What Every Global CIO Should Know About German Works Councils and Data Protection Officers

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German works councils and data protection officers (DPOs) can impact global IT projects and teams; yet, many global CIOs are unaware of these organizations and roles, and how to work effectively with them.

Key Findings

- Many global IT leaders fail to understand how works councils influence IT projects and the management of their German employees.

- Failure to work effectively with a DPO and the works councils can derail and delay IT projects significantly.

- Effective partnership with works councils early in a project will make communicating difficult decisions like downsizing easier in the long run.

- Data protection law is often used to foil or delay a global initiative, but it is not always the German works councils that are to blame.

Recommendations

- Partner early with the works council and DPO to get buy-in to your project. You may need your own legal support.

- Do not mistake the works council for the DPO, and vice versa. They do not replace each other, but rather complement each other. In most cases, you will have to involve them both. In some cases, the DPO will help in negotiations with the works council.

- Focus on benefits for the employee when discussing technology implementations and changes with the works council — e.g., strengthening the protection of personal information, reducing surveillance to the absolute minimum, and installing monitoring only as a safety net to allow the employee to communicate and interact more freely.

- Network with other companies, vendors and legal counsel to benchmark works councils and DPOs. Ensure that you have not been told that something is impossible because of the works council, when other political dynamics are to blame.

What You Need to Know

Many CIOs and other executives of global companies don't understand the specific roles and functions of the German works councils or DPOs. Failing to actively involve them in decisions about IT resources, systems deployment, outsourcing, new application purchases, changes in compensation or employee evaluation practice can lead to major project delays, significant legal costs, and workforce mistrust of your project. By working effectively with them, you will smooth your German rollout. Some other European countries, such as France, have similar legal and social systems.

Analysis

Context

German Labor Laws and Privacy

German labor laws provide strong rights for workers' representatives to be part of major decisions that impact employees. These include decisions not only about pay conditions, but also for corporate strategy, and the systems and processes that are used in the business (France is similar). This often takes managers from outside Germany by surprise.

Although bound by similar laws to the rest of Europe, data privacy (often called "data protection") is taken more seriously in Germany than in most other countries (see "A Privacy Guide for Companies Doing Business in Germany").

What Is the Works (Workers) Council?

The works council is an institutionalized representation of employee interests in the workplace. The tasks of the works council are regulated by the Works Constitution Act (called Betriebsverfassungsgesetz [BetrVG]). Employees elect council members, and these members participate in decisions about company strategy and its execution. In organizations with more than 250 employees, it is typical that the works council representatives have seats on the company's supervisory board. An important concept to grasp is the right of codetermination and its impact on technology-related decisions. According to §87 I no. 6 of the BetrVG, the works council shall have a right of codetermination regarding "the introduction and use of technical devices designed to monitor the behavior or performance of the employees." The codetermination right includes productivity measuring devices or automatic storage of phone calls, including private calls, particularly computer-assisted personnel information systems.

The works council has a major say in:

- Employee compensation

- Employee terms and conditions

- Employee promotions and transfers

- Work methods

- Employee data privacy and monitoring

- Outsourcing

- Reorganization and downsizing

Do not confuse a works council with a trade union. However, organizations based in Germany often will have trade unions and works councils, and the trade unions provide advisory services to works council members who are part of their union. At works council election time, representatives may campaign under the banner of a trade union.

What Is the Role of the DPO?

Since 2006, the appointment of a DPO has been compulsory for any company or organization employing more than nine employees in its automated personal data processing operations in Germany. The DPO must ensure that the organization processes all personal data within the bounds of the German data protection legislation. If the DPO states that a given system or process is not compliant, he or she has the power to stop that processing. Any plans to process personal data must be reported to the DPO. This isn't just employee data, but customer or partner data, too. Consider the DPO to be similar to an internal auditor.

There is some overlap between the roles of a DPO and the works council, and most IT projects that involve the processing of personal data will involve both roles. A CRM project will definitely require DPO involvement, and most likely works council involvement, too, if the work of the system users changes significantly. For instance, a German airline recently added boarding pass scanning in its executive lounges, and personal data processing change that had to be cleared with the DPO. The airline published a brochure explaining how the data will be used. A global HR system rollout will definitely need the DPO and the works council to be involved.

