)) or insulting statements, for example. Anyone who, in a manner likely to disturb the public peace,

- incites hatred against a national, racial, religious or ethnic group, against parts of the population or against an individual because of his or her membership of the aforementioned group or part of the population, or incites violence or arbitrary measures, or

- attacks the human dignity of others by insulting, maliciously denigrating or slandering a designated group, part of the population or an individual because of their membership of a designated group or part of the population.

This also includes the dissemination of such writings or articles in social media or on the internet. A punishable approval of criminal acts is also considered (§ 140 StGB). This criminal offense can be committed, for example, by celebrating or justifying the atrocities committed by Hamas at gatherings or on social media. In contrast to incitement to hatred, offenses committed abroad are also covered. The statement: "Free Palestine, from the river to sea" is usually aimed at the eradication of the state of Israel and can therefore constitute an offense (according to Fischer in LTO of 16 October2023, see **here**). If an unlawful or even criminal statement is made in a private chat group, an employee can only invoke a legitimate expectation of confidentiality in exceptional cases (German Federal Labor Court (BAG), ruling of 24 August 2023 – 2 AZR 17/23). As a result, chat content can be used, and in particular, used to justify dismissal. The disturbance of industrial peace (below the threshold of criminal liability) can also justify dismissal in individual cases, usually after a prior warning.

> "Employers cannot and must not tolerate political agitation that goes beyond the right to express an opinion. This also applies to members of the works council."

Not only activities within the company, but also activities outside the company can be relevant to dismissal if they have an impact on employment. There may be serious doubts as to the employee's reliability and/or suitability for the activity owed under their employment contract. Dismissal would be all the more justified if there is a connection to the job. Employees are also obliged to take into account the legitimate interests of their employer outside working hours. Unlawful conduct outside of work can result in an employee breaching their duty of consideration under § 241 (2) German Civil Code (BGB).

Political activities in the works council

Pursuant to § 74 (2) 2 (2) German Works Constitution Act (BetrVG), employers and works councils must refrain from activities that would impair the work process or the peace of the company. This prohibition applies not only to the works council as a body, but also to every member of the works council. Party political activities of the works council and its members are also prohibited, § 74 (2) 3 BetrVG. In contrast to the activities pursuant to § 74 (2) 2 BetrVG, it is not necessary for work processes or industrial peace to be impaired. The ban on party-political activity does not extend to statements of a general political nature without reference to a political party. Therefore, the works council would not violate the party-political neutrality requirement simply by making an appeal to the employees of the company to participate in an upcoming political election or to vote (BAG, ruling of 17 March 2010 – 7 ABR 95/08, NZA 2010, 1133). This means that general political statements are permissible, even if a distinction is difficult to make. Statements that are punishable by law or that disturb industrial peace are not permissible.

Injunctive relief of employers

In the opinion of the BAG, employers have no right to injunctive relief against works councils. Conversely, the court does grant works councils a general injunctive relief claim against employers if the relevant employer disregards the co-determination rights of the works council. However, it rejects a claim for injunctive relief on the part of employers – in a legally unconvincing manner – citing

the lack of assets of works councils and the associated lack of enforceability of injunctions.

Dissolution of works councils

If a works council grossly violates its statutory duties, an employer can, among other things, have the works council dissolved by a labor court, § 23 (1) BetrVG. In practice, however, this option proves to be a blunt sword. A works council would only be dissolved when the decision becomes final. A works council can delay the entry of a ruling like this into legal force, for example, by means of an appeal, including an appeal against denial of leave to appeal, if the Regional Labor Court (LAG) did not allow an appeal to the BAG. On the other hand, a works council could avoid dissolution by resigning shortly before a legally binding ruling, appointing an election committee and holding new elections. It is not possible to dissolve a works council by means of a temporary injunction.

Exclusion from works councils

If it is not the works council itself but one of its members that acts in a manner that represents a gross breach of duty, the employer (but also the works council itself) may apply to a labor court to exclude this member in accordance with § 23 (1) BetrVG. Similarly to the case of an application to dissolve the works council, a works council member would only be excluded on the basis of a legally binding ruling. The works council member who had acted in breach of duty may stand for re-election at a new election. A temporary ban on holding office may be considered, at least according to the Hessian Higher Labor Court (ruling of 28 August 2023 – 16 TaBVGa 97/23). An employer would have to take this step but would not be able to issue a legally effective ban on a works council member.

Dismissal of a works council member

The employment contract of a member of a works council (or a youth and trainee representative body) can only be terminated without notice for good cause. This means it would have to be unreasonable for the employer to continue with this employment. In addition, § 103 BetrVG requires the prior consent of the works council to their dismissal. If this were refused, the employer would have to obtain a labor court ruling. The works council member concerned would not be entitled to vote. Such dismissal can only be pronounced after consent has been granted or replaced. There are no absolute grounds for dismissal. The individual case must always be considered. As a rule, a warning must be issued before notice of dismissal is given. If there is a strong suspicion of a serious breach of duty or a criminal offense, dismissal on suspicion may also be considered. The employer would have to give the relevant employee the opportunity to comment on the specific allegations before issuing a dismissal on suspicion. A transfer may also be considered as a milder measure. Pursuant to § 103 (3) 1 BetrVG, the consent of the works council to a transfer is only required if the transfer would lead to a loss of office or eligibility for election.

Dismissal request of the works council

In accordance with § 104 BetrVG, a works council can demand that an employer removes or transfers disruptive employees from the company if an employee has repeatedly seriously disturbed industrial peace through unlawful conduct or gross violation of the principles contained in § 75 (1) BetrVG. This also applies if the employee in question is a member of the works council. The Federal Constitutional Court (BVerfG) recently ruled that the extraordinary dismissal of a member of the works council was lawful due to racist comments made by an employee (ruling of 2 November 2020 – 1 BvR 2727/19, NZA 2020, 1704). A works council could also enforce the dismissal request in a labor court. If an employer acts contrary to a legally binding court ruling, the works council could apply for the imposition of a fine of €250 for each day of non-compliance.

Conclusion

Employers cannot and must not tolerate political agitation that goes beyond the right to express an opinion. This also applies to members of the works council. While collective measures are often not very promising, (extraordinary) dismissals of works council members are also possible – with the consent of the works council. It is always important to consider the individual case. ←

IntellectualProperty

German versus European patent system

A plea in favor of the German patent system

By Detlef von Ahsen

Since 1 June 2023, proprietors of European patents granted by the European Patent Office (EPO) have had the choice between a traditional European bundle patent and a Unitary Patent for the 17 participating member states of the European Union.

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Introduction

On 1 June 2023, the new European Unified Patent Court (UPC) opened its doors. It is responsible for patent disputes for both existing and future European bundle patents granted under the existing system as well as for the new European Patents with Unitary Effect (Unitary Patent – UP) for the 17 participating member states of the European Union. An interactive map showing the 17 participating member states of the European Union can be found on the UPC's **website**. It is expected that Ireland and Croatia will follow very soon.

The Regulation on the creation of the UP mentioned above also entered into force on the same date as the UPC. Since then, proprietors of European patents granted by the European Patent Office (EPO), insofar as they were granted after this date, have had the choice between a traditional European bundle patent and a UP for the 17 participating member states of the European Union.

Only the bundle patent is available for the reminder of the member states of the European Patent Convention.

The launch of the new European patent system had been eagerly awaited. Initial experience shows that this new system promises to be a great success. The new system has already been used extensively in the first few weeks and the first rulings published by the UPC show that the judges involved are applying the rules with the utmost competence and care.

Despite all the euphoria shared by the author in favor of the new system and the associated advantages for patent proprietors and patent applicants, the tried and tested national German patent system should not be overlooked. In particular, it offers individual inventors and small and medium-sized enterprises a number of advantages, which will be highlighted below.

German versus European patent application

In particular, an IP right for Germany alone is often sufficient for individual inventors and small and medium-sized enterprises. Furthermore, Germany is a very important market within the European Union, so that competitors can be sufficiently disrupted, if not blocked, by an IP right that is only valid for Germany when entering the market outside Germany. However, this must be carefully examined for each individual case.

Both the EPO and the German Patent and Trademark Office (Deutsches Patent- und Markenamt – DPMA) have highly qualified examiners with a Master's degree or even a doctorate in an engineering or natural science subject from a university. Both offices provide intensive internal training for their work as examiners. However, in order to become an examiner at the DPMA, several years of practical technical experience are also required. As a result, DPMA examiners always have practical experience in their field of specialization. Consequently, they recognize the everyday work of typical inventors from their own experience.

> "Patent applications, in particular patent claims, must be clearly worded so that everyone can clearly recognize what is protected as an invention and thus prohibited to third parties."

