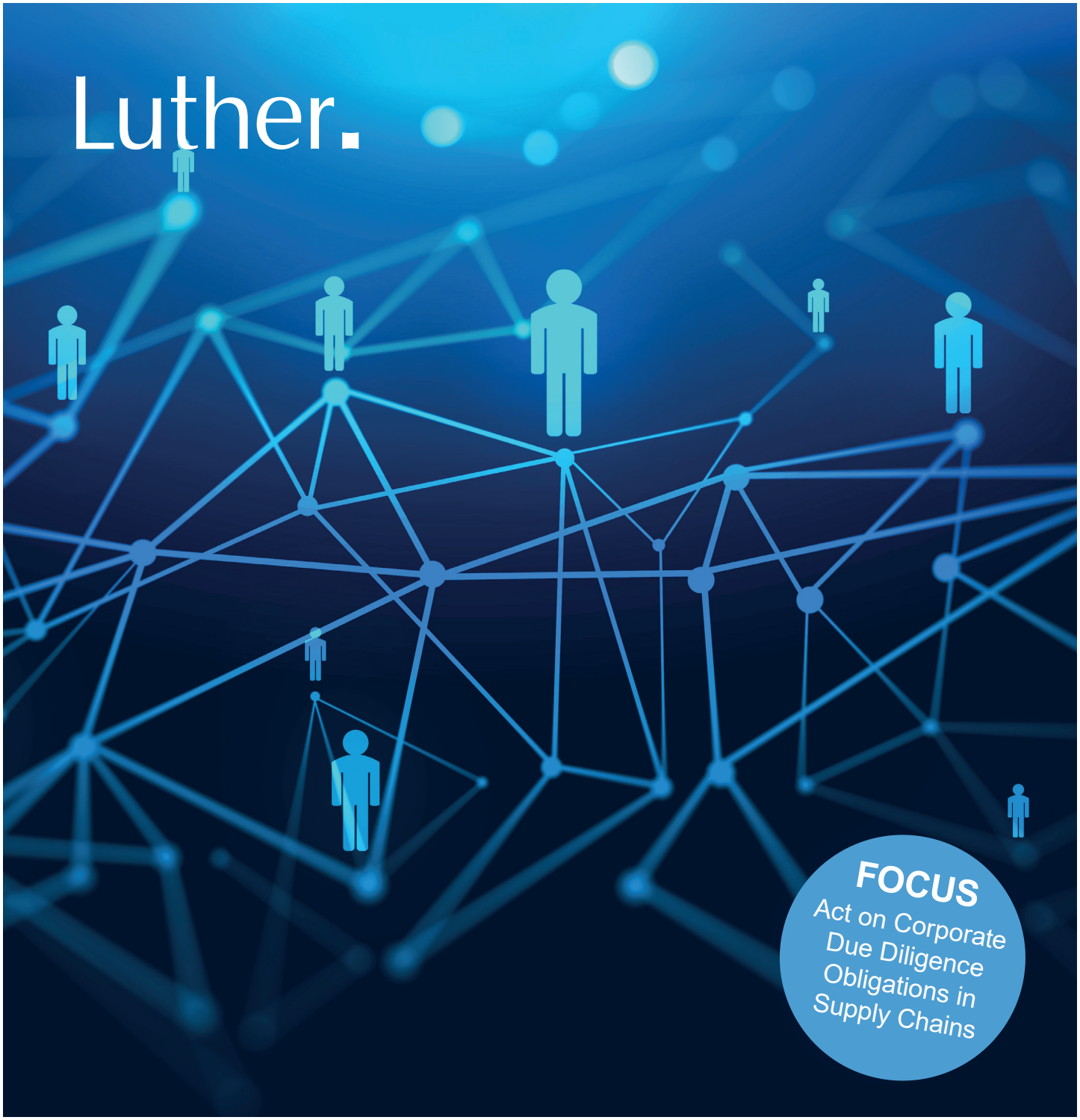

Labour & Employment Law Newsletter

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Dear Readers,

For weeks we have all been following the terrible war in Ukraine. We are moved by the pictures. We see the immeasurable suffering of the people. More than two years after the start of the pandemic, we are once again facing another major challenge. The long-term effects of the war will be significant and cannot yet be predicted. The wide-ranging economic sanctions imposed on the Russian Federation are only one part of this. However, it is already apparent now how a war in Europe will affect us and our economy. The topic of supply chains is becoming increasingly important in this context.

The German Bundestag had already passed the Act on Corporate Due Diligence Obligations in Supply Chains (LkSG) in the summer of 2021. The LkSG establishes binding regulations with respect to the responsibility of large German enterprises in the context of global supply chains and should thereby contribute to an improvement in the human rights situation. This results in far-reaching obligations for enterprises to take action. From 1 January 2023, large enterprises with initially at least 3,000 employees will have to comply with special human rights and environmental due diligence obligations along their supply chains. However, the Act also imposes obligations on smaller enterprises, at least indirectly, if they are part of the supply chain. The issues relevant from an employment law perspective alone are comprehensive and concern, for example, prohibitions of child labour, slavery and forced labour, disregard for occupational health and safety or the withholding of an appropriate wage. Reason enough for Kerstin Groene to take a closer look at the LkSG topic in her latest article.

Kevin Brinkmann from our Hamburg office also addresses a very topical issue in this edition of our Newsletter. Ever since the Confederación Sindical de Comisiones Obreras (CCOO) decision of the Court of Justice of the European Union in 2019, the issue of recording working time has once again become the focus of employment law discussions. In particular, the question arises as to whether employers are required to introduce an (electronic) system for recording working time. In his contribution, Kevin Brinkmann presents the current state of the discussions and provides an outlook on what can be expected in the future surrounding this issue.

In our last Newsletter we presented a new section in which we report on employment law developments and topics from our global network unyer. We are very pleased that Xavier Drouin from FIDAL in Strasbourg is providing new insights into French employment law.

In addition, this issue will of course also provide you with the usual overview of current decisions of the labour courts in Germany which we consider to be of particular relevance to human resources work. Particularly noteworthy in this regard is a decision by the Hesse Higher Labour Court on the issue of the validity of collective redundancy notifications. The judgment has already attracted a lot of attention in the legal press. The appeal on points of law before the Federal Labour Court is pending and its outcome is eagerly awaited by employment lawyers.

Our authors look forward to your feedback. Please do not hesitate to contact us if you have any questions or suggestions.

Yours’

Achim Braner

Employment law and occupational health and safety in the supply chain

Everyone is talking about the Act on Corporate Due Diligence Obligations in Supply Chains (*Lieferkettensorgfaltspflichtengesetz,* LkSG), which has led to a great deal of uncertainty among enterprises. From 1 January 2023, large enterprises with initially at least 3,000 employees will have to comply with special human rights and environmental due diligence obligations along their supply chains. However, smaller companies cannot sit back and relax, because, as part of the supply chain, they are also indirectly held accountable - through their direct or, in turn, indirect contractual partners. A major focus is on aspects of occupational health and safety, compliance with minimum working conditions and ensuring the freedom of trade unions to operate.

In the summer of 2021, the German Bundestag passed the LkSG, which stems from the 2016 National Action Plan on Business and Human Rights (NAP), which in turn is intended to be the basis for implementing the 2011 United Nations Guiding Principles on Business and Human Rights. The aim of the LkSG is to contribute to improving the human rights situation by establishing binding regulations regarding the responsibility of large German companies along global supply chains.

The entire topic is described by the umbrella term corporate social responsibility (CSR) and also covers multi-faceted requirements for the prevention of inappropriate working conditions: Prohibition of child labour, slavery and forced labour, disregard of occupational health and safety measures, withholding of an adequate wage, disregard of the right to form trade unions or other bodies of employee representation.

I. General content of the LkSG

The Act on Corporate Due Diligence Obligations in Supply Chains requires enterprises in Germany to respect human rights by implementing defined due diligence obligations. The establishment of a risk management system is a core element of the law. This risk management system is responsible for identifying, avoiding or minimising the risks of human rights violations and damage to the environment. To this end, the Act stipulates various preventive and remedial measures (Sections 6, 7 LkSG) as necessary and requires enterprises to establish a complaints procedure mechanism (Section 8 LkSG) and to prepare reports regularly. It even contains a special capacity to sue (Section 11 LkSG), which enables trade unions or non-governmental organisations (NGOs) to conduct litigation in their own name before German courts on behalf of a person affected.

The special feature of the Act is its scope, which extends beyond the immediate organisational area of enterprises: The due diligence obligations relate not only to the enterprise's own business operations, but also to the conduct of contractual partners and other (indirect) suppliers - in other words, along the entire supply chain. This applies in both directions in the supply chain: i.e., upstream and downstream.

The Act will initially apply from 2023 to enterprises with at least 3,000 employees in Germany and from 2024 to enterprises with at least 1,000 employees in Germany.

Violation of the legal obligations may result in fines of up to EUR 8 million or up to 2% of global annual turnover. This may even result in companies being excluded from the awarding of public contracts.