Analysis

Here, we list several scenarios with DPO and works council implications. There are more, but these are the typical ones that we note in client inquiries. If you are deploying any system or changing any process that impacts German employees, understand that you need to discuss it with the works council and DPO before you start. How you manage your team will also be affected by the works council. Your local HR department will have expertise in dealing with the works council and the DPO, but, in some cases, you may need your own counsel, such as:

- **Business process change:** The implementation of IT systems always changes some aspects of how a business process is executed. Often, such implementations change the staff's responsibilities, roles or organizational setup. Such changes are subject to participation by the works council and need to be planned with early works council participation, to avoid due delays by postmortem discovery. For example, works councils have been successful in attaining court orders to disengage a phone system for several days and cut off major communication lines, because no information about capability of the system had been shared beforehand.

- **Performance measurement:** Measuring the performance of staff via any IT-based method has been at the top of the list of works council participation for some time (see Baker & McKenzie).

Performance management systems are often viewed skeptically, as they are seen as a tool to justify dismissal, rather than merely to develop and reward employees. It pays to disclose the true intent of performance measurement to establish trust. Data captured for one HR process can't simply be used for another without agreement. If you capture skills and capabilities for training catalogues, you can't just use that data to plan your downsizing without agreement. Any project involving HR data of German employees will need works council clearance.

Work with the DPOs to reduce the concerns of the works council by analyzing how such performance measurements are taken and how they are used in subsequent evaluation processes. Also, work with your key vendors for reference benchmarks. If your design system and process are solid, then the DPO could be a useful ally in your discussions with the works council.

Failure to adequately involve the works council delayed a major manager and employee performance project at a global bank by more than a year. In another example, a large software company had to postpone a management development process deployment for more than six months, because the works council raised concerns that the system would track poorly performing managers (see "Global Talent Management Isn't Just Global").

Rewarding, Managing and Terminating IT Staff Based in Germany

Many organizations have global IT departments, with some staff reporting remotely to their managers. Compensation decisions for German employees, such as bonuses, stock or merit increases, will need works council approval. Work closely with your German HR function to ensure that you have sufficient time to conclude any German employee-related bonus discussions. It is not unusual for German employees to receive bonuses months later than their peers in other countries. Don't simply assume that because global HR approves the numbers that the process is complete. Promotions and terminations almost always require works council approval.

Segregation of Data Hierarchies

This means that confidential, personal data should not be visible beyond the immediate reporting line. The data protection officer should support the design of such architecture to create trust and discipline about how data is handled across multiple hierarchies. This should not hinder a group from creating aggregated data for reporting, but the process should be in line with a works agreement with the works council. When evaluating HR applications, ensure that the HR

organization handles hierarchical security adequately. For example, in Germany, religion is a required field for church tax, but this data has little relevance for a manager, especially outside Germany.

Impact of IT Solutions on Employment

Another area of concern of every works council is the impact of a system implementation on employment. While the fundamental decision for using systems is an entrepreneurial right of the organization's leadership, its impact on employment becomes an immediate target of any works council. Decisions to move production away from a specific site may be subject to participation by the works council. Glib ROI studies that talk of full-time equivalent (FTE) reduction is the main reason that system deployments tend to flounder.

Alternative Deployment Methods, Such as Software as a Service

When considering software as a service (SaaS) or hosted solutions, it will be critical to involve the works council and the DPO. Insist that the vendor provides clear guidance on how its solutions comply with data protection law (see "Critical Privacy Questions to Ask an HCM/CRM SaaS Provider"). Processing that takes place outside the EU will face greater scrutiny than in the EU. You can process personal data outside Germany or the EU, but there are hurdles to do so. If your proposed vendor has an inadequate strategy to address the German concerns, then you are likely to face similar issues in France and Austria, for instance.