In the author's opinion, a further advantage is the so-called deferred examination. Whereas in the case of a European patent application, a search request must be filed with the application and then a request for examination must be filed with the EPO within six months of the publication of the official search report (i.e., usually within two years of the filing date), applicants in the German procedure have up to seven years to file a request for examination. This means that applicants can wait for market opportunities and market development for the invention, if they wish, and can observe whether a time-consuming and costly examination procedure is worthwhile at all. Furthermore, competitors and their products can be observed during this time.

To avoid misunderstandings: Of course, applicants can also file the request for examination with the DPMA immediately with the application if they are interested in a very fast patent grant. In the German procedure the search and examination are carried out in one step and not in two consecutive steps, as is the case at the European Patent Office. This means a faster patent grant can generally be expected (if the requirements for protection are met).

Formal aspects of a patent application

Patent applications, in particular patent claims, must be clearly worded so that everyone can clearly recognize what is protected as an invention and thus prohibited to third parties. Furthermore, the application text, in particular the patent claims, is amended in the course of an examination procedure if it emerges during the examination procedure that the initially filed patent claims do not fulfil the requirements for protection, such as novelty or an inventive step. The author considers it a great advantage that the DPMA examiners are less formalistic in their examination of clarity and the admissibility of amendments than their colleagues at the EPO. Experience has shown that the DPMA examiners have a much closer eye on what a person skilled in the relevant technical field actually recognizes directly and unambiguously as technical teaching from the application documents in the light of the overall disclosure of the patent application. However, they are not too generous, as the author feels is the case in the

U.S. procedure, for example. Rather, in the author's opinion, there is a very good balance.

Despite careful examination, from time to time in the course of the examination procedure it happens that an inadmissible amendment, for example to the patent claims, creeps in. Here, too, the German procedure offers an advantage. If such an inadmissible extension of the disclosure occurs, the patent claims would actually have to be amended back again after the patent has been granted. At the same time, however, the scope of protection of a patent may no longer be broadened after the patent has been granted. In such a case, the prohibition of the unauthorized extension of the disclosure often conflicts with an inadmissible broadening of the scope of protection. In most cases, the inadmissible extension of the disclosure cannot be removed without simultaneously broadening the scope of protection.

In the European proceedings, the patent proprietor is then caught in what the EPO's Enlarged Board of Appeal called an inescapable trap in its rulings. The patent is completely revoked in its entirely purely for this formal reason, without any consideration of the quality of the invention.

In German proceedings, this error can be remedied by a disclaimer: If the novelty and inventive step of the invention are examined in opposition or nullity proceedings after the patent has been granted, the impermissibly extended feature is ignored. The patent proprietor cannot rely on this feature to support novelty or inventive step. If, on the other hand, the patent proprietor takes action against an alleged infringer on the basis of the patent, they must also rely on the impermissibly extended feature. The accused infringement must also show this feature in order to constitute an infringement.

The German utility model bifurcation

Another very nice German instrument is branching off a utility model, which is available to both European and German patent applications and patents. If an applicant still needs full protection during the pending examination procedure, they can branch off a German utility model from the pending patent application (whether German or European). This is registered without an examination of the requirements for protection, in particular novelty and inventive step, and thus very quickly offers full protection equivalent to a patent.

It should be noted that the term of a utility model is limited to a maximum of ten years from the filing date. In the case of branching off, the filing date of the patent application applies. Furthermore, utility models cannot be granted for pure process claims. This can often be avoided by skillfully wording the claims.

However, the applicant bears the full risk that the requirements for protection are met. As already mentioned, these are not officially examined. The state of the art to be taken into account for the protectability of utility models is less than for patents. Whereas in the case of patents, any prior publication, whether by written description, prior use, orally or in any other way, must be taken into account, only public prior use in Germany and written descriptions constitute relevant prior art in the case of utility models. If, for example, it turns out that an invention was pre-published by public prior use, for example in Japan or France, or by purely oral description during a lecture in Heidelberg, effective patent protection can no longer be obtained, but valid a utility model is still possible.

Furthermore, it is still possible to branch off a utility model during pending opposition proceedings, but not after the conclusion of such proceedings, e.g., during nullity proceedings. As a result, it is worthwhile to branch off a utility model at the end of a patent application procedure and have it up your sleeve.

Tactical considerations

With the introduction of the new system on 1 June 2023, the prohibition of double protection for European patents and national German patents, insofar as the patent proprietor also subjects their traditional European bundle patent to the jurisdiction of the UPC, has been removed and replaced by a prohibition of double enforcement. This means that both patents can continue to be valid side by side without restriction. Only when the patent proprietor actually wants to take action against an alleged infringer will they have to decide which of the patents to enforce, the German or the European patent. This means that it may be worthwhile to maintain both patents despite the costs for two patents with effect in Germany.

Another tactical consideration is the possibility of deferred examination in Germany. As mentioned above, the request

for examination at the DPMA can be deferred for up to seven years from the filing date. This makes it possible to apply for a European patent and have it granted as quickly as possible, while at the same time filing a German patent application and making use of the deferred examination. If an alleged patent infringement now occurs, a utility model can be branched off, the protection claims of which will be tailored to the alleged form of infringement within the disclosure of the patent application (an impermissible extension is also prohibited in the case of branching off a utility model). This provides a very sharp sword for infringement proceedings, which the author has often used successfully for his clients in his about 30 years of practice.

German court system versus EPG

Patent infringement proceedings for the 17 participating Member States arising from European bundle patents, unless their owners have opted out (in which case the national courts retain exclusive jurisdiction) and European Patents with Unitary Effect (the UPs) can be brought before the UPC. An infringement action before a competent regional court is possible for national German patents.

As already reported at the beginning, the UPC has experienced and highly qualified judges in patent law. Yet, this also applies to the competent German regional courts. Some German patent judges are at the same time judges at the UPC. However, one advantage of the UPC could be that a technically qualified judge can be added to the three legally qualified judges as a fourth full judge.

In German proceedings, the regional court can only appoint a technical expert. However, the preparation of expert opinions by an expert usually takes a long time and consequently often leads to considerable delays in the proceedings.

In response to an infringement action, an action for revocation is regularly brought against the patent in suit. In the case of the UPC, a nullity action is brought as a counterclaim and consequently also initially ends up before the infringement division. This division can separate the nullity counterclaim and refer it to a central division. This is not expected in practice. Rather, it can be assumed that the infringement chamber will decide on both the nullity counterclaim and the infringement claim in the same judgement in uniform proceedings.

In German proceedings, a nullity action must be brought before the Federal Patent Court in Munich. The regional courts are not authorized to rule on the validity of the patent in suit. Therefore, in a typical course of proceedings, the defendant will file a nullity action shortly before the expiry of the time limit for filing a defense in the infringement proceedings in order to obtain a stay of the infringement proceedings until the nullity proceedings have been concluded. However, practice shows that the regional courts are very reluctant to make use of the stay and only stay the proceedings if there is a potential probability that the patent in suit will be invalidated.

Nullity proceedings usually begin several months after the infringement action becomes pending. As the duration of proceedings at the Federal Patent Court is currently longer than at the regional courts, a judgement of nullity is often only issued several months later than a judgement of infringement if the proceedings have not been stayed. This time difference is referred to as the injunction gap.

In general, this injunction gap is perceived to be disadvantageous and jeopardizes the acceptance of the German court system. However, a patent proprietor can also take advantage of this injunction gap. Therefore, it can also be perceived as an advantage of the German system. However, the patent proprietor also exposes themselves to a liability risk if the patent in suit later proves to be invalid. Consequently, it must be considered very carefully whether a patent proprietor actually wants to enforce the infringement judgement obtained before the nullity proceedings have been concluded.