The competent authority, the Federal Office for Economic Affairs and Export Control (BAFA), has extensive monitoring powers. It can, for example, enter business premises, request information and inspect documents and request that companies take specific action to fulfil their obligations and enforce this by imposing penalty payments.

II. Protected legal positions: occupational health and safety and fundamental principles of labour law

The protected legal positions along the supply chain also significantly include those that are familiar to occupational safety experts and employment lawyers from their daily work. However, the focus is now no longer solely on the enterprise's own business/clients, but also on third-party enterprises. Section 2 (2) LkSG lists in nos. 5 to 8 prohibitions for which there is a human rights risk in the event of a violation. In the case of the occupational health and safety obligations mentioned in no. 5, explicit reference is made to the law applicable to the place of employment. A non-exhaustive list of occupational health and safety obligations is provided, which, if disregarded, pose a risk of accidents at work or work-related health hazards, such as:

- obviously insufficient safety standards with regard to the workplace, workstation and work equipment;
- absence of appropriate protective measures to avoid exposure to hazardous substances;
- lack of measures to prevent excessive fatigue, in particular with regard to working hours and rest periods;
- inadequate training and instruction.

However, human rights risks also arise from non-compliance with the prohibition on disregarding freedom of association (Section 2 (2) no. 6 LkSG). It lists the freedom of employees to form and join trade unions, not to suffer disadvantages for doing so, and the right of trade unions to operate, including the right to strike and the right to collective bargaining.

Further human rights risks are seen in non-compliance with the prohibition of unequal treatment in employment (no. 7) for example on the grounds of national and ethnic origin, social origin, health status, disability, sexual orientation, age, gender, political opinion, religion or belief. Explicit mention is also made of unequal treatment with regard to the payment of unequal remuneration for work of equal value.

A failure to comply with the prohibition of withholding an adequate living wage - determined in accordance with the regulations of the place of employment - also gives rise to the threat of a human rights risk (no. 8).

III. Implementation at the corporate level: Human Rights Officer

The enterprises concerned are now confronted with the task of setting up the relevant procedures and reporting lines and designing them in such a way that they meet the requirements of the LkSG without being subject to fines. Pursuant to Section 4 (3) LkSG, enterprises will have to explicitly designate who within the enterprise is responsible for monitoring risk management. The Act also mentions the appointment of a Human Rights Officer to carry out this task without specifying in more detail who is eligible for this position. Accordingly, en-

terprises have a wide playing field.

Enterprises can benefit from the fact that they are already familiar with the regulatory structure of corporate responsibility and monitoring by authorities regarding occupational health and safety issues. The enterprise's existing occupational safety experts (e.g., occupational safety specialists, Sections 5 et seqq. of the German Act on Occupational Physicians, Safety Engineers and Other Occupational Safety Specialists (*Arbeitssicherheitsgesetz,* ASiG) will therefore be often perfectly suited to support management in implementation issues due to their subject matter expertise - at least with regard to their own enterprise.

The competencies of the Human Rights Officer are not clearly defined by law. Enterprises can therefore independently determine which instruments and rights the Human Rights Officer is given in order to take action against irregularities - always subject to the proviso of effectiveness. The draft bill provides (p. 25) that the Human Rights Officer should report directly to senior management.

The Act provides those applying the law - in contrast to what is known, for example, from Section 13 of the German Act on the Implementation of Measures of Occupational Safety and Health to Encourage Improvements in the Safety and Health Protection of Workers at Work (*Arbeitsschutzgesetz*, ArbSchG) - with only a little guidance with regard to the legal consequences. It is therefore still completely open as to what (minimum) position the Human Rights Officer must have within the organisation, what financial, professional and organisational resources he or she must have and what responsibility this person bears in the event of fine proceedings.

The wording of Section 4 (3) sentence 1 LkSG indicates in any event that the monitoring of risk management must be carried out by an employee of the enterprise and may not be outsourced to external third parties. According to Section 4 (1) LkSG, risk management itself is even to be "*enshrined in all relevant business processes*", so that the strategic question also arises as to whether third parties should be granted such a wide-ranging right of inspection in the first place.

IV. Involvement of employee representation bodies: works council and economic committee

The Act also involves employee representation bodies: The policy statement required under Section 6 (1), (2) LkSG shall include a human rights strategy. Although, according to the bill, this policy statement is to be drawn up independently by management, it is required that this also be communicated to the works council (bill p. 29).

Another facet of the LkSG to be complied with as of 1 January 2023 results from Section 106 (3) no. 5b of the Works Constitution Act (*Betriebsverfassungsgesetz,* BetrVG) as amended. According to this, economic matters that entail the involvement of the economic committee also include issues of corporate due diligence in supply chains under the LkSG. However, the right of the economic committee in this respect is also limited to consultation and information rights, which must, however, be provided in a comprehensive manner and with the submission of the necessary documents.

V. Conclusion

The LkSG only provides enterprises with homeopathic doses of guidance on how to structure the content of risk management - a rather unfortunate state of affairs in view of the considerable threat of fines. When implementing internal risk management systems, great care must therefore be taken to ensure that the system can monitor all relevant business processes and that effective measures can be taken.

At www.csr-in-deutschland.de the Federal Ministry of Labour and Social Affairs (BMAS) provides guidelines that can provide initial (industry-specific) orientation and information on consulting and training services.

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Requirement to introduce an (electronic) system for the recording of working time, current status and outlook

Since the recent Confederación Sindical de Comisiones Obreras (CCOO) decision of the Court of Justice of the European Union (CJEU) in 2019, the issue of recording working time has once again become the focus of political and social discussion. A bill that provided for the mandatory electronic recording of working time for marginally employed persons (*geringfügig Beschäftigte*), inter alia, recently caused a stir but this has ultimately not (yet) been adopted. Meanwhile, an amendment to the working time legislation seems likely in the not too distant future.

Consequences of the CCOO decision of the Court of Justice of the European Union

The CJEU decided in its judgment of 14 May 2019 (C-55/18 - CCOO) that Member States must require employers to set up an **objective, reliable and accessible** system enabling the duration of time worked each day by each worker to be measured. This is the only way to ensure compliance with the working time regulations and thereby the intended protection of the health of employees.

This triggered a lively discussion on the consequences of the decision for the legislature and employers in Germany. While some concluded from the decision that the legislature must now require employers to fully record working time (start, end, duration) - as demanded, for example, by the Left Party and the Greens - this interpretation was met with incomprehension elsewhere. For example, Professor Dr Hanau, university professor of civil law, commercial, economic and labour law at the Helmut-Schmidt University in Hamburg, emphasised in his comments when he appeared as an expert before the Committee on Labour and Social Affairs of the German Bundestag that the proposals were probably based on a misunderstanding. In its reasons for the decision, the CJEU did not order the widespread introduction of systems for recording working time. It only talked about measuring or determining the working time. In his view, this is a fundamental difference.

It became clear that, according to the prevailing opinion, the CJEU case law does not have any direct effect on the recording of working time in private companies. In particular, existing German working time law cannot be interpreted in a way that is in conformity with EU law, which would lead to an obligation to record all working time. It has always been the task of the German legislature to transpose European directives into national law and the German courts cannot take this task off the hands of the legislator. However, although German judges may decide not to apply provisions of national law that are contrary to EU directives, they may not supplement national law.

Current status

The CJEU's requirements have not yet been transposed into German law. German working time law does not recognise any fundamental obligation to record working time in full. Section 16 (2) of the German Working Time Act (*Arbeitszeitgesetz,* ArbZG*)* only stipulates the obligation to record the "working time in excess of the working hours per working day". The legislature sought at that time to avoid "unnecessary expense" in recording working hours by limiting the requirement to provide proof.

Insofar as the legislator was of the opinion that the basic concept of the Working Time Act was not sufficient, it established special arrangements for certain industries and activities in the form of a comprehensive documentation requirement. Such is required, for example, in the area of marginally employed persons. Section 17 (1) of the Minimum Wage Act (*Mindestlohngesetz,* MiLoG) contains the requirement to record the beginning, end and duration of the daily working time of marginally employed persons and the industry branches and sectors referred to in the German Act to Combat Undeclared Work and Unlawful Employment (*Schwarzarbeitsbekämpfungsgesetz*, SchwarzArbG) no later than the end of the seventh calendar day following the day on which the work is performed and to retain such records for at least two years effective from the date relevant for the recording. The manner in which the time is recorded is not stipulated.