Outsourcing, Especially When Involving Staff Transfer

This is an especially contentious topic. When planning to transfer employees to a service provider, the workers council has to be involved early not only because of the law (BetrVG [industrial relations law] and Arbeitsschutzgesetz [job protection law] rule when the workers council has to be informed, consulted or when they need to agree), but also to ensure the right level of communication, to ensure that the employees get treated correctly and to lay the foundation for successful staff transfer. Many transfer projects are significantly delayed when the staff transfer is not planned carefully with the right parties. Workers councils will intervene later (often more aggressively) in the negotiations if they are not involved initially. The rules for transfer and protection of employees when businesses or parts of businesses change owners are defined in §613a, BGB (see Note 1). Beyond that, collaborating with the workers council will minimize the internal disruption in an employee transfer process. A smooth transition is essential for the success of the outsourcing project, as only motivated employees — the remaining and the transferred — can ensure that the services in scope do not get interrupted.

There are three key areas where works council collaboration is critical for the success of an outsourcing project:

- **Decision:** Enterprises should let the works council participate in the decision process for an outsourcing project. This will not stop the process (a fear of executives), but will provide the possibility to achieve a desirable win-win situation. It helps to make clear from the beginning

that the project is for the benefit of the whole company, and to treat the affected employees as humans and not merely as resources.

- **Communication:** It is critical to communicate effectively when announcing an outsourcing project. Communicating too early causes rumors that reduce an employee's motivation and efficiency. Communicating too late causes disruption and an immediate stop in motivation in most cases. Successful outsourcing projects (that include staff transfer) are those where communication is planned jointly (between the workers council and management) and executed consistently. What, when, how and to whom are key elements to define early. Service providers can help here, as they have frequently been involved in such projects.

- **Collaboration with the service provider's works council:** The transfer of employees usually also involves works council of the service provider. Bringing the two works councils together, which then discuss the transfer and the major concerns of the effected employees, can help ensure a smooth transition. This interaction has to be carefully planned. Participants should discuss not just the short-term impact (what happens day one and in the first year), but also the long-term impact (benefits and careers of the affected employees) of the transfer to both parties (works councils of the service provider and the employer).

Security Monitoring and Data-Loss Prevention

Certain technologies have a dual use. Monitoring and filtering tools can be used to analyze IT problems and prevent sensitive data leaks. However, IT administrators and managers could also use these tools to monitor employee performance. Consequently, involve the DPO and the works council before installing such tools, and discuss which features you can activate to prevent abuse. For example, you can log all privileged access (see "Content-Aware DLP in Europe").

A Final Caveat

Don't blindly accept "the works council says it is forbidden," or "data protection law makes this impossible."

For global CIOs and IT leaders without German experience, codetermination and the works-council-related processes can be confusing and daunting. It is not unknown for the German subsidiary of a global enterprise to use this to its advantage when it perceives that a global project isn't in its self-interest. This is sometimes the case when it involves data processing being moved out of Germany. Local IT organizations may feel threatened by the potential loss of control or even jobs.

Understand your organizational politics, as they will shape the dynamics of the negotiation as much as the formal regulations do. Network with other CIOs to share experiences. Your key vendors may also have good case studies for you to reference. There is also a strong ecosystem of advisors and legal experts to tap into.

Key Facts

- Do not ignore works councils and DPOs when deploying systems or processes that impact your German organization. Ignoring works councils and the DPO when deploying systems will lead to

major project issues, including delays before go-live or even a shutdown of systems after go-live.

- Typically, the earlier you enter into discussions, the better.

- Informing only the works council is not enough, as codetermination is a legal right. You will need to engage and negotiate.

- Understand your organization's global politics, as it isn't always the works council or the DPO that creates the delay.

Recommended Reading

Some documents may not be available as part of your current Gartner subscription.

"Toolkit: Outsourcing Contract Human Capital Management Attachment"

"Toolkit: Outsourcing Contract Key Personnel Attachment"

"Toolkit: Personnel Article"

"A Privacy Guide for Companies Doing Business in Germany"

"German Perspective: Gartner Privacy Survey, 2010"

"Global Talent Management Isn't Just Global"

"Content-Aware DLP in Europe"

"Critical Privacy Questions to Ask an HCM/CRM SaaS Provider"

Note 1 Links to Laws

- Federal Data Protection Law in English (BDSG)

- Works Constitution Act in English (BetrVG)

- German Civil Code (BGB)

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