Conclusion

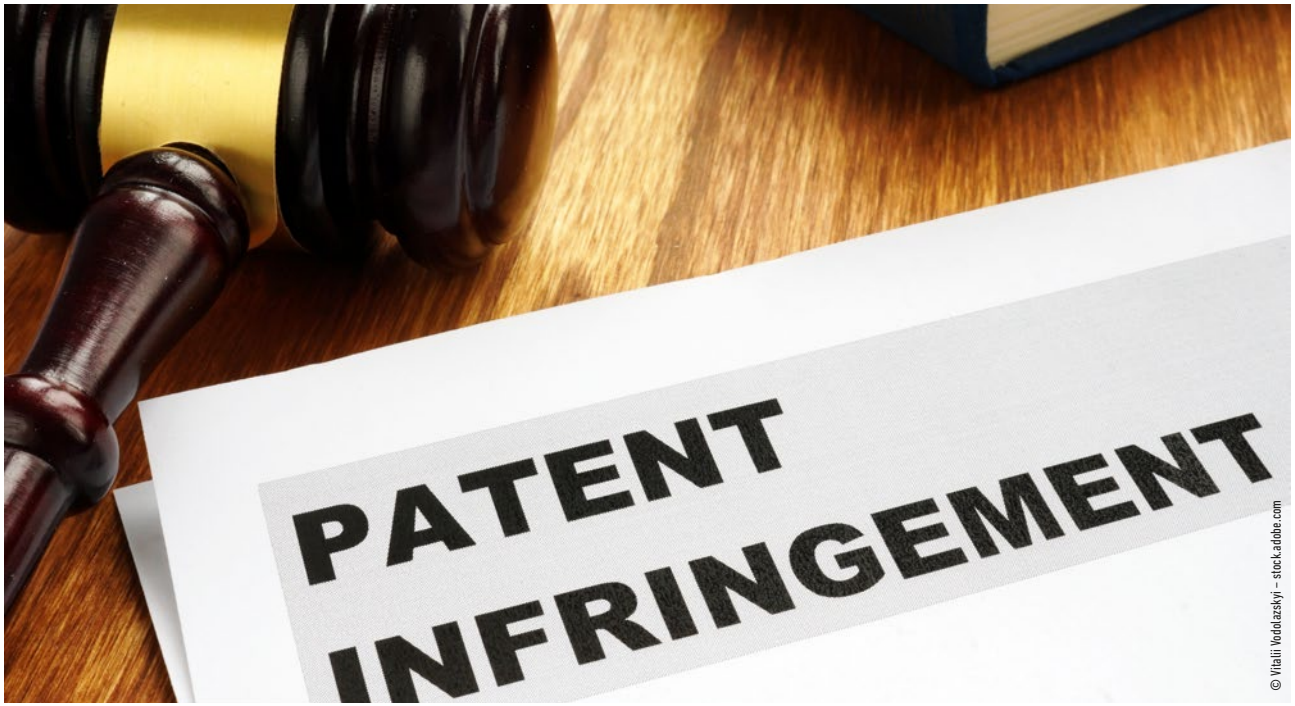
The list of differences between the European and German systems could be continued. The author has only picked out what he considers to be the most relevant.

At the same time, this article is intended to promote the filing of German patent applications in addition to or even instead of European patent applications. The German utility model should not be overlooked either. ←

The independent evidence procedure

Underestimated or unattractive?

By René Okoampah, Dipl.-Ing. and Dr. Peter Koch, LL.M.



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The independent evidence procedure is a tool available in particular in cases when establishing the facts and proving infringement is impossible for the applicant, because the actual embodiment of the challenged embodiment is not fully known and a sample is not or not yet available on the market.

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A patent infringement action – before the German courts or before the UPC – only has a chance of success if the plaintiff can prove the facts of infringement disputed by the defendant. If the actual embodiment of the challenged embodiment is not fully known and a sample is not or not yet available on the market, it is advisable to obtain evidence by means of an independent evidence procedure.

The independent evidence procedure (according to the Düsseldorf Model [§ 140c PatG] or according to Art. 60 UPCA) offers an opportunity to establish facts, secure evidence and obtain a court expert opinion. It can precede an intended infringement action in order to better assess its prospects of success.

Furthermore, an independent evidence procedure can also lead to the avoidance of main proceedings (e.g., because the parties already reach an agreement on the basis of the expert opinion or because the inspection eliminates the facts of the infringement). The person of the expert is likely to be decisive for an agreement between the parties.

The expert's expertise, reputation and independence – despite the applicant's right of nomination – often determine whether the parties accept the expert opinion and agree on a settlement to avoid a legal dispute.

> "The independent evidence procedure (according to the Düsseldorf Model [§ 140c PatG] or according to Art. 60 UPCA) offers an opportunity to establish facts, secure evidence and obtain a court expert opinion."

The requirements for such proceedings are manageable. The cost risk is limited compared to an infringement suit. However, despite the advantages mentioned above, it is used relatively rarely in practice and could be used even less frequently in the future if the requirements for the selection of the expert are excessive.

In the following we will provide a brief overview of the essential requirements and the course of the independent evidence procedure and highlight some practical difficulties.

Prerequisites

As a rule, the patent proprietor or the exclusive licensee comes into question as the applicant for a request for inspection. The request is filed with the infringement court that would also be entrusted with any subsequent main proceedings. A certain probability of infringement of the patent in suit is a prerequisite. The validity of the patent-in-suit must also be sufficiently probable. Furthermore, any other reasonable possibility of examining the validity of the infringement allegation must be ruled out.

Course of the proceedings

Once the request has been submitted to the competent district court, the inspection order can be issued in just a few days. In this order, the court specifies, among other things, the basis on which the written expert report is to be drawn up and appoints a court expert, who is usually proposed by the applicant. An inspection appointment is then coordinated between the bailiff, the expert and the applicant of inspection (inspection creditor). From the applicant's point of view, it is particularly charming that the inspection (according to the Düsseldorf model) – assuming a particular urgency – takes place without the defendant of inspection (inspection debtor) being summoned and heard beforehand. The resulting surprise effect reduces the risk of the defendant being able to remove evidence. A lawyer and/or a patent attorney may attend the inspection on behalf of the applicant. The applicant themself is not allowed to attend. The applicant's attorneys are obliged to maintain confidentiality with regard to the information they obtain during the inspection.

After the bailiff has handed over the inspection order to the inspection debtor, the latter has two hours to consult their legal counsel. The court expert then begins the appraisal. The latter only has to take place to the extent specified in the inspection order. Although the inspection debtor is not obliged to take any active steps, a certain duty to cooperate is considered reasonable (e.g., the removal of access obstacles, i.e., providing keys or entering passwords, providing energy supplies or other consumables, etc.).

In the second stage of the proceedings, the court expert draws up their report. The latter is then sent to the inspection debtor in order to give them the opportunity to comment on any confidentiality interests. In addition, the report is also handed over to the inspection creditor's attorneys, who may not, however, disclose it to their client without the court's approval. If the inspection debtor does not claim any business secrets, the expert opinion may also be disclosed to the inspection creditor. If, on the other hand, the inspection debtor asserts trade secrets, the inspection creditor will only receive a partially redacted report. If the confidentiality interest of the inspection debtor cannot be remedied by redactions, a disputed court decision is required as to whether and, if so, in what form the inspection creditor will also be personally informed of the expert opinion. The latter will have to be affirmed if the court's preliminary assessment confirms the suspicion of patent infringement. The independent evidence procedure ends when the expert opinion is sent to the parties. If necessary, this may be followed by an oral hearing of the expert.

The independent evidence procedure can be used to create facts quickly and easily. These facts can be used as leverage

in settlement negotiations, serve as a basis for a patent infringement suit or lead to an abrupt end to the legal dispute.

Practical difficulty – is an inspection still attractive?

In addition to the advantages of the inspection procedure, however, the difficulties faced by this type of fact-finding procedure should not be downplayed. This concerns both the selection of the expert and the question of whether the inspection should generally or only in exceptional cases be carried out without a prior hearing of the defendant.

Selection of the expert

The expert – usually a patent attorney – is appointed by the court but proposed by the applicant, and they are usually accepted by the court without any further examination. As a court-appointed expert, they not only have technical expertise; they also have the necessary independence and are subject to the duty of confidentiality towards third parties not involved in the proceedings, which is necessary for effective protection of trade secrets.

Depending on the technical field of the invention in dispute, even the search for a technically qualified patent attorney can prove to be time-consuming and difficult for the applicant. The patent attorney should not be aligned with either the applicant or the defendant, i.e., must not have a conflict. These may arise not only in relation to the applicant/defendant, but possibly also to suppliers or customers. If the patent attorney acts as an expert witness, they will be barred from both the active and passive process, not only at present but often also for the future. Consequently, the search for an available patent attorney can be difficult. In addition to the necessary technical understanding and expertise to gain a comprehensive picture of the possible infringement in a short time, numerous candidates are eliminated, especially as the remuneration or compensation of the expert is often disproportionate to the actual effort involved.

The question of whether the proposed and selected patent attorney is too "well-disposed" or too friendly with the applicant or the legal representatives, or whether they "owe a favor" to the lawyer or patent attorney representing the applicant, is often disputed. In other words, whether there are sufficient reasons that, in the eyes of a reasonable party, are likely to cast doubt on the impartiality of the expert, whereby purely subjective and unreasonable ideas such as excessive mistrust are not sufficient. If the requirements made of a "neutral" expert were to be set too high and the integrity of the expert were to be denied prematurely and without concrete evidence, there would presumably be little room for the selection of a suitable expert, especially as the expert would then regularly have to fear that they would also have to provide lengthy explanations as to why they are not biased or why there is not even the appearance of bias.

If every patent attorney with whom cooperation has already taken place in the past or is conceivable in the future were to be excluded as an expert witness in principle for fear of bias, this could reduce the circle of possible expert witnesses to virtually zero, considerably restrict the inspection procedure and also restrict lawyers' freedom to exercise their profession.

> "The expert's expertise, reputation and independence – despite the applicant's right of nomination – often determine whether the parties accept the expert opinion and agree on a settlement to avoid a legal dispute."

Of course, this does not mean that bias or even the mere concern of bias should not be avoided in every case. This applies to special close relationships, the appearance of which can arise, for example, from joint presentations by judges and lawyers at law firm events. Objectivity and impartiality are absolutely essential for judges as well as for experts in the context of expert activities. However, both here and there, it is important to warn against sweeping condemnations. It is important not to lose sight of reality and to strike a balance.