Recent developments

Being aware of the CJEU case law, the coalition agreement of 2021 between the Social Democrats (SPD), the GREENS (BÜNDNIS 90/DIE GRÜNEN) and the Free Democratic Party (FDP) did not contain a clear objective. Only a rough direction was given: "*In dialogue with the social partners, we are examining the need for adjustments in light of the case law of the Court of Justice of the European Union on working time law. Flexible working time models (e.g., trust-based working time) must continue to be possible.*"

The question of which legislative changes are necessary and sensible continues to be the subject of controversial debate. This was also pointed out by the Federal Government in its response to a minor interpellation from some members of parliament and the DIE LINKE parliamentary group on 5 August 2021 (Bundestag printed paper 19/31886): "*The question of what legislative consequences the CJEU ruling will have for Germany is the subject of controversial debate in the literature, among the social partners and within the Federal Government. Therefore, thoroughness is needed to balance the different perspectives.*"

An initial push towards tightening documentation requirements was contained in a draft bill from the Federal Ministry of Labour and Social Affairs dated 1 February 2022 (draft of a Second Act regarding amendments in the area of marginally employed persons). Section 17 (1) sentence 1 MiLoG should be worded as follows: "*An employer who employs workers pursuant to Section 8 (1) of the Fourth Book of the Social Code or in the industry sectors or branches referred to in Section 2a of the German Act to Combat Undeclared Work and Unlawful Employment shall be required to* ***record the beginning of the daily working time immediately upon commencement of work and the end and duration of the daily working time for each employee on the day on which the work is performed in an electronic and a tamper-proof manner*** *and to retain such records electronically for at least two years effective from the date relevant for the time recording."*

According to estimates made by the Federal Government, such a change would have resulted in 1.5 million (approx. 81.1%) out of the 1.85 million businesses that fall under the scope of the documentation requirement still having to introduce electronic time recording. This would have mainly affected smaller businesses, which, however, would have been able to fall back on "simpler and therefore cheaper solutions available to them". It was estimated that the introduction of electronic time recording would entail a one-time cost of EUR 300.00. This would have had to be implemented by 1 October 2022.

The draft bill was criticised in particular by the employers' associations as being too far-reaching, while it did not go far enough for the trade unions. However, shortly before the government bill was passed, the additional documentation

requirements and therefore the need for employers to purchase and use an electronic and tamper-proof system to record daily working hours were deleted.

At the meeting of the Federal Cabinet on 23 February 2022 the final bill was adopted and, at the same time, it was decided that the Federal Ministry of Labour and Social Affairs and the Federal Ministry of Finance will jointly examine how electronic and tamper-proof working time records can further improve the enforcement of the minimum wage without placing an excessive burden on small and medium-sized enterprises in particular through the purchase of time recording systems or digital time recording applications. To this end, the development of a digital time recording application that can be made available to employers free of charge shall be explored.

No requirement to record working time electronically

This means that under German working time law it is still not required to record working time electronically. The statements made by the CJEU (C-55/18, CCOO judgment), also see no need to record working time using information technology. Similarly, the system used does not necessarily have to be tamper-proof. Moreover, these requirements would hardly be feasible where work is performed without a fixed place of business or access to information technology resources. This understanding is also supported by the opinion of Advocate General Pitruzzella, who, in addition to the electronic form, considered the recording of working time in paper form or "any other suitable instrument" to be practicable. Whether this involves a manually kept time sheet, the checking off a fixed schedule (shift work) or a sophisticated electronic time recording system, the prerequisite is always the same in that the records are suitable for recording the time worked in a proper manner.

Side note: right of initiative of the works council

The issue repeatedly arises as to whether the works council can initiate or force the introduction of an (electronic) time recording system for the recording of working time. This issue has not been conclusively clarified by the highest courts. A case is currently pending before the Federal Labour Court, which is dealing with this issue (Federal Labour Court, case no.: 1 ABR 22/21; previously Hamm Higher Labour Court, decision of 27 July 2021 – 7 TaBV 79/20). The Dusseldorf Higher Labour Court recently ruled on the issue of setting up a conciliation committee to deal with the introduction of an electronic working time recording system at the instigation of the works council (Dusseldorf Higher Labour Court, decision of 24 August 2021 - 3 TaBV 29/21). The Higher Labour Court granted the works council's application and established a conciliation committee, since, in its view, the works council's right of initiative to introduce a system for recording working time was not obviously excluded.

In support of this, it stated that the Federal Labour Court had ruled in 1989 (Federal Labour Court 28 November 1989 - 1 ABR 97/88) that the works council did not have a right of initiative under Section 87 (1) no. 6 of the Works Constitution Act (*Betriebsverfassungsgesetz,* BetrVG), as such an interpretation would be incompatible with the protection of the employees' personal rights and the associated defensive function of the right of co-determination in question. Since then, however, it has not confirmed this case law. In the meantime, the judgment has been criticised in decisions of other courts and in the literature. Since this is therefore an isolated decision which was also made some time ago and there is a considerable number of dissenting opinions, the Federal Labour Court case law cannot be regarded as "established". A further criticism is that the Federal Labour Court's classification at that time only referred to Section 87 (1) no. 6 BetrVG (introduction and use of technical devices), whereas a right of initiative could also follow from Section 87 (1) no. 7 BetrVG (inter alia regulations on health protection). Since appeal proceedings regarding this issue are currently pending before the Federal Labour Court and a requirement to introduce a time recording system already follows in general from the CJEU case law, it is not obvious that the conciliation committee is not the responsible body.

However, there are still strong arguments against the assumption of a right of initiative on the part of the works council. Although the wording of Section 87 (1) no. 6 BetrVG - in contrast to Section 87 (1) no. 7 BetrVG - also covers the "introduction" of technical devices, the technical equipment must be designed to monitor the behaviour or performance of employees, which is not the case where only working time is recorded. If the employer does not intend to introduce any system for recording working time, there is no risk of the employees' performance and behaviour being monitored. Consequently, there is no risk of intrusion into the employees' individual rights that triggers the works council's right of co-determination in the first place. The granting of a right of initiative would instead lead to unjustified interference in the employer's entrepreneurial autonomy.

A corresponding right of initiative also does not result from Section 87 (1) no. 7 BetrVG. The right of co-determination relates solely to measures and decisions of the employer which the employer takes or must take for reasons of health protection. There would have to be a risk that would have to be determined as part of a risk assessment. The mere concern of exceeding the maximum working time without this being appropriately recorded is not sufficient, also against the backdrop of CJEU case law, to impose a documentation requirement on the employer.

A clear position of the Federal Labour Court on the issue of the works council's right of initiative would be desirable as part of the expected decision. It is awaited with bated breath!

Outlook

The first tentative steps have been taken in the direction of stricter documentation requirements for specific areas. However, it is doubtful whether an objective, reliable and accessible system for recording working time has to be necessarily an electronic system. The controversial discussion on the topic of working time recording has now been going on for more than two and a half years. An end to the discussions is - fortunately - not expected in the near future. The legislator seems to be willing to amend the Working Hours Act. In doing so, the legislator has an eye not only on the recording of working time, but also on making weekly working time more flexible. Whatever changes are agreed upon in the future, it is to be hoped that they will be chosen in moderation and will balance the interests of employers and employees. Excessive emphasis on action, on the other hand, is just as ineffective in shaping the world of work 4.0 as continued inaction.

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■ JUDGMENT IN REVIEWS

Leave compensation in the event of long-term illness – employer's obligation to provide information

The employer's obligation to notify and request employees to take leave also applies to employees who have been on long-term sick leave. If this obligation is not fulfilled, the holiday entitlement nevertheless is forfeited 15 months after the end of the respective year, if the employee was continuously unfit for work due to sickness during the respective year. If this is not the case, this remains to be clarified by the CJEU.

Federal Labour Court, judgment of 7 September 2021 – 9 AZR 3/21 (A)

The case

The claimant employee terminated his employment relationship with the defendant employer for health reasons as of 31 December 2019. He was unfit for work due to sickness from 18 November 2015 until the end of his employment. He is contractually entitled to 30 days of leave per calendar year. The defendant granted him 21 working days of leave in 2015 and no leave in 2016 and 2017. The employer had not asked him to take leave, nor had the employer advised him that the leave could be forfeited. The claimant is demanding payment for 9 days of leave for the year 2015 and for 30 days of leave for each of the years 2016 and 2017. The action was unsuccessful in the courts of the first instance and second instance.

The decision

The Federal Labour Court also dismissed the action regarding the leave compensation for the years 2016 and 2017. It sus-

pended the proceedings regarding the leave compensation for 2015 analogous to Section 148 of the German Code of Civil Procedure (*Zivilprozessordnung,* ZPO) until the CJEU has ruled a case already referred to the CJEU for a preliminary ruling (Federal Labour Court, decision of 7 July 2020 - 9 AZR 401/19 (A)).

The claimant is not entitled to compensation for leave for the years 2016 and 2017. The holiday entitlement is forfeited if not taken within 15 months after the end of the respective year pursuant to Section 7 (3) of the Federal Vacation Act (*Bundesurlaubsgesetz,* BUrlG). According to established case law, Section 7 (3) BUrlG is to be interpreted in line with EU law such that the holiday entitlement is forfeited 15 months after the end of the respective holiday year if the employee continues to be unfit for work, although it was not possible for the employee to take his holiday due to sickness.

This is not in conflict with the fact that the defendant had failed to properly inform the claimant about the leave and the possibility that it may be forfeited and to request him to take it. EU law (Article 7 of Directive 2003/88/EC) requires an employer to ensure in concrete terms and on a fully transparent basis that the employee is able to take his leave; the employer must therefore request the employee - formally if necessary - to take his leave and inform him clearly and in good time that otherwise the leave will be forfeited at the end of the calendar year (or at the end of the carryover period pursuant to Section 7 (3) sentence 3 BUrlG). If the employer does not fulfil these obligations, the leave is not forfeited. In principle, these obligations also apply to employees on long-term sick leave. However, the leave shall nevertheless be forfeited if, due to a long-term illness - which can only be determined in retrospect - it would have been objectively impossible to enable the employee by informing him to take his leave. In this case, it is not the breach of the obligation to provide information that causes the leave to be forfeited, but solely the incapacity for work.

The Federal Labour Court was able to decide this itself, as these requirements have been clarified in this respect by the CJEU (CJEU, judgment of 25 June 2020 - C-762/18 and C-37/19 - *Varhoven kasationen sad na Republika Bulgaria*). However, the situation is different with respect to the leave from 2015. Since the claimant was not incapacitated for work throughout 2015, it would have been at least possible for him to take his leave. In this situation, it is not yet clear under what circumstances a holiday entitlement may be forfeited if the employer has not fulfilled its obligation to cooperate. This question has already been referred to the CJEU for a preliminary ruling and the decision is still pending in this regard (Federal Labour Court, decision of 7 July 2020 - 9 AZR 401/19 (A)), so that the proceedings in this case are to be suspended in this respect analogous to Section 148 ZPO until the CJEU reaches a decision.

Our comment

The decision represents a further building block in the Federal Labour Court ‘s leave “mosaic”. German holiday law has been undergoing fundamental changes for more than ten years as the CJEU has successively issued new - usually employee-friendly - rulings that must also be followed in Germany. The last major upheaval was the establishing of the employer’s above-mentioned obligations to cooperate (CJEU, judgment of 6 November 2018 - C-684/16 - *Max-Planck-Gesellschaft zur Förderung der Wissenschaften v Tetsuji Shimizu*); if these are not fulfilled, leave entitlements cannot in principle be forfeited. However, this statement may conflict with other - employer-friendly - statements of the CJEU, as the present case vividly shows. According to the German legal wording in Section 7 (3) BUrlG, a leave entitlement can only be carried over to the next calendar year as an exception and then is forfeited after three months in any event. The CJEU had already put an end to this some time ago by ruling that leave can be carried over for a period of 15 months if the employee was prevented from taking the leave due to sickness (CJEU, judgment of 22 November 2011 - C-214/10 - *KHS*; CJEU, judgment of 29 November 2017 - C-214/16 - *King*). Little by little, the mosaic is continuing to come together as the last special situations are clarified. Unfortunately, this is taking (too) long. Employers should therefore always keep abreast of the topic of holiday law and, in case of doubt, should rather inform employees more frequently and in more detail in order to avoid unnecessary risks.

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No entitlement to remuneration for default of acceptance due to a Covid-related plant closure

According to a decision by the Federal Labour Court, plant closures ordered by the authorities as part of a general lockdown to combat a pandemic do not fall under the operational risk to be borne by the employer. If employers cannot deploy their employees due to a closure order, there is indeed default of acceptance. However, the employer does not have to bear the risk of the impossibility of acceptance as part of its operational risk.

Federal Labour Court, judgment of 13 October 2021 – 5 AZR 211/21

The case

The parties are in dispute about remuneration for the month of April 2020 during the first Covid-induced lockdown. The defendant employer carries on a trade in sewing machines and accessories and maintains a branch office in Bremen, Germany, for this purpose. The claimant works there as a marginally employed person in sales at a monthly salary of EUR 432.00.

Due to the general decree issued by the Free Hanseatic City of Bremen on 23 March 2020 to contain the coronavirus, the employer closed the sales business and did not pay the claimant any wages for the month of April 2020.

In her lawsuit, the claimant sought payment of wages for the month of April 2020, basing her claim on the fact that the closure was a case of operational risk to be borne by the employer under the operational risk doctrine. This would also apply during the pandemic. The employer refused to pay, citing that the pandemic-related closures related to the ordinary risks of life and not to the operational risk it had to bear.

The decision

After the claimant prevailed in the lower courts, the employer's appeal was successful. The claimant is not entitled to remuneration for default of acceptance under Sections 615 sentence 1, 611a (2) of the German Civil Code (*Bürgerliches Gesetzbuch,* BGB).

The Federal Labour Court first established that default of acceptance had occurred as a result of staff not being employed in April 2020. The claimant had not been employed despite her ability and willingness to perform. Whether the claimant had actually or literally offered to perform the work was irrelevant, since it was obvious from the general decree that the employer could not have accepted the offer.

Whereas the Higher Labour Court had stated that there was an unwillingness to accept the offer on the part of the employer because the claimant could have been assigned tasks other than sales, this did not stand up to scrutiny by the Federal Labour Court. Firstly, the Higher Labour Court had not determined the content of the work duties, such that it was not even clear whether the claimant could have been assigned other tasks. Secondly, the failure to provide the opportunity to work on other tasks would not have given rise to a claim for remuneration for default of acceptance, but, if applicable, may have triggered a claim for damages.

The Federal Labour Court then dealt with the consequences of an inability to accept. While the claim for remuneration in arrears under Section 615 sentence 1 BGB does not require any fault on the part of the employer, Section 615 sentences 1 and 2 apply accordingly to cases where the employer bears the risk of the loss of work. The courts would have to respect the will of the legislator in this respect and work out criteria that justify the employer bearing the risk. However, in the present case, the employer does not bear the risk of loss of work.

According to the case law on the operational risk doctrine, the employer bears the operational risk because it manages the business, organises the operating pro-

cesses, bears the responsibility and earns income. Therefore, it would have to be responsible for the fact that the work performance becomes impossible for reasons within its control. In addition to these internal disruptions, the employer also bears the risk for external circumstances affecting the company, which constitute force majeure, or for decisions made due to external influences. A distinction must be made as to whether the employer bears the risk of loss of work in the event of a plant closure caused by the Covid-19 pandemic.

If the employer uses the pandemic as an opportunity to close down the company on its own initiative, it is in principle responsible for the operating risk on the basis of this autonomous decision.

If the employer has to close the company due to an official order in the context of fighting the pandemic, the assumption that the employer always bears the risk of the loss of work in this case cannot be based on force majeure, which the pandemic is in any event. On the contrary, the cause of the operational disruption was an activity of a public authority. The employer does not bear the risk of loss of work if the officially ordered plant closure forms part of general government measures to combat the pandemic and serves to protect the population across all businesses. In such a case, a risk is not intrinsic to a particular business. The employer does not have to bear the general risk, which ultimately is the consequence of political decisions made to contain the risk of infection affecting the general public as a whole.

The fact that the state has mitigated the financial consequences for employees subject to social security contributions by facilitating access to short-time working allowance does not conflict with this assessment. If the conditions for short-time work were met, the employer would probably be obliged to make use of this instrument due to its duty of care. However, this and any subsequent claims are not relevant for the claim for remuneration arrears for default of acceptance.

Our comment

The Federal Labour Court's decision may be described as a thunderbolt. After all, it calls into question the hitherto very generous answer to the question of what is covered by the concept of operating risk. The Federal Labour Court systematically examines the individual prerequisites for default of acceptance and then of the operational risk doctrine and makes a distinction between closures made on the basis of an employer decision and those which were to be implemented without an employer having any say in the decision.

Almost as interesting as the issue critical for the decision on the scope of the operating risk is the interplay in the area of short-time work and any claims for damages. While this was not relevant in the present case, as the claimant was not subject to social security contributions, the Federal Labour Court points out that an employer may have to ensure the payment of short-time working allowance due to its duty of care. It remains to be seen whether an employer actually has to make use of public benefits, sometimes at great administrative expense, and how far efforts have to go - for example, if no agreement can be reached with the works council in the short term on the introduction of short-time work.

However, irrespective of the legal obligation, some employers should address for the purposes of a long-term human resources strategy the question of whether payments to employees will be maintained to the extent commercially reasonable in order to have access to employees and to be able to operate after the pandemic ends.

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Setting a maximum age limit for an occupational pension plan is not discriminatory

Setting a maximum age limit of 55 years for a pension plan as a prerequisite for receiving occupational pension benefits is permitted.

Federal Labour Court, judgment of 21 September 2021 – 3 AZR 147/21

The case

The parties are in dispute about the claimant's entitlement to an occupational pension.

The claimant, who was born in 1961, had been employed by the defendant employer since 18 July 2016, initially under a fixed-term contract and since 14 November 2016 as a permanent employee.

Under the applicable pension provision rules all employees who are in permanent employment and have not yet reached the age of 55 at the start of their employment relationship were enrolled in the pension fund as part of the occupational pension plan.

The employer did not enrol the claimant in the pension fund because she had already reached her 55th birthday at the start of her employment. The claimant challenged this in her action.