In the context of balance, one should probably also think about the consequences: What is the consequence of a courtesy opinion? Not only is the reputation of the patent attorney at stake, that of the attorney involved is as well. In addition, the underlying objective to avoid further litigation paving the way for settlement discussions cannot be

achieved if the expert is obviously biased. It should thus be in the very interest of the applicant to suggest a patent attorney as a technical expert that passes the test of being biased, thus providing for a reliable expert opinion that is objective, reliable and technically convincing for both parties.

High bar according to Art. 60 UPCA?

Before an inspection order is issued, the alleged infringer could be heard in order to introduce confidentiality interests into the proceedings in good time and from the affected side. However, this will rarely serve the interests of the applicant. Granting the right to be heard entails the risk, which can hardly ever be ruled out, that the subject matter of the inspection will be changed so that the originally infringing condition can no longer be determined in an inspection following the hearing. In contrast, the court's prohibition of the inspection debtor from making unauthorized changes to the object of inspection offers only limited protection. The easier it is to eliminate the infringing condition and the more difficult it is to identify the unlawful manipulations in retrospect, the less protection there will be.

In contrast to the German procedure for the preservation of evidence, which as mentioned earlier regularly takes place without a prior hearing of the party liable for inspection, the counterpart in Art. 60 UPCA provides that a hearing of the opposing party is only waived if "in particular where any delay is likely to cause irreparable harm to the proprietor of the patent, or where there is a demonstrable risk of evidence being destroyed". Only in the case of irreparable harm and a demonstrable risk of evidence being destroyed will the defendant not be heard (see also RoP 197). It remains to be seen whether the courts will lean towards the German model in future and regularly refrain from hearing the opponent or whether this will become the rule. So far, the UPC has used the ex parte option.

While the bar under Art. 60 UPCA with regard to "irreparable harm" and the "demonstrable risk of evidence being destroyed" appears to be set somewhat higher than in the German inspection procedure, it is something that can be overcome by the applicant.

In conclusion, the independent evidence procedure is a tool available in particular in cases when establishing the facts and proving infringement is impossible for the applicant, because the actual embodiment of the challenged embodiment is not fully known and a sample is not or not yet available on the market. While the requirements for such a proceeding are manageable and cost risk is limited, there are certain pitfalls and challenges the applicant needs to be aware of. ←

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The metaverse as a virtual marketplace

Opportunities and legal risks for businesses

By Ann-Cathrin Tönnes, LL.M. (King's College London)

The metaverse transcends physical boundaries and enables a global presence. It also offers businesses new ways of engaging with customers, such as interactive experiences, virtual events and personalized interactions.

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Ever since Mark Zuckerberg announced that he was renaming Facebook as Meta, it's been on everyone's lips – the metaverse. Although still in its infancy, this emerging industry promises to usher in a new era and fundamentally change the way we communicate, create, and do business.

Industry giants such as Microsoft and Google have announced billion-dollar investments to build the metaverse in the coming decades and, according to McKinsey, the metaverse could potentially be worth up to five trillion US dollars by 2030.

What exactly is the metaverse?

In the narrowest sense, the metaverse is intended to be an interoperable network of virtual 3D worlds in which we can network, learn, interact, and do business – the three-dimensional evolution of the internet, so to speak. There are already independent – i.e., non-interoperable – virtual 3D worlds such as the gaming platforms Roblox and Fortnite. These are not just used for gaming but are already generating millions in revenue through the sale of virtual goods.

In a broader sense, this vision also includes the seamless merging of the real and virtual worlds, for example by using augmented reality. Furniture manufacturers are already offering apps that allow customers to virtually place furniture in their home to visualize the desired piece of furniture in their living space before they buy it.

What opportunities are there for businesses?

The sale of virtual goods or services is opening up a new market with significant growth potential without the cost and complexity of physical production and distribution. Rapper Travis Scott's virtual concert on the gaming platform Fortnite in 2020, for example, only lasted eight minutes but generated revenues of around $20 million.

The metaverse also makes it possible to develop physical products more efficiently. Businesses can design and test digital twins in the metaverse. This minimizes risk, optimizes product development processes and reduces costs.

> "The metaverse transcends physical boundaries and enables a global presence. It also offers businesses new ways of engaging with customers, such as interactive experiences, virtual events and personalized interactions."

Businesses also have the unique opportunity to reach new and, above all, younger target groups. The 3D platform Roblox, for example, has around 50 million daily users, 67% of whom are under the age of 16. This demographic group holds immense potential, as they are the customers of the future, not only in virtual worlds, but also in the real world.

In addition, the metaverse transcends physical boundaries and enables a global presence. It also offers businesses new ways of engaging with customers, such as interactive experiences, virtual events and personalized interactions. The result is greater customer loyalty and retention.

What is there to consider? Three important tips

However, the new and unknown nature of the metaverse also harbors legal challenges and the risk of unintentionally becoming entangled in legal pitfalls.

So, what needs to be considered to ensure that businesses do not unintentionally infringe the rights of third parties when they enter the new virtual world and want to become active there?

1. Think of the metaverse!

With the advent of the internet, there were disputes in the past as to whether licensed rights also covered online use in addition to physical use. Many people did not anticipate internet use and therefore did not address and regulate it in their contracts. This led to ambiguities and, as a result, to legal disputes.

In the Web3 world, similar problems are now becoming apparent, as illustrated by the conflict between film producer Miramax and director Quentin Tarantino in connection with so-called NFTs. NFTs or "non-fungible tokens" essentially consist of two parts: the metadata, a

code that is stored on the blockchain, and the content, which can in principle be anything and is linked to the metadata via a hash code.

Tarantino had reserved certain rights to the film "Pulp Fiction", including "publication in print". The conflict arose when Tarantino announced that he wanted to sell some excerpts from his handwritten screenplay as NFTs. He argued that the above-mentioned clause also allowed him to create such NFTs. Miramax disagreed and went to court. At the end of 2023, an out-of-court settlement was reached between the parties, the details of which are not yet available.

> "The metaverse also makes it possible to develop physical products more efficiently. Businesses can design and test digital twins in the metaverse. This minimizes risk, optimizes product development processes and reduces costs."

To avoid such complications, emerging or future technological developments must be included in license and usage agreements at an early stage. In the context of the metaverse, this means integrating clear regulations on virtual use into contracts – even if there are no concrete plans for the metaverse yet.

For example, a business is planning to develop a specific product line in collaboration with a well-known designer or pop star. If the business intends to have its partner transfer the corresponding rights to it, virtual versions of this product line must also be considered. Can the business create virtual versions for 3D platforms in addition to the physical product? Does the transfer of rights also include the production of NFTs? For which countries is a license required for such virtual and thus transnational use?

Of course, this also applies vice versa. Businesses that license their intellectual property to third parties should define clear and precise conditions for the use of their rights in the metaverse.

This foresight will enable a smoother transition to the metaverse without the need for lengthy renegotiations.

2. Secure the appropriate rights!

Businesses typically rely on external partners, particularly software developers and virtual reality designers, to create virtual worlds and objects. Although experiences in the metaverse may seem vivid and tangible, virtual products are fundamentally different from physical products. At their core, they are merely manifestations of software code that has been created specifically for this environment. As such, these codes, and thus the digital/virtual creations, may be protected by copyright – independently of the copyright protection of the physical product on which the virtual product may be based.

Imagine a furniture company hires a virtual reality designer to transform one of its characteristic and copyright-protected pieces of furniture into a virtual product for the metaverse. Even if this virtual product is ultimately only an exact copy of a real object that is already protected by copyright, it could still be considered a copyrightable creation in its own right.

The same applies when software developers are commissioned to first design a virtual product for product development, which will be tested as a digital twin in the virtual world before it goes into physical mass production. New and independent copyrights could arise in connection with this digital twin.

Therefore, it is important to include provisions in the agreements with the designers that regulate the ownership and transfer of the exploitation rights of the virtual products. In this way, potential disputes over exploitation rights can be avoided and businesses can fully exploit their virtual goods without infringing the rights of their software developers.

3. Be transparent!

One common first step in establishing a presence in the metaverse is the use of NFTs. These can take a variety of forms, such as keys or tickets to exclusive events, or access to physical or virtual products. For example, RTFKT, a digital fashion company (since acquired by Nike), worked with a digital artist to sell 620 virtual sneakers as NFTs, raising $3.1 million in less than 5 minutes. With the help of so-called "smart contracts",

functions can also be integrated that enable revenue shares in subsequent NFT resales.

But – the sale of NFTs is a new business area that is not yet characterized by established practices. This means that buyers are often very uncertain about what exactly they are buying. In particular, the current NFT hype and sometimes exorbitant sales prices can lead to the erroneous assumption that the acquisition of such NFTs also entails the acquisition of comprehensive industrial property rights.