The decision

The claimant relied on the invalidity of the age limit and lost.

In its decision, the Federal Labour Court stated that the fixed age limit of 55 years for enrolment in the pension plan is objectively justified.

Employers are also permitted to use the means of setting age limits for membership or receipt of retirement pensions in pension provision rules to set up an occupational pension plan (Section 10 sentence 3 no. 4 of the German General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz,* AGG).

According to the Federal Labour Court, the exclusion of employees from pension benefits if they have already reached the age of 55 at the start of the employment relationship cannot be contested from a legal viewpoint, even taking into account the increase in the standard retirement age. It does

not “unduly interfere” with the legitimate interest of employees in building up adequate retirement benefits over the course of their working lives.

In doing so, the Court assumes a typical working life of at least 40 years as the reference figure. On this basis, the Third Senate considered a maximum age limit of 50 years for enrolment in an occupational pension plan to be “just about acceptable”. On the other hand, a maximum age limit of 55 years after a ten-year waiting period is no longer appropriate, because this effectively results in an age limit of 45 years, which means that the exclusion applies to half of one’s working life in a typical case.

In the Federal Labour Court’s view, in the case under review, also women did not suffer indirect discrimination within the meaning of Section 3 (2) AGG because of their gender. In particular, this does not follow from the fact that women would be affected more frequently than men by the age limit that is the subject of the dispute. When looking at a typical case, the re-entry of women into working life after child-rearing can be expected before the age of 55. Nor does the claimant maintain that more women than men would enter into an employment relationship with the defendant after the age of 55. Consequently, the right to self-determination in shaping family life is not unlawfully impaired by the age limit.

Our comment

The Federal Labour Court follows its established case law and, with this decision, confirms the judgments of 18 March 2014 - 3 AZR 69/12 - and 12 February 2013 - 3 AZR 100/11 - on the setting of age limits in occupational pension plans. The decisive factor continues to be whether, in the context of a typical working life of at least 40 years, there is still a reasonable period of time to build up an occupational pension before reaching the maximum age limit or to provide for adequate alternatives.

Here, the Court addressed the gender-related differences regarding the length of a typical working life and drew on statistics from the Deutsche Rentenversicherung (German Statutory Pension Scheme) from 2019. According to these, insurance pensions in the Federal Republic of Germany in 2019 were based on an average of 39.0 years of insurance. For women, this figure was 36.5 years of insurance, and for men, 41.9 years.

It remains to be seen whether and how statistical changes will affect the decisions of the Federal Labour Court with regard to maximum age limits in pension plans in the future.

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No right to Bridge part-time work in the event of Non-compliance with the notice period

An employee is not entitled to be granted the bridge part-time work requested if the minimum notice period of three months can no longer be met when the request is submitted, and the employer does not waive compliance with the minimum notice period. A request for bridge part-time work cannot be interpreted as a request for bridge part-time work effective at the next possible date if the employer is not aware of any tangible evidence that an employee would alternatively like to shorten or postpone the bridge part-time work.

Federal Labour Court, 7 September 2021 - 9 AZR 595/20

The case

The parties are in dispute about the defendant's obligation to consent to the claimant's application for a temporary reduction in working hours (bridge part-time work). The claimant has been employed by the defendant since 2007. The defendant granted the claimant a reduction in her contracted working time on a full-time basis on the basis of Section 12 (1) BAT/AOK-Neu for the periods from 1 April 2012 to 31 March 2019 and from 1 April 2019 to 31 March 2020, amounting to 33 hours per week most recently. In an application dated 22 January 2020, the claimant again requested a reduction in her contractual working hours for the period from 1 April 2020 to 31 March 2021, citing her father's need for care. The defendant rejected the application on the grounds that the information provided by the claimant was insufficient without the submission of evidence, such as a medical certificate or an expert opinion.

The claimant considers that she is entitled to a temporary reduction in her working hours pursuant to Section 9a (1) of the German Act on part-time work and fixed-term employment contracts (*Gesetz über Teilzeitarbeit und befristete Arbeitsverträge*, TzBfG). The defendant is of the opinion that the claimant's application is invalid because it was not submitted within the three-month notification period (Section 9a (3) sentence 1 in conjunction with Section 8 (2) sentence 1 TzBfG). The defendant had not waived this minimum notification period.

The lower courts upheld the action. The defendant filed an appeal. In the appeal instance the claimant declared the legal dispute to be settled concerning the substance of the claim. The defendant did not consent to this.

The decision

However, the defendant's appeal was successful. The Federal Labour Court concluded that the claimant is not entitled to be granted bridge part-time work for the period requested. The prerequisite for the claim to a temporary reduction in working time pursuant to Section 9a TzBfG is compliance with the minimum notification period of three months pursuant to Section 9a (3) TzBfG in conjunction with Section 8 (2) sentence 1 TzBfG.

Contrary to the assumption of the Higher Labour Court, the defendant had not unconditionally discussed the application for bridge part-time work with the claimant and, thereby, had also not waived the right to assert the failure to meet the deadline. An employer may waive the notification period of three months provided solely for its protection without having to expressly state this. However, from the perspective of an objective recipient, the employer's response must convey in a clear, unambiguous and unequivocal manner that it does not attach any importance to compliance with the notification period and will also no longer assert this in the further handling of the application for bridge part-time work. This is to be assumed, for example, if the employer merely requests the applicant to specify the distribution of the reduced working time or gives its consent to the bridge part-time work as such and only rejects the selected distribution of the reduced working time, whereas the mere rejection of the application for bridge part-time work by referring to operational reasons which stand in the way of the requested reduction in working hours does not justify the assumption of such a waiver of the minimum notification period or the absence of other grounds for refusal.

The request for bridge part-time work could also not be interpreted as an offer to reduce working hours at the earliest possible date. The principles of interpretation applied in determining requests for permanent reductions in working hours (Section 8TzBfG) could not be readily applied to requests for bridge part-time work. Whereas, in the case of a permanent reduction in working time, the employee is clearly concerned with the "whether" regarding the reduction and it can therefore be assumed that the reduction will be granted at an alternative earliest possible date, this is not readily apparent in the case of applications for bridge part-time work. When bridge part-time work is requested (Section 9a TzBfG), the employee determines not only the start but also the end of the reduction in working time. The employer cannot therefore assume without any tangible evidence that the employee is requesting a postponement or a shortening of the reduction period as of the earliest possible date as an alternative to the period designated by the employee. Such tangible evidence did not exist in this specific case. It had not been known whether the claimant would have other support for her father, who was in need of care, following the end of the period of the bridge part-time work granted. Nor could the claimant's request for bridge part-time work be taken to mean, in the alternative, a shortening of the reduction period starting with the earliest possible period and ending on 31 March 2021 as requested. A request interpreted in this way would lead to the minimum reduction period of one year not being reached (Section 9a (1) sentence 2 TzBfG). This means that the conditions for the claim are not met.

Our comment:

The Federal Labour Court confirms its previous case law on the interpretation of requests for bridge part-time work and strengthens the protection of the employer provided by the legislator. The sole purpose of the three-month minimum notification period is to allow employers to prepare for the temporary partial loss of the employee's labour and to adjust their operations accordingly or to provide for a replacement to cover existing labour needs. A waiver of this protection can only be properly assumed if the response to the request for bridge part-time work shows beyond doubt that the employer does not rely on the three-month protection period. To do otherwise would run counter to the protective idea behind the notification period.

For employers, however, it remains uncertain when the employee can assume a waiver from the perspective of an objective recipient. To avoid misunderstandings, employers are therefore advised to also refer in any feedback or on refusing the request for bridge part-time work to the failure to comply with the minimum notification period in addition to the substantive grounds for refusal or referring to the infeasibility of implementing the desired distribution of working time.

One has to also concur with the Federal Labour Court to the extent that a flexible request for the next possible date can only be assumed if there is clear evidence suggesting such an understanding of the request for bridge part-time work. However, in practice, the issue will also arise here as to at what point in time does this clear evidence exist. This applies in particular if the request exceeds the minimum period for a reduction in working time of one year (Section 9a (1) sentence 2 TzBfG) and a reduction in the bridge part-time work is therefore possible within the period requested. Against the backdrop of an interpretation of requests for bridge part-time work, caution is therefore nevertheless advisable in individual cases. Depending on the duration, circumstances and reasons for the request for bridge part-time work given by the employee, employers are therefore advised to include a reference to non-compliance with the minimum notification period in order to establish clear conditions and avoid a postponement/shortening of the bridge part-time work that is not desired by the employer.

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Continued employment during proceedings for protection against unfair dismissal vs. employment relationship during legal proceedings

The employee shall also be entitled to remuneration for default of acceptance if he insists on employment in accordance with the judgment obtained by him for continued employment and refuses an offer by the employer to enter into a fixed-term employment relationship during the legal proceedings.