> "The new and unknown nature of the metaverse also harbors legal challenges and the risk of unintentionally becoming entangled in legal pitfalls."

This may be true in some cases. For example, in the case of the Bored Ape Yacht Club (an NFT collection of profile pictures of a cartoon monkey), the owners of the NFTs have been granted the right to make unlimited commercial use of their NFT artwork. However, the vast majority of businesses will want to retain commercial exploitation rights when creating and selling NFTs and only transfer certain rights of use for non-commercial purposes. This allows them to continue to exercise exclusive control over the use and marketing of the digital or virtual products in various contexts and platforms.

To avoid such misunderstandings caused by differing expectations and any resulting legal disputes due to unfair competition, transparency in the legal structure is essential. It must be clearly communicated which rights of use are granted to the buyer. If the NFT's smart contract stipulates that the business will also participate in resales, this must be clearly indicated. This will ensure smooth participation in the evolving digital or virtual world and avoid disappointed expectations. The old legal adage also applies in the metaverse: "The best contracts are those in which everything is regulated in such a way that they can disappear directly into the (digital) drawer after conclusion."

Summary

The metaverse offers businesses immense opportunities, from new markets to efficient product development. Nevertheless, businesses should think about legal aspects at an early stage, make clear agreements on ownership and utilization rights, and focus on transparency when selling NFTs or virtual products. The rapid rise of this digital world requires proactive action to ensure smooth integration and legal clarity. ←

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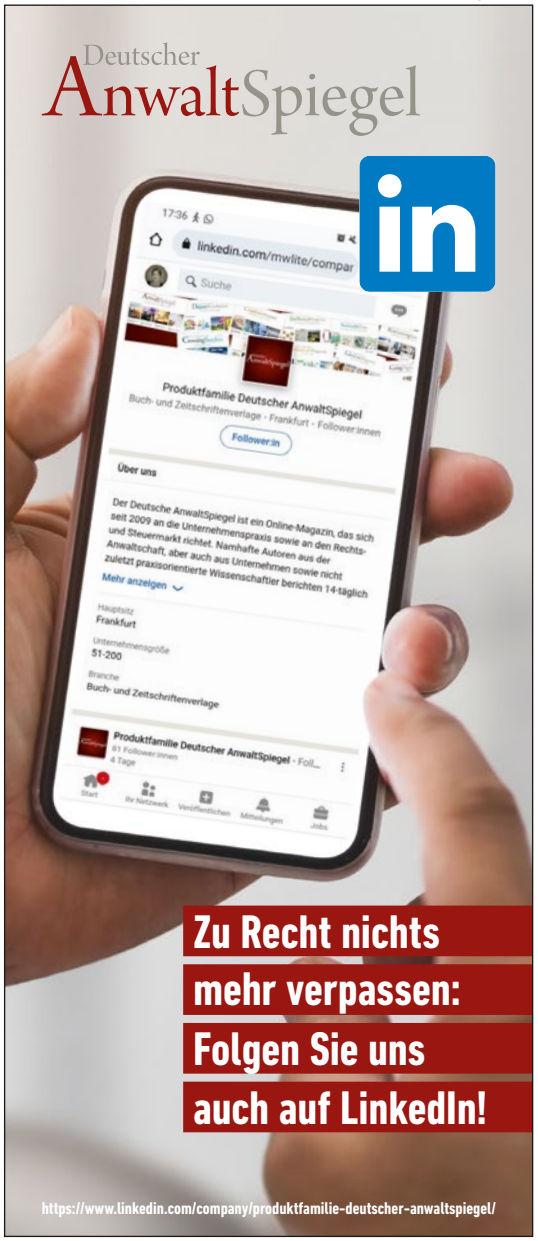

Harmonizing the breadth and scope of privileged research

The AIPPI Resolution on experimental use and Bolar-type exemptions from patent protection

By Markus Rieck, LL.M.

AIPPI is convinced that consistent and predictable application of experimental use and Bolar-type exemptions are key factors in advancing technological progress and medical research nationally and globally.

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Background

The purpose of patent law is to encourage innovation by granting inventors exclusive rights to their inventions for a limited period. This legal protection incentivizes the development and sharing of new technologies, ensuring that inventors can benefit commercially from their creativity. In return for this monopoly, inventors must publicly disclose their inventions, contributing to the wider knowledge pool and fostering further innovation. This balance aims to stimulate technological progress while ensuring public access to new inventions after patent rights expire.

To foster innovation and the further development of patented inventions, experimental use of a patented invention for generating knowledge about the patented invention is exempted from patent protection in many jurisdictions. Bolar-type exemptions on the other hand allow clinical studies for the purposes of market approval of a patented product, i.e., they allow experiments that serve purely commercial purposes. Other than experimental use exemptions, Bolar-type exemptions primarily serve public interests, i.e., the facilitation of early market approval for generic medicines.

> "Uncertainty about the breadth and scope of an experimental use exemption can affect technological progress, particularly in industries that rely on incremental improvements of existing technologies."

AIPPI is convinced that consistent and predictable application of experimental use and Bolar-type exemptions are key factors in advancing technological progress and medical research nationally and globally. Intensified international cooperation after the outbreak of the COVID pandemic has strongly increased the need for harmonization of these exceptions to patent protection. AIPPI's Pharma Committee, one of the 25 Standing Committees within the organization, drafted a questionnaire and received responses from 37 national groups. The group reports provide a comprehensive overview of the national laws of these groups. The reports are prepared by intellectual property law experts, attorneys, academic researchers, judges and in-house professionals. These reports and the final resolution can be accessed in AIPPI's online library (see **here**).

The adopted resolution

AIPPI's adopted resolution proposes a harmonized approach to the experimental use and Bolar-type exemptions that national courts and legislators should consider to further consistent and predictable legislation and jurisprudence.

Based on an analysis of diverging national practices reported by AIPPI's national groups, the following suggestions for harmonization were discussed, drafted and adopted at the AIPPI World Congress in Istanbul.

Exempted acts

The experimental use exemption should cover experiments on the subject matter of the invention. In other words, the purpose of the experiment must be to generate knowledge about the invention. Conversely, if the invention is a research tool, using this tool in experiments for other purposes should not be covered by the exception. If the experiment is directed at the investigation of the patented product, the exception should apply, irrespective of whether the aim of the experiments may also have commercial value. For example, the following actions should be allowed:

- Investigating the validity of the patent and its scope of protection,
- Discovering features and properties of the patented subject matter,
- Finding alternative methods of making or using the patent subject matter,
- Improving the patented invention.

Assisting parties

A party who assists the experimenter in performing the experiments should likewise not be liable for patent infringement as long as the experiments are exempted actions. Assisting parties are for example suppliers, contract manufacturers or research service providers who help the party that conducts the experiments. These assisting parties should fall under the exemptions even if they have a purely commercial intent.

Scope of Bolar-type exemptions

The Bolar-type exemption should apply to activities necessary for developing products which require regulatory approval, regardless of whether the product is an innovative, biosimilar or generic product.

The geographical scope should extend to actions performed with the purpose of regulatory approval in a foreign country, e.g., a clinical trial performed in Germany should fall under the exemption even if the desired market authorization is applied for in the UK.

The Bolar-type exemption should apply to assisting parties as well, e.g., suppliers of patented product. However, it should be clear that stockpiling, i.e., manufacturing the patent-protected product during the term of the patent for the purpose of early market entry, is not covered by the Bolar-type exemption.

Burden of proof

The burden of proof of an exception – be it an experimental use exception or a Bolar-type exemption – should lie with the party that intends to rely on it. The same should apply for assisting parties.

Discussion

Uncertainty about the breadth and scope of an experimental use exemption can affect technological progress, particularly in industries that rely on incremental improvements of existing technologies. As of today, most countries have statutory exceptions to patent protection for experimental activities. However, the laws of the various countries are not harmonized in that the definition of what constitutes an experimental activity varies, particularly as regards commercial purposes of the experiments. Also, laws differ concerning the question of whether assisting parties may benefit from the exemption, or whether patented inventions may be used as research tools, i.e., experiments with the patented invention as opposed to experiments on the patented invention.

Having identified the many variations in the various national laws of its national groups, AIPPI adopted the resolution summarized above as a suggestion for international harmonization. The resolution is the result of many rounds of discussion among intellectual property law experts. The result is a further example of how AIPPI can help shape a more harmonized international IP landscape by providing guidance to courts and legislators around the world.

> "To foster innovation and the further development of patented inventions, experimental use of a patented invention for generating knowledge about the patented invention is exempted from patent protection in many jurisdictions."

From a German perspective, the adopted resolution is not at odds with the existing laws in Germany. However, clear guidance regarding the exemption of actions performed by assisting parties is still lacking in Germany. It would be desirable to see such guidance in line with AIPPI's resolution from the courts in due course, particularly since smaller research entities are often dependent on support by assisting parties to conduct their research. Clarity as to the extent to which the experimental use exemption covers assisting actions would improve legal certainty and thereby strengthen Germany as a country of scientific and clinical research. ←

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GoingDigital

Data protection and digital issues in 2024

At a glance: upcoming legislative changes

By Dr. Benedikt Kohn, CIPP/E and Carla Nelles, LL.M. (Amsterdam)

In 2024, there will once again be some interesting developments in the area of data protection and digital matters – including, for example, the implementation of the EU requirements for the Digital Services and Data Act. However, German legislators also have plans that have already been announced in the coalition agreement and the German government's data strategy.

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The first quarter of 2024 has flown by and it's time to tackle new projects! To keep you up to date in the area of data protection and digital matters, we have summarized some of the most important developments in 2024 for you.

Digital Services Act

The "Digital Services Act" (**DSA**), which aims to prevent illegal or harmful online activities and the spread of disinformation, currently only applies to very large online platforms ("VLOPs") and very large online search engines ("VLOSEs"). The entire set of rules has applied since 17 February 2024 and therefore also applies to smaller platforms as a result. By means of a graduated regulatory system, various due diligence obligations now apply to online platforms, in particular the obligation to remove illegal content quickly and efficiently. EU Member States are required to create the corresponding foundations and powers for their national authorities to enforce the new EU law by the aforementioned deadline. A draft bill for an implementing law has been available in Germany since 4 August 2023 and was approved by the Federal Cabinet on 20 December 2023. The first reading in the Bundestag took place on 18 January 2024. The transposition period of the DSA could therefore not be met and the legislation process is still ongoing.

Artificial Intelligence Act

The "Artificial Intelligence Act" (**AI Act**), which was drafted in April 2021, was adopted by the European Parliament on 13 March 2024. The AI Act lays down harmonized rules for the placing on the market, putting into service or use of AI systems within the EU and is intended to promote innovation as well as reduce AI-correlated risks. It provides transitional regulations from the time it enters into force (expected May 2024). After six months (expected November 2024), prohibited practices in the AI sector (Art. 5 AI Act) must be shut down. The AI Act will take full effect from mid-2026.

Data Act

The "Regulation on Harmonized Rules on Fair Access to and Use of Data" (**Data Act**), which was published on 13 December last year, entered into force on 11 January 2024. However, the Data Act will not apply until 20 months after its entry into force, from 12 September 2025. The aim of the regulation is to enable increased and better use of data in various areas of life in the future. To this end, the Data Act regulates, for example, the transfer of data between companies and consumers (B2C), between companies themselves (B2B) and also – in narrow exceptional cases – to public authorities (B2G). There are also provisions prohibiting abusive contractual clauses for data access and data use between companies, as well as contractual regulations and technical implementations when switching between data processing services (so-called cloud switching).

Digital Act and Health Data Utilization Act

The German legislator also has plans. On 30 August 2023, the Federal Cabinet passed the "Act to Accelerate the Digitalization of the Healthcare System" [Entwurf eines Gesetzes zur Beschleunigung der Digitalisierung des Gesundheitswesens] (**Digital Act**) and the "Act on the Improved Use of Health Data" [Entwurf eines Gesetzes zur verbesserten Nutzung von Gesundheitsdaten] (**Health Data Use Act**). The Digital Act aims to introduce electronic patient files from 2025, further develop electronic prescriptions and create new rules for telemedicine. The Health Data Use Act aims to improve the availability of health data, particularly for public welfare purposes. Both laws were passed by the Bundestag on 14 December 2023 and are expected to be passed by the Bundesrat on 2 February 2024.

Regulating short-term rental platforms

Less well known, but with a potentially major impact on the daily lives of many people, is the **draft** "Regulation on data collection and sharing relating to short-term accommodation rental services", which is intended to enable national control of short-term rental platforms such as Airbnb. The Regulation aims to introduce clear rules for data sharing and harmonized administrative procedures within the EU in order to better tackle illegal holiday rentals in major cities and enforce local regulations. An agreement on the Regulation was reached in trilogue on 16 November 2023, which was approved by the European Parliament in February 2024. After the

Regulation enters into force, short-term rental platforms will have two years to implement the necessary data sharing mechanisms.

NIS-2 Implementation Act

The "Directive on measures for a high common level of cybersecurity across the Union" (**NIS 2 Directive**), which provides for numerous legal measures to increase the overall level of cybersecurity in the EU and introduces various innovations compared to the first version of the NIS Directive from 2016, came into force in 2023. EU Member States are now required to implement the Directive into national law by 17 October 2024. A corresponding draft bill from the Federal Ministry of the Interior and for Home Affairs is already available.

Cyber Resilience Act

From smartwatches and baby monitors to other products and software that contain a digital component and are not already covered by existing regulations, the Cyber Resilience Act (**CRA**) is intended to protect consumers and businesses that buy or use software or products with a digital component. Inadequate security features will become a thing of the past with the introduction of mandatory cyber security requirements at every stage of the supply chain. Software and products that are connected to the internet should be CE marked. While the European Parliament approved the CRA on 12 March 2024, it is not expected to enter into force before mid-2024.

Recording digital working time

According to the rulings of the European Court of Justice of 14 May 2019 (**C-55/18**) and the Federal Labor Court [Bundesarbeitsgericht] of 13 September 2022 (**1 ABR 22/21**), employers are obliged to introduce and apply a system to record the daily working hours of their employees. A draft by the Federal Ministry of Labor on the structure of recording working time in the Working Hours Act, which was published on 18 April 2023, is intended to specify this obligation and put it on a legal basis. The draft, which requires employers to digitally record the start, end and duration of employees' daily working hours, is controversial and is considered too inflexible. The legislative process has not progressed since then, but due to considerable pressure on the issue, developments are expected in 2024. The "Working Hours Act" task force of the Bundesverband der Wirtschaftskanzleien in Deutschland (BWD) has published a position paper on this subject, which is well worth reading (see **here**).

Employee Data Protection Act

Will it really happen this time? In 2024, the question still remains as to whether the Employee Data Protection Act [Beschäftigtendatenschutzgesetz], which has been awaited for over a decade, will enter into force. The draft law envisaged in the **coalition agreement** and announced in the **Federal Government's data strategy** for 2023 is expected to be available by mid-2024. In any case, the arguments for and against are very well known (see **here**).

Markets in Crypto-Assets Regulation

The "Markets in Crypto-Assets Regulation" (**MiCA**) is intended to provide legal certainty for crypto assets – cryptocurrencies, security tokens and stablecoins. MiCA is intended to ensure risk-appropriate regulation of distributed ledger technology and virtual assets in the EU by increasing the protection of investors and contributing to the functioning of the markets. The MiCA was approved by the EU Parliament on 20 April 2023 and published in the Official Journal of the European Union on 9 June 2023. Some provisions are due to enter into force as early as July 2024, while the majority will not take effect until early 2025.

Revised Product Liability Directive

On 14 December 2023 the EU Parliament and the Council reached a political agreement on the revised Product Liability Directive (see **here**). This is intended to replace the current Product Liability Directive, which dates back to 1985. In particular, the area of new digital technologies, including software and AI systems, will be taken into account and product liability regulations will be tightened. The vote in the European Parliament is scheduled for 10 April 2024, with entry into force expected in mid-2024.

EU Digital Identity Wallet

Identity cards, drivers' licenses, health certificates, bank accounts and more – all of these will be subject to a single

framework for trusted and secure digital identity, enabling universal access to secure and trusted electronic identification and authentication for public and private services in the EU. The **agreement** following the trilogue negotiations in February 2024 still needs to be adopted by the European Parliament. The corresponding implementing provisions will be adopted 6 and 12 months after the adoption of the Regulation. 24 months after the adoption of the relevant implementing provisions setting out the technical specifications for the EUid wallet and its certification, EU Member States will have to make EUid wallets available to their citizens. EUid wallets are therefore not expected to be available before 2026/2027.

Legal and ethical guidelines for the metaverse

The EU Parliament has published a **draft report** discussing the legal and ethical challenges involved in developing virtual worlds and the metaverse. The report places particular emphasis on standardized definitions, ethical guidelines, data protection and the applicability of EU law. The vote in the European Parliament took place on 15 January 2024.

Pact for accelerating planning, approval and implementation

Planning and approval procedures will be accelerated. On 6 November 2023, the Federal Chancellor and the leaders of the Federal States in Germany concluded a **pact** to accelerate planning, approval and implementation [Pakt für Planungs-, Genehmigungs- und Umsetzungsbeschleunigung] to digitize and accelerate planning and approval processes in Germany and thus secure the competitiveness of Germany. The acceleration will be decisive for several core areas such as digitalization, the energy transition, improving infrastructure and achieving climate targets, and will be incorporated into the legislative process in a timely manner. The first results of the federal-state pact should be available in the first quarter of 2024. ←

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The GenAI revolution has already begun

The importance of generative AI for Document and Contract Lifecycle Management (DCLM)

By Dr. Juergen Erbeldinger

As the power of artificial intelligence continues to grow, so do the possibilities for document creation and management. At the same time, the ability of machines to read and "understand" text has created a gray area regarding the protection and use of intellectual property and documents in general.