Federal Labour Court, judgment of 8 September 2021 – 5 AZR 205/21

The claimant claimed remuneration for default of acceptance. The defendant refused to pay on the grounds that the claimant had maliciously failed to earn any other income. This was based on the following facts:

The defendant terminated the employment relationship as of 30 September 2019. The action brought by the claimant against this for protection against unfair dismissal was successful. In the judgment handed down in August 2019, which upheld the action, the labour court also ordered the defendant to continue to employ the claimant on the same terms and conditions until the legally binding conclusion of the proceedings for protection against unfair dismissal. The legal proceedings ended with the withdrawal of the appeal by the defendant at the end of December 2019. In September 2019, the defendant offered to enter into a fixed-term employment relationship during the legal proceedings (*Prozessarbeitsverhältnis*) with the claimant "for the duration of the ongoing legal proceedings," which the claimant rejected. Under this fixed-term employment relationship during the legal proceedings the claimant was to perform tasks, 80% of which, in his view, corresponded to the tasks he last performed as a "Quality Manager". In addition, he was to receive his previous remuneration, but no continued payment of remuneration in the event of sickness and no paid vacation. For his part, the claimant requested that the defendant continue to employ him as a Quality Manager in accordance with the judgment of the labour court. On 1 October, the claimant appeared at work after being asked by the defendant to start work. However, because the claimant refused to sign the agreement regarding a fixed-term employment relationship during the legal proceedings, he did not start work. The employment relationship with the claimant continued as of 1 January 2020.

The claimant requested remuneration for default of acceptance for the period from October to December 2019. The defendant rejected this and said that a claim to remuneration for default of acceptance did not arise because the claimant had maliciously failed to earn the same amount of remuneration elsewhere. The acceptance of the agreement offered regarding a fixed-term employment relationship during the legal proceedings and the conditions provided therein had been reasonable for the claimant. While the claimant was unsuccessful in the labour court, the Higher Labour Court upheld the action on appeal.

The decision

The defendant's appeal was unsuccessful. According to the Federal Labour Court's judgment, the claimant is entitled to remuneration for default of acceptance pursuant to Section 615 sentence 1 in conjunction with Section 611a (2) of the German Civil Code (*Bürgerliches Gesetzbuch,* BGB). The claimant did not have to accept any other earnings being offset.

The employee's failure to earn other income is malicious within the meaning of Section 11 (2) of the German Protection against Dismissal Act (*Kündigungsschutzgesetz*, KSchG) if he can be blamed for deliberately remaining inactive during the default of acceptance period despite being aware of all objective circumstances and not taking up other work which he could reasonably be expected to do so in good faith (Section 242 BGB) or intentionally preventing the commencement of work. The decisive factor is an overall assessment taking into account all the circumstances of the individual case. In the Federal Labour Court's opinion, the employment offered by the defendant at an unchanged level of remuneration was in itself reasonable for the claimant, since it was equivalent to 80% of the work that he had last performed up to the time of his dismissal. Although the claimant had intentionally disregarded another employment opportunity known to him with the same employer, he could not be blamed for this on the grounds of malicious intent, since the claimant had not been obliged to enter into a fixed-term employment relationship during legal proceedings in addition to the terminated employment relationship during the ongoing proceedings for protection against unfair dismissal despite having obtained a judgment for continued employment. Section 11 no. 2 KSchG lays down - as does Section 615 sentence 2 BGB - an obligation derived from Section 242 BGB to generate reasonable earnings in the meantime out of consideration for the employer. However, the duty to consider the interests of the employer has its limits where the employee has a (provisionally) enforceable judgment and therefore a legal claim binding on the employer. On the contrary, it was incumbent on the defendant - if it wanted to reduce the risk of default of acceptance - to comply with its obligation under the judgment for continued employment and not to make the claimant's continued employment during the dismissal proceedings dependent on the conclusion of a fixed-term employment contract during legal proceedings.

Our comment

The continued employment of a dismissed employee during the duration of proceedings for protection against unfair dismissal can be based on various legal grounds, which the Federal Labour Court explicitly mentions in this judgment. In addition to actual employment based on a general entitlement to continued employment addressed in the judgment for continued employment, contractual arrangements may be considered, such as the temporary continuation of the terminated employment relationship that is either subject to a condition subsequent to the dismissal of the action for protection against unfair dismissal or fixed until the final conclusion of the proceedings for protection against unfair dismissal. The Federal Labour Court has recently left open whether the conclusion of a further fixed-term employment contract in addition to the terminated employment contract is also possible (cf. judgment of 20 May 2021 - 2 AZR 457/20).

If there is a provisionally enforceable judgment for continued employment, the employee is initially in a strong legal position. In this case, the employer cannot remedy the default of acceptance through offering a fixed-term employment relationship during the legal proceedings in addition to the terminated employment contract. However, the employer has options available to contest a (threatened) compulsory enforcement of the right to continued employment. If the employer can credibly demonstrate a disadvantage that cannot be compensated for as a result of enforcement, enforceability may be excluded or discontinued. If the employer can also present reasons that further cooperation between the employer and the employee that is beneficial for the business is unlikely and files an application for termination in the course of the proceedings, a temporary suspension of the enforcement order may be considered on this basis.

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Mass dismissal notification: Ineffectiveness for lack of display of target data

Is “shall” information mandatory for a collective redundancy notification?

Hesse Higher Labour Court, judgment of 25 June 2021 /– 14 Sa 1225/20

The information to be provided by the employer to the competent Employment Agency when issuing a collective redundancy notification is governed by Section 17 (3) sentences 4 and 5 of the German Protection against Dismissal Act (*Kündigungschutzgesetz,* KSchG*).* The Act distinguishes between so-called “shall” and “must” information, whereby the “shall” information has not been considered by the courts to be mandatory for a collective redundancy notification to be valid. This has now changed.

The case

The parties are in dispute about the validity of an ordinary termination for operational reasons. The defendant submitted a collective redundancy notification (*Massenentlassungsanzeige*, MEA) to the competent Employment Agency on 18 June 2019 and terminated the employment relationship with the claimant the following day. On 23 June 2019, the defendant employer submitted to the Employment Agency the attachment to box 34 of the MEA. Information on the gender, age, occupation, and nationality of the employees affected by the collective redundancy is provided in this attachment. This is the information that “shall” be provided in the MEA in accordance with Section 17 (3) sentence 5 KSchG. The Frankfurt Labour Court considered the MEA of 18 June 2019 to be defective and therefore invalid, as it did not contain what the court considered to be the necessary “shall” information. This was only submitted after the notice of termination had been served. The dismissal was therefore invalid due to the absence of an effective MEA.

The decision

The defendant’s appeal was unsuccessful. The Hesse Higher Labour Court also took the view that a valid MEA had not been served by the defendant prior to receipt of the notice of termination by the employee. The Higher Labour Court justified this by stating that the required interpretation of Section 17 (3) KSchG in accordance with the EU Collective Redundancies Directive (98/59/EC) shows that an MEA is only properly prepared if it also contains the “shall information” as set out in Section 17 (3) sentence 5 KSchG on gender, age, occupation, and nationality. According to the provisions of Council Directive 98/59/EC, all “relevant” information must be provided in the MEA. The Directive does not distinguish between information that must be provided in any event due to its relevance and information that, although relevant, need not necessarily be provided. The information on gender, age, occupation, and nationality, even though some of these are proscribed characteristics under Section 1 of the German General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz,* AGG), is relevant because it is important both for placement efforts and from a socio-economic viewpoint. Consequently, the employer must provide all information that it can - if necessary, after undertaking the necessary investigations. In the Higher Labour Court’s opinion, neither the unambiguous wording of Section 17 (3) sentence 5 KSchG, nor the logic of the provision or the intention of the national legislator conflict with this interpretation. While it is the case that the principle of interpretation and further development of national law in conformity with EU law is subject to limits, because the content of a provision that is unambiguous in terms of its wording, logic and meaning cannot be reversed by way of interpretation in conformity with the Directive, the further development of the law by judges must not lead to the courts substituting their own substantive concept of justice for that of the legislature. An interpretation of the law that disre-

gards the clearly discernible will of the legislature therefore improperly interferes with the competences of the democratically legitimised legislature. In its decision, the Higher Labour Court assumes that the wording of Section 17 (3) sentence 5 KSchG as a "shall" provision does not necessarily mean that the failure to provide the information may not have any effect on the validity of the MEA. A "shall" provision does not necessarily entail weaker legal consequences than a "must" provision. "Shall" could also be understood to mean that an obligation is only established where the required conduct is possible for the addressee to whom the provision is targeted, but the obligation exists without restriction in this case. The Higher Labour Court does not recognise a systematic incompatibility with the provision in Section 17 (3) sentence 4 KSchG, which is worded as a "must" provision. The information set out in Section 17 (3) sentence 4 of the KSchG would concern the sphere of the employer and would be available to the employer in any event. The wording of Section 17 (3) sentence 5 KSchG as a "shall" provision can therefore be justified in the context of the history of the law by the fact that the negotiations with the works council were not to be burdened by the premature identification of individual employees. However, the legislative goal of allowing more room for negotiations with the works council is rendered obsolete by the changed definition of dismissal.