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Documents and contracts serve as a reliable source for the rights and obligations an organization has with in relation to its environment. As a result, the entire lifecycle of documents and contracts must be governed and managed reliably and in as standardized a form as possible – from the underlying data sources to creation, delivery, and archiving. As the power of artificial intelligence continues to grow, so do the possibilities for document creation and management. This means that a radical change in document and contract lifecycle management (DCLM) is within reach.

Documents as a contradiction to the digitalized "single source of truth"

The primary purpose of documents in general, and contracts in particular, is to create a binding basis for all parties that can be referred to in the event of doubt and to resolve disputes. Ideally, the relevant facts and the resulting rights and obligations should be stated only once, and then as clearly and unambiguously as possible. When these conditions are met, documents and the subset of contracts can fulfill their true purpose as a

"single source of truth" (SSOT) (see **"Practical Handbook Legal Operations"**).

Documents, as the traditional way of storing and managing data and information, are inherently at odds with information technology. This is because IT systems are ultimately based on computers that are built to perform calculations in the areas of algebra, analysis, geometry, etc., and not to understand text. Texts are merely representations of binary data that make them readable by humans. Of course, computers can store documents, and the data and values they contain (document data in the strict sense), and can also support the creation and editing of texts. However, they cannot per se recognize and understand what the regulatory content of the texts is and what the data means.

> "The use of artificial intelligence is nothing less than a paradigm shift in document creation and management."

This means that there must always be an intermediate step to extract and classify data from texts so that it can be processed by a computer. The content and meaning of texts must be translated into formal logic that a computer can understand – programming languages are nothing else. All these steps are or have been possible in the past only with human intervention and were prone to error as a result – and in general also prone to failure. If you look at this medial or conceptual rupture in considering digitalized documents as the only reliable source of information, you can see the contradiction. Being the sole source already fails because relevant data and information (content) have to be extracted and transformed from documents in order to be processed in systems, i.e., they are always derived and secondary.

Machines can understand and create text for the first time

The use of artificial intelligence is nothing less than a paradigm shift in document creation and management. The ability to vectorize texts, i.e., to convert them into numbers, and to train neural networks based on these vectors – nothing more than the training of foundation models – to then apply algebraic rules to texts, is a scientific advance whose scope we can hardly measure. At the same time, the ability of machines to read and "understand" text has created a gray area regarding the protection and use of intellectual property and documents in general.

The paper "Attention is all you need" (Vaswani et al., 2017; see **here**) has fundamentally changed research in the field of artificial intelligence worldwide. The article introduces the transformer model, the encoder. This model processes entire sentences simultaneously rather than word by word. This preserves the context, i.e., the relationship between words in the sentence structure.

When text is vectorized, i.e., converted into numbers, the entire sentence or text segment is used, not just the individual word or character. It is then statistically determined which parts of the sentence are relevant for the meaning (self-attention layer). The verb "fly" gives the noun "bat" a different meaning than the words "risky" or "money". The results are based on simple algebraic rules (logistic regression), something computers are very good at.

The next breakthrough was already achieved in 2018 with the concept of pre-trained bidirectional transformers (Devlin et al., 2018, the abbreviation BERT stands for "Bidirectional Encoder Representations from Transformers", see **here**). These models use decoders and encoders (bidirectional transformers) and minimize the number of nodes needed to achieve results. Pre-trained means that the neural networks are specified to correctly close gaps (masking) in the text or correctly continue truncated text.

This approach is ideal for self-supervised learning and allows networks to be trained on much larger amounts of data and to utilize the nodes more efficiently than was previously possible. This change in scale has greatly improved the discriminative power of the regression models.

Bidirectional transformer models have made it possible to represent words, sentences and entire texts conceptually, i.e., abstractly and in terms of content (representing binary data as text is merely a symbolic representation). The capital letter "B" is assigned the ASCII code 66 and thus the binary value 01000010. A conceptual representation means that objects (words, sentences, texts) are understood in the sense of "understood" in their context. It should be emphasized that no linguistic approaches are used, but purely algebraic (computational) rules make this breakthrough possible. With these approaches, computers

(calculators) have for the first time achieved the ability to understand a text, which is otherwise reserved for humans.

The importance of foundation models for handling documents and contracts

Properly trained foundation models allow us to communicate with computers using natural language: We can give instructions in our own language (no one seriously takes the claim that prompting is a "own" computer query language anymore), ask questions, and follow up until we are satisfied with the result, or the maximum prompt length has been reached (the prompt length is currently around 4,000 tokens, which corresponds to around 8 to 12 thousand words, or 20 to 40 DINA4 pages of sophisticated text. To solve the above or similar tasks, the prompt length is often not enough. An iterative approach is not possible because the models are all stateless and cannot remember results). The machine becomes our interlocutor.

This feature alone is groundbreaking. In the context of DCLM systems, it will mean that the capture of document data and content, an activity previously reserved for humans, will be transferred to computers. It is easy to instruct the model to extract data and relevant text passages from texts and prepare them for subsequent systems or tasks and analyses.

An instruction along the lines of "make a list of all the contracts we have with company A and its successors and predecessors, show when and how the contracts have changed, and highlight all the places where change of control provisions have been made" will not produce the desired results on the first try. However, with sufficient experience and expertise, a modified GenAI system can be created that is capable of performing this and other much more demanding tasks quickly and reliably.

Another task that machines can and will take over is creating documents and certain tasks from the "negotiation and coordination" phase. Microsoft's Co-Pilot models provide a first, albeit very weak, indication of what will be possible here.

> "Documents, as the traditional way of storing and managing data and information, are inherently at odds with information technology."

In the creation phase, the focus is on whether the form and regulatory content meet the requirements of the creator. In negotiation and agreement, it is often a matter of adapting texts so that they reflect what is intended and are sufficiently clear and precise to prevail in the event of a dispute. Another consideration is whether a provision is balanced or biased in favor of one party.

These aspects can be very well represented by semantic proximity and therefore especially by transformer-based models. If single and few-shot learning (fine-tuning) is not sufficient, you can train your own small models based on synthetic data. We use our document generators to generate training data with low variance. Small deviations ensure very good training effects in particular.

AI as a trained expert system for legal texts

The second approach is to train the GenAI to control a document generation engine, which then ensures compliance with rules and uses curated metadata to map requirements such as "clear and concise", "admissible in court", or "balanced". Training AI models on a formally logical command language to drive an engine is standard and produces excellent results. Much of what is set and assigned by hand today will come from GenAI in the future.

The third option is to train the models to extract and input content objects and make heuristic-based suggestions for evaluation and curation. Curated data sets are the basis for training expert systems, which in turn can contribute to increased performance of the GenAI models through reinforced learning. One of the 16 or more models of GPT-5 could be a broadly trained expert system for legal texts in the future. The most important trend in AI at the moment is the combination of large language models with conceptually trained domain-specific expert systems. There is enormous potential here for understanding and creating complex domain-specific texts and documents. It is doubtful whether DCLM systems in the current sense will still be needed. While many are still struggling with digital transformation, the GenAI revolution has already begun. ←

CLD challenges: Too much information is relative

A conversation with Hans Van Heghe

By Ivan Rasic

The conversation with the founder of Knowliah, Hans Van Heghe, revolves around CLD work and challenges in the contemporary business environment.

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When STP announced the Knowliah acquisition earlier this year, it was an excellent opportunity to learn about their sector (plus, I am always keen to listen to founder stories).

As a starter, Knowliah helps Corporate Legal Departments (I'll refer to these as "CLD" for brevity in the latter text) navigate and thrive in the age of digitalization of knowledge and information. As a result, my conversation with its founder, Hans Van Heghe, revolves around CLD work and challenges in the contemporary business environment.

Some points may illuminate if you are a corporate counsel, or otherwise part of a CLD. Their forward-looking approach to managing and using information (the "JERI") made a particular impression and is, in my humble view, paramount for contemporary CLD work.

Without further ado, below are the highlights of Hans' and my discussion, laid out in the Question & Answer format.

The context is the glue

Firstly, for the uninitiated, would you please introduce yourself, Knowliah, and your mission?

Hans Van Heghe: Certainly; to start with myself, I am an engineer, computer scientist, and mathematician. I have also been the President of the Engineers Association in Belgium and am deeply interested in psychology and human behavior. Due to those interests, I've been told that I am not a "typical" engineer.

For the last 25 years, my interests have shaped my work. Therefore, when I started Knowliah in 1999, I was mainly driven by the ambition to develop a novel platform and method of managing information. Please pardon a bit of industrial jargon; to put it briefly, I didn't want to use relational databases or tree structures. Our vision ultimately brought us to a cognitive and context-driven object-oriented information management method.

The main point and benefit of such a method is that it serves "Just Enough Right Information" (or "JERI", as we dubbed it for brevity). The information from it is contextual and relevant to your present work and helps you swim (or even surf) through informational tides.

Once we were happy with the core of the method, we built ancillary functions around it: repositories, document management, document generation, search, and advanced case management (to name some). Any data points or documents in the system become a part of the context and enable users to reach their goals accordingly.

Think of context as the glue that ties it all together.

> "In the context of CLDs, we need that information to stay compliant if a new regulation comes into effect. But we must keep the replaced regulation, at least during a transitional period."

You've mentioned your goal was to revolutionize how people find, think about, and reuse information. What does that mean, practically? What is wrong with the way we use information today?

HVH: As professionals, it is easy to be subject to tunnel vision, mainly when we focus intensely on a given task. CLDs are no exception here; the same goes for every sector. And due to tunnel vision, we sometimes get distorted notions of information and its value.

What's the information worth to you?

What do I mean by that?

HVH: Simply, the value of information is not in collecting but in reusing it. Similarly, the importance of knowledge management is in reusing said knowledge rather than sharing it. In other words, hundreds of people could share knowledge and information, but there is no value creation if nobody uses that knowledge. The whole point is then lost.

My utmost goal is to inspire and enable people within CLDs to reuse their available information, as that is one of the few ways to create value. Sharing is essential, and that is true. But without use, it is nothing but noise.

Would you argue that information overload is one of the main challenges (generally speaking) that CLDs face nowadays? Or was that always a part of their job?

HVH: I quite like a quote by an English journalist: "The evil of nowadays is too much information." What was the year when this writer stated that?

You're spot on if you guessed Barnaby Rich, the 16th-century soldier and writer. Information increase has been a trend that transcends centuries; it is nothing new. And I don't see it reversing any time soon, either.

There are many reasons for that. Generally, human knowledge expands as our civilization advances. For example, I

graduated in robotics and could follow and pinpoint any relevant information back then. Fast forward a few decades, and I cannot do the same anymore.

Another reason, however, is that we tend to cling to things. We hoard and rarely throw away. This phenomenon goes even more for digital goods, data, and information. In the context of CLDs, we need that information to stay compliant if a new regulation comes into effect. But we must keep the replaced regulation, at least during a transitional period. And what happens once that period ends? Do we always diligently clean up our machines and wipe irrelevant sources?

The answer is "no, not always," and that factor also contributes to the exponential growth of digital media. It is easy to see why many feel overwhelmed. However, if we only observed the relevant information vital to your present work, it would grow much slower.

From "cost" to "luminaries"

Corporate lawyers and CLDs have the particular task of managing compliance risks. This means they are inherently afraid of missing any critical information. Their responsibilities practically encourage them to keep as much information as possible. This brings us to their primary challenge: Navigating through and finding "Just Enough Relevant Information".

Again, the point is not collecting information; it is about presenting it in a consumable way and using it.

In your view, how has the role and perspective of CLDs changed from the early 2000s to what is today?

HVH: Ten years ago, CLDs were regarded as just one of the "staff" departments. They were considered a cost. Today, though, they are one of the most important teams of a corporation.

Just consider the regulatory explosion over the last few years and all the liabilities of Boards and their directors. Compliance is more of a focal point than a decade ago, and top management have kept notes.

CLDs have gotten a new responsibility due to the whole trend. Namely, they must educate their organizations' managers about compliance topics and initiate preventive projects where required.

AI – an enabler in evolving CLDs?

You started applying AI within your solutions to CLDs' challenges quite early?

HVH: I have considered AI to be a supportive technology for about 20 years. We then released our first AI, driven by natural language processing (NLP) and auto-classification. We have released a new version every two or three years, so AI is a core aspect of Knowliah.

Some views of AI are pretty sensationalistic (e.g., "replacing legal professionals"). What's your take there?

HVH: I feel that even in the Computer Science world, not many understand AI. And that is not meant as an insult; it is a complex topic, and it's OK not to understand it entirely.

I also remember the CEO of a speech tech company where I worked in the '90s. He, too, claimed their tech would remove the need for personal assistants. Well, thirty years later, personal assistants are still quite an essential part of all industries, while their job has evolved. Likewise, repetitive and low-value tasks of legal teams will disappear, but more valuable work will continue to come their way.

Yes, their jobs will change. They will need to adapt but will not disappear.

Just look at all the areas they are busy with (even without considering their educational role that I've mentioned previously). They are responsible for contract management, legal entity management, IP, and legal operations. As the cherry on top, there's compliance. Compliance alone will make sure there's always work in CLDs. ←

Strategic shifts for Chief Legal Officers

The current legal and business landscape in 2024

By Veta T. Richardson

The key findings from 669 participants from organizations spanning 20 industries and 31 countries underscore that the role of Chief Legal Officers in 2024 is marked by a dynamic interplay of challenges, strategic priorities, and evolving responsibilities.

As legal and business landscapes continue to undergo significant transformations, Chief Legal Officers (CLOs) are grappling with multifaceted challenges internally, externally, and often on a global scale. From increasing financial pressures and regulatory concerns to the often-rapid integration of new technology, CLOs in companies large and small, and across industries have a lot to navigate.

Now in its 25th consecutive year, the Association of Corporate Counsel's 2024 Chief Legal Officers Survey (CLO Survey) offers unparalleled insights into the complexities of what CLOs are facing. Based on CLO responses spanning 20 industries and 31 countries, several key takeaways emerged.

Balancing act: Cost-cutting mandates and law firm rate hikes

CLOs are no strangers to the pressure of doing more with less. A substantial 42% of CLOs report receiving cost-cutting mandates in their legal departments over the past year. CLOs expect fewer staffing increases in 2024

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compared to last year across all legal department positions, partially due to these cost-cutting mandates. Simultaneously, 58% have been impacted by law firm rate hikes, with 23% finding these increases challenging to manage. These financial pressures have prompted a strategic reassessment of resource allocation and operational efficiency.

Sleepless nights: Top concerns keeping CLOs awake

Overall survey respondents, and those from Europe, agreed that regulations, enforcement, privacy, and data security were the top two concerns keeping them up at night heading into 2024. That said, in the context of so much happening in the world, it was interesting that third on the list for CLOs in the EMEA and APAC regions was issues of talent retention and maintaining and growing their workforce, compared to only 19% of their American counterparts. Finally, while cybersecurity threats ranked third among global respondents, these managed only sixth on the list for European CLOs at 23%. As business becomes increasingly interconnected globally, seeing these nuances of what CLOs are facing in certain regions can be eye opening.

Mitigating data risks: Focus on data breach prevention

Data breaches loom large on the horizon of CLO priorities, with 34% citing them as the most significant data-related threat to mitigate in 2024. Despite this, only 9% expressed being "very confident" in their organization's ability to counter emerging data risks. In response, 40% plan to institute new processes to bolster their defenses. With so much attention being paid to data privacy and cybersecurity protections, this persistent lack of confidence to defend against and respond to attacks remains concerning. Partially to blame may be a continually changing regulatory landscape. 33% of CLOs pointed to changing regulations and lacking a clear understanding of obligations as the biggest obstacle to their organization effectively responding to privacy, compliance, and litigation requirements.

Strategic imperatives: Operational efficiency emerges as top priority

Operational efficiency takes center stage as 40% of CLOs rank it as their department's top strategic initiative for the coming year. "Right-sourcing" of legal services (15%) and talent management/retention (10%) follow suit. The majority (59%) have experienced an increase in workload over the past year, emphasizing the critical need for streamlined operations. In an effort to improve their department's overall efficiency, 45% of CLOs shared that they plan to invest in new technology, a 4% increase compared to 2023. Another option identified is better internal communication, with 27% saying that greater collaboration with their organization's operations department would improve business outcomes.

Embracing AI: A positive outlook

A noteworthy 67% of CLOs expressed optimism regarding the impact of artificial intelligence (AI) on the in-house legal profession, with European CLOs more likely to feel positive about this new technology than their American counterparts. The potential applications best suited for AI garnering the most attention among European participants are drafting documents (43%) and document analysis (26%). This contrasts with the views of their peers elsewhere in the world, where they believe the value of this technology more strongly lies in document analysis. CLOs in the information technology industry are the most positive about AI, with 77% expecting it to positively impact the in-house profession.

These key findings from 669 participants from organizations spanning 20 industries and 31 countries underscore that the role of Chief Legal Officers in 2024 is marked by a dynamic interplay of challenges, strategic priorities, and evolving responsibilities. As corporate legal departments continue to adapt, CLOs find themselves not just legal stewards, but integral advisors and business strategists of their organization's direction, embracing technological innovation, managing risks, and shaping the future of legal leadership. Learn more about additional key findings from the 2024 ACC CLO Survey **here**. ←

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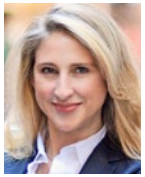

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