Our comment

The decision of the Hesse Higher Labour Court is surprising, as it is contrary to the opinion prevailing to date in the literature and case law that failure to provide information in accordance with Section 17 (3) sentence 5 KSchG in the context of an MEA does not result in the MEA being invalid. Moreover, the reasoning of the Hesse Higher Labour Court is not convincing.

With the provisions set out in sentences 4 and 5 the legislator has implemented the requirements of Council Directive 98/59/EC in conformity with the Directive. There is therefore no scope for a more far-reaching interpretation of Section 17 (3) sentence 5 KSchG in conformity with the Directive. Moreover, contrary to the opinion of the Higher Labour Court, the further information set out in sentence 5 is not relevant within the meaning of Council Directive 98/59/EC. In particular, the information under sentence 5 is not suitable for supporting the Employment Agency's placement efforts. The Higher Labour Court also fails to recognise that the serving of the collective redundancy notification does not yet constitute irreversible measures for the implementation of change in the business operations, in particular with regard to identifying the employees to be dismissed.

An appeal on points of law has been lodged against the judgment handed down by the Hesse Higher Labour Court. Until the highest court has ruled on whether it is actually mandatory to include the "shall" information in the MEA, it is strongly advisable that, against the backdrop of the current decision of the Hesse Higher Labour Court, information on gender, age, occupation, and nationality be also included in the MEA. Employers may no longer rely on the explicit instructions of the Employment Agency on the relevant form, according to which the information pursuant to Section 17 (3) sentence 5 KSchG may be submitted subsequently. It is unfortunately not clear from the decision of the Higher Labour Court what efforts in detail are required of the employer if the employer does not have the "shall" information on the employees to be dismissed. In any case, the Court assumes that all information contained in the MEA must be objectively correct, i.e., also that under Section 17 (3) sentence 5 KSchG. Is it therefore sufficient to check the information in the personnel file for this information or is the employer required to ask the employees to provide it with this missing information regarding themselves? How does an employer deal with the situation where employees do not provide any information or provide objectively incorrect information, e.g., do not disclose that they have dual nationality? These considerations also illustrate that the decision of the Hesse Higher Labour Court is far removed from practice and, if it were to continue to stand, would in fact lead to a second protection against dismissal via the MEA route.

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■ CASE LAW IN A NUTSHELL

Jurisdiction over an action brought regarding a Corona bonus

Munich Higher Labour Court, decision of 30 July 2021 – 4 Ta 178/21

The action brought by an employee against his employer for payment of the so-called "Corona bonus" pursuant to Section 150a of the German Social Code, Book XI (*Sozialgesetzbuch,* SGB*)* is a civil dispute and comes under the jurisdiction of the labour courts and not the social courts.

Reasons for the decision

The parties are in dispute about the payment of a Corona bonus pursuant to Section 150a SGB XI. The claimant was employed as a nurse by the defendant, which operates an outpatient nursing service.

The employee sued for payment of the Corona bonus in the labour court. The court referred the lawsuit to the social court, as the claimant was not entitled to pursue legal action in the labour courts, according to the court. It held that this was a matter of social long-term care insurance, for which the employer is merely the paying agent and not the claimant. The employee filed an immediate complaint against this decision.

The labour court did not allow the complaint and referred the lawsuit to the Higher Labour Court. The immediate complaint was successful. In the opinion of the Higher Labour Court, legal action regarding this dispute can be pursued in the labour courts pursuant to Section 2 (1) no. 4a) of the German Labour Court Act (*Arbeitsgerichtsgesetz,* ArbGG). In its decision, the Higher Labour Court states that the assertion of a claim for payment of the Corona bonus constitutes a dispute about a civil-law claim of an employee against his/her employer, which is legally connected to the employment relationship. This is clear from the wording of Section 150a (1) sentence 1 of the SGB Book XI, which establishes an obligation on the part of the employer vis-à-vis its employees and stipulates an employment relationship and therefore a relationship under private law as a prerequisite for the claim. The fact that the Social Code is public law is irrelevant for the qualification as labour law here. Nothing different results from the fact that the amounts pursuant to Section 150a (7) SGB Book XI are paid in advance by the nursing care insurance funds (*Pflegekassen*) to the employers. This is in line with the legal situation regarding the short-time working allowance, where the employee as the claimant has no contact with the authorities and must revert to his/her employer for payment.

Commencement date of the special protection against unfair dismissal for pregnant women

Baden-Württemberg Higher Labour Court, judgment of 1 December 2021 - 4 Sa 32/21

Only 266 days should be used to calculate back from the expected date of delivery determined by a doctor to establish the time of conception. The Higher Labour Court thereby deviates from the established case law of the Federal Labour Court, which usually counts back 280 days in such cases.

Reasons for the decision

The parties are in dispute about the validity of a notice of dismissal served by an employer. The claimant was employed as a housekeeping assistant from October 2020 and was dismissed during her probationary period on 7 November 2020 with effect from 23 November 2020. The employee defended herself against this by filing an action for protection against unfair dismissal. A confirmation of pregnancy was provided during the course of the proceedings. This was submitted by the employee's gynaecologist, who confirmed on 26 November 2020 that the employee was in her sixth week of pregnancy. A medical certificate confirming the expected date of birth as 5 August 2021 was provided shortly afterwards. The employee is of the opinion that the dismissal is invalid due to a violation of the prohibition of dismissal during pregnancy under Section 17 (1) of the Maternity Protection Act (*Mutterschutzgesetz,* MuSchG). At the time of her dismissal, she was already pregnant, which she had not yet known about. The employee informed the employer about her pregnancy immediately after she found out about this on 26 November 2020.

The Labour Court dismissed the action for protection against unfair dismissal, and the appeal lodged against this was unsuccessful. According to the Higher Labour Court, the dismissal was not invalid under Section 17 (1) MuSchG, since pregnancy could not be determined at the time of the dismissal. The Higher Labour Court justified its decision by stating that the burden of proof for the fact that the employee was

pregnant at the time the notice of dismissal was served rests with the employee. If the proof is derived from statistical probabilities, this is only possible by providing prima facie evidence, which, however, only facilitates proof in the case of typical sequences of events. Such an assessment based on probability can only be made for a period of 266 days before the expected delivery, since it can be assumed that the egg would not be fertilised until the 12th or 13th day of the cycle. The - ultimately fictitious - determination of the time of conception to be the first day of the last menstrual period links the protection against unfair dismissal to a point in time at which conception is not only unlikely, but very unlikely and practically virtually impossible. Such a bringing forward of the protection against dismissal to a point in time before the start of pregnancy would have the effect that an initially effective dismissal would be subsequently deprived of its effectiveness due to the actual start of pregnancy, which is practically always later in time.

If, however, 266 days were calculated back from the expected date of delivery of 5 August 2021, pregnancy would have started on 12 November 2020, i.e., only four days after receipt of the notice of dismissal.

Summary dismissal for deliberately coughing on another person in times of the pandemic

Dusseldorf Higher Labour Court, judgment of 27 April 2021 – 3 Sa 646/20

Deliberately coughing on a work colleague accompanied by the words “I hope you get Covid” entitles the employer to summarily dismiss the employee concerned even without a prior warning. However, the employer bears the burden of production and proof concerning the allegation that resulted in dismissal. In this specific case, however, the legal dispute ended in favour of the employee.

Reasons for the decision

The parties are in dispute about the termination of their employment relationship as a result of an extraordinary notice of termination being served by the employer. The claimant was employed as a machine operator by the defendant employer. In mid-March 2020, the employer drew up its internal pandemic plan in view of the spreading of the coronavirus. Measures included keeping a distance and covering the mouth and nose with a tissue or sleeve when coughing or sneezing. The workforce was informed in detail about this. The employer summarily dismissed the claimant at the beginning of April 2020. It accused the claimant of failing to comply with hygiene measures and keeping safe distances on several occasions. According to the employer, the claimant had indicated to the employer in conversations that he did not take the measures seriously and would not comply with them. For example, he had grabbed a co-worker’s arm against his will and intentionally coughed on a co-worker at a distance of only half an arm’s length to a full arm’s length. Afterwards he had said that he hoped that his colleague would get Covid. Thereupon, the employer had served notice of dismissal. The claimant employee countered that he did not expose other persons to a risk of infection and, as far as he was able, kept a safe distance and observed the coughing etiquette. On that day, he had merely felt an urge to cough and as a result had an uncontrollable coughing fit. During this coughing fit he had kept a sufficient distance from the work colleague. When the other work colleague became annoyed and made this known, he replied that the colleague should “chill out, he wouldn’t get Covid”.

The Higher Labour Court upheld the action for protection against unfair dismissal. The employer had not been able to prove the facts alleged by it after the extensive taking of evidence. Since the employer bears the burden of proof regarding the grounds for dismissal, this lack of proof would be to its detriment. However, the Higher Labour Court clarifies in its decision that the version of the facts alleged by the defendant could have justified summary dismissal in the specific case. Anyone who deliberately coughed at a colleague at close range and said that he hoped he would get infected with the coronavirus has committed a serious breach of the duty of consideration vis-à-vis his work colleague. This person at least consentingly accepts that he is exposing the work colleague concerned either objectively to the actual, specific risk of a life-threatening infection and illness or in any event subjectively to the corresponding specific feeling of anxiety. If the employee then also makes it clear that he is not prepared to comply with the occupational health and safety regulations, a prior warning is also not required.

Effective obligation to participate in employer-mandated coronavirus testing

Munich Higher Labour Court, judgment of 26 October 2021 – 9 Sa 332/21

A provision in the collective bargaining agreement under which the employer is allowed to have an independent doctor or the health department determine where appropriate whether the employee is fit for work and free of infectious diseases entitles the employer to order coronavirus testing even for individuals who show no symptoms of illness in the current pandemic situation.

Reasons for the decision

The claimant employee is a flautist at the Bayerische Staatsoper. The claimant's employment contract contains a reference to the collective bargaining agreement for musicians in cultural orchestras. This requires employees to be examined for the presence of infectious diseases if there is reason to do so. The employer implemented an occupational hygiene policy for the 2020/2021 season, which included regular testing by means of PCR tests in order to take part in rehearsals and performances. For this purpose, the employer organised testing, which was performed by medically trained personnel using a nasopharyngeal swab. Alternatively, employees could present an appropriate test result performed by a physician of their own choice. According to the occupational hygiene policy, this measure was based, inter alia, on the fact that, due to the nature of the employment, it was not possible to wear mouth and nose coverings, and safe distances could not always be kept in an orchestra. The employee then informed the Bayerische Staatsoper that she would not submit to a test. She had not been in a high-risk area, nor did she show signs of COVID-19. She is of the opinion that this represents a significant intervention in the body's physical integrity and poses a risk of injury to the nose or throat area. Players of wind instruments in particular could become incapacitated with even minor injuries to the nose and throat. As a result, the defendant ceased employing the employee and stopped paying her wages. In her action, the employee asserted, inter alia, claims for remuneration for the period of non-employment.

The Higher Labour Court upheld the first instance decision of the Munich Labour Court, which had dismissed the action. The defendant had not been in default of acceptance because the employee had not been willing to perform the work under the contractually agreed conditions. The instruction to carry out the tests could have been based on the provisions of the collective bargaining agreement, according to which the employer was entitled to require that the employee be tested, even if there were no specific symptoms of illness. According to the provision of the collective bargaining agreement, the existence of a concrete reason in the form of an objective reason is sufficient to preclude the arbitrary ordering of examinations. The Higher Labour Court further stated that the serious risk of infection during a pandemic situation was sufficient. The employer has a considerable interest in carrying out the tests, as it is obliged under both private and public law to protect the health of other employees, see Section 618 (1) of the German Civil Code (*Bürgerliches Gesetzbuch,* BGB).

No right to transfer upon presenting a face mask exemption certificate

Hamburg Higher Labour Court, judgment of 13 October 2021 – 7 Sa 23/21

If an employee is no longer able to perform his or her work duties because he or she cannot wear a mouth and nose covering, he or she is not entitled to remuneration for default of acceptance. Section 296 BGB does not impose an obligation on the employer to determine work duties according to the employee's wishes or concerns.

Reasons for the decision

The parties are in dispute, inter alia, about the payment of remuneration for default of acceptance. The claimant employee worked as a financial advisor in the branch office of a bank where, in order to reduce the risk of COVID-19 infections, it was generally required to wear a mouth and nose covering. The employee refused and immediately submitted a medical certificate for exemption from wearing a face mask.

The claimant suggested to the defendant that he be employed at another location in an individual office or be allowed to work from home. The defendant did not pursue this suggestion and informed the claimant that it currently did not have any workplaces available where he would be able to work without wearing a mouth and nose covering. For this reason, it would also no longer pay him any remuneration.

The Hamburg Labour Court upheld the employee's action. The appeal lodged against this decision was successful. The claimant was not entitled to remuneration for default of acceptance that was specifically sought in the action. The

Higher Labour Court explains that the right of direction exercised by the defendant with respect to the wearing of a mouth and nose covering was lawful. The employer had specified the work duties such that the employee had to perform the work in a specific branch. The employee did not offer to work there. Accordingly, a claim for remuneration for default of acceptance had not arisen. The employer is not required to address the employee's wishes and concerns with regard to the work duties, which were initially effectively defined by the employer. If the employer culpably fails to assign work to the employee which the employee can still perform and is in accordance with the contract, this could at most justify a claim for damages on the part of the employee. Such a claim had not been filed.

Employer may order the return from the home office

Munich Higher Labour Court, judgment of 26 August 2021 – 3 SaGa 13/21

An employer who allowed his employee to work from home is entitled in principle to change his instructions pursuant to Section 106 sentence 1 of the German Industrial Code (*Gewerbeordnung,* GewO), if operational reasons later emerge that do not support working from home.

Reasons for the decision

The parties are in dispute about the employee's entitlement to work at his place of residence. The claimant was employed by the defendant full-time as a graphic designer. Since December 2020, almost all employees who would otherwise work in the office have been working from home. After the employee repeatedly failed to log in and out of work electronically during the home office period and failed to attend virtual meetings without giving any reasons, the defendant issued a warning to the claimant and ordered him at the end of February to work again from the office in the future. By way of a temporary injunction, the employee sought permission to perform his work from his home office and only to be present at the company if his presence at the office was actually required. He would already be entitled to work from home in accordance with Section 2 (4) of the SARS-CoV-2 Occupational Health and Safety Ordinance (*SARS-Cov-2-Arbeitsschutzverordnung*, SARS-CoV-2-ArbSchV).

The Munich Labour Court rejected the application. The right of the claimant to work from home would not result from the employment contract nor from Section 2 (4) SARS-CoV-2-ArbSchV. Furthermore, there would also be no obligation on the part of the defendant to exercise the right of direction in the desired manner under Section 106 sentence 1 GewO. Specifying the work duties is a matter for the employer.

The Higher Labour Court dismissed the appeal and confirmed the decision. In the decision, the Higher Labour Court states that Section 106 GewO gives the employer the right to determine where the work is managed at its reasonable discretion, unless otherwise stipulated in the employment contract or collective bargaining agreement. The determination of work performance on the basis of reasonable discretion requires a balancing of the mutual interests in accordance with, inter alia, constitutional and legal value judgements. Taking this as the basis, the defendant should be allowed to re-designate the place of work by way of instruction, since compelling operational reasons spoke against the employee working from home. The technical equipment at the home workplace was not the same as that provided at the office location and the employee had not been able to demonstrate that the data was protected against access by third parties and the wife who was working for a competitor.

The right to perform work from home can also not be derived from Section 2 (4) SARS-CoV-2-ArbSchV. This does not convey a subjective right to employees to work from home according to the intention of the legislators.

■ INTERNATIONAL NEWSFLASH FROM OUR GLOBAL NETWORK UNYER

Posting of employees to France

When posting employees to France, prior declaration of the posting is required for each employee posted. The French administration wants to ensure by this means that certain working conditions are guaranteed.

Of course, France has also transposed Directive (EU) 2018/957 concerning the posting of workers in the framework of the provision of services into national law. There are three main areas of protection in which certain conditions must be met: working time, statutory or collectively agreed minimum wages (with overtime pay for hours worked in excess of 35 hours) and health and safety protection. It must be initially determined which French collective bargaining agreement is applicable, especially for the purposes of verifying the minimum wages. It should be noted that a collective bargaining agreement is applicable to almost all industries (including service providers).

For each posted employee, the employer must submit a prior declaration of the posting via the SIPSI portal. This must include extensive information about the employer, employee, place and duration of the service, wages paid and housing conditions. The employer must also designate a representative in France who must be able to immediately forward a whole range of documents to the authorities in the event of an inspection during the posting. In particular: payroll records, time sheets as well as pay stubs and overtime records. The representative must compile the necessary documents every month. This may be an employee of the company or a third party (law firm, etc.).

For construction activities in building and civil engineering, an additional declaration is required to obtain a state professional identity card (carte BTP). Inspections are mainly carried out at

the building sites.

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Together with the French law firm FIDAL, we launched the global organisation unyer in May. Four months after its formation, unyer has already expanded into Italy and welcomed the renowned Italian law firm, Pirola Pennuto Zei & Associati, as a new member. unyer is a global organisation of leading international professional services firms. unyer is open not only to law firms but also to other related professional services, particularly from the legal tech sector, enabling advice to be provided on all matters and across all jurisdictions under one international umbrella brand. In this issue, we therefore present a new section of our newsletter in which we report on developments in employment law and topics from unyer.

■ GENERAL INFORMATION

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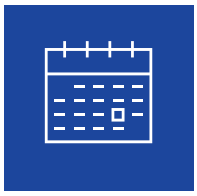
Events, publications and blog



You will find an overview of our events here.

You will find a list of our current publications here.

You will find our blog here.

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