Legislators broaden employee codetermination

New legislation: temps may make the difference, but new law lacks clarity

By Dr. Birgit Friedl and Dr. Mark Zimmer

Very soon, temporary workers will have to be counted toward German codetermination thresholds, any may thus be decisive for triggering employee representation on supervisory boards. On April 1, 2017, an amendment to the German Law on Temporary Employment *(Arbeitnehmerüberlassungsgesetz* or *AÜG)* will come into force, and it may have a major impact on the governance of any affected entities.

Under the German Codetermination Act *(Mitbestimmungsgesetz* or *MitbestG)*, limited liability companies *(GmbHs)* and stock corporations *(AGs)* with more than 2,000 employees have to establish a supervisory board that consists of 50% employee representatives. For companies with 500 to 2,000 employees, a supervisory board with one-third employee representation has to be established under the German One-Third Participation Act *(Drittelbeteiligungsgesetz* or *DrittelbG)*. The employee codetermination requirement for supervisory boards is unique to Germany and is often viewed with suspicion, in particular by foreign investors. →

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In the newly amended AÜG, Section 14, paragraph 2 stipulates that temporary workers shall count toward the threshold numbers at the company they are sent to; but if application of the *MitbestG* or the *DrittelbG* is in question, this shall only be the case if the temporary worker's period of service exceeds six months. The legislative materials suggest the amendment was designed to deal with the growing importance of temporary workers for the German job market and the economy as a whole. The particular clauses were said to implement the precedents set by the German Federal Labor Court *(Bundesarbeitsgericht* or *BAG)*. Also, the amendment would aim to end the dispute among scholars regarding the treatment of temporary workers with respect to codetermination laws.

Practical implications

Taking temporary workers into account when determining employee thresholds could significantly increase the number of companies subject to employee codetermination on their supervisory boards. For the governance structure of a company and its eligible German group of companies who (together!) have, e.g., 1,800 employees and 500 temps, it makes a huge difference if the threshold number of 2,000 is exceeded and the company has to allow 50% of employees on the supervisory board, rather than only one-third or none at all.

However, what looks like a simple, straightforward calculation exercise at first glance does raise a whole host of questions requiring further clarification.

Issues involved

First and foremost, the treatment of temps under the new law has to be reasonably aligned with the other requirements under the respective codetermination laws. Almost all codetermination law provisions refer to a certain number of employees to be exceeded "generally, as a general rule" or "normally" rather than at a particular point in time. The number of workers at a company must therefore be monitored during a certain reference period of between 16 and 24 months on the basis of the company's personnel planning. Management decisions on expansion (or reduction) of the business, the opening of new or the closure of existing plants, acquisitions or disposals, and the like are taken into account should they have reached a level of certainty. A short-term seasonal increase in the workforce is considered irrelevant except in cases where the increase occurs repeatedly and follows the same model or pattern. The requirement to examine a certain sustained period (rather than a certain point of time) is an attempt to keep the codetermination structure stable for a certain period of time, especially in view of the time and effort required for implementing a new codetermination structure. While scholars generally assert that the requirement to monitor staff numbers over a certain period of time was not meant to be set aside by the law's amendment, the question arises how this requirement can be aligned with the often short-term nature of temporary employment.

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In addition, the amendment requires that the period of the temp's service must exceed six months to count toward the threshold. In this regard, the amendment does not specify whether the length of service of a particular individual temp is decisive or whether the workplace as such must be staffed by any temp in excess of six months. Further, it is unclear if the required period of service can also consist of several shorter assignments of, for example, four months and five months with an interruption of one month over a 12-month period.

Precedents and legislative materials

The question about the applicable codetermination structure is decided on the basis of status proceedings pursuant to Sections 98 et seq. of the German Stock Corporation Act (Aktiengesetz or AktG). The civil courts record *(Ordentliche Gerichte)*, which oversee rulings on status proceedings, have in the past not taken temporary workers into account for determining the applicable codetermination structure at the hiring company. In particular, the Higher District Court *(Oberlandesgericht)* of Hamburg in 2014 and the Higher District Court of Saarbrücken as recently as 2016 ruled against taking temporary workers into account. A ruling by the German Federal Court of Justice *(Bundesgerichtshof* or *BGH)* on the issue has not been made.

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On the other hand, labor courts have jurisdiction over matters concerning the voting procedures connection with co-determination laws. On appeal, *BAG* had held in 2015 that temps need to be taken into account for determining whether employee representatives to the supervisory board are elected directly by the entire workforce or indirectly by delegates. While *BAG* conceded that the relevance of temps could not be decided in general terms but only in reference to the purpose of each threshold, it argued with regard to an election by delegates that a worker's integration into the enterprise was the relevant criterion rather than a formal employment relationship with the relevant company, which temps generally do not have. In that particular case, *BAG* did take temps into account.

These circumstances suggest that legislators, for whatever reasons, went far beyond simply translating *BAG* precedents into statutory law: lawmakers, as well as apparently the interest groups involved in the legislative process, completely disregarded the primary jurisdiction of the civil courts in determining the status of codetermination. The position and arguments brought forward by the higher district courts were apparently not even raised during the legislative process. Also, within its jurisdiction, even *BAG* had specifically stated that the question concerning the relevance of temps needs to be determined for each threshold provision by separately considering the purpose of the relevant threshold. In contrast, the amendment seems to proceed from the assumption that all threshold numbers in the above-mentioned laws on codetermination justify considering temps, albeit while also remaining subject to additional requirements should the application of a specific act be in question.

As a result, the legislative materials are, in this particular case, not suitable for shedding further light on the complex questions the new provisions raise.

Considerations for corporate practice

It will likely take some time before the civil courts, let alone the German Federal Court of Justice, will get a chance to issue a binding ruling on the legal questions involved. In the meantime, companies may wish to consider the following:

General relevance of the number of jobholders

The new law does not specifically amend codetermination law provisions. Temps are thus only relevant to the extent the personnel planning for the reference period of 16 to 24 months suggests an applicable threshold number is, as a rule, exceeded either by way of ordinary employees or temps. To the extent regular positions in the reference period are staffed with temps in the case of vacancies, such positions are taken into account and will likely be considered "regular positions" as it would not make any difference whether these positions are filled with persons employed by the company directly or by temps. Otherwise, the door for bypassing the new provisions would swing widely open. If the personnel plan includes nonpermanent positions for various workplaces, some of which only cover a one-time peak, the peak-time positions would not likely be relevant regardless of whether they are staffed with regular employees or temps. Other nonpermanent positions over a longer period of time in the personnel plan are likely to hit the "regular" hurdle. The remaining key question then is whether or not the temps count toward the threshold.

This is where the amendment kicks in. On the basis of the jurisprudence to date of the courts of record, temps would not have to be counted. This has changed. Temporary workers will count, but how?

Specific individual temp versus workplace approach

Some scholars suggest looking at a particular specific temp to determine whether or not a period of service in excess of six months has been exceeded. But some in this group of scholars concede that various (interrupted) assignments during a period of one year should be added up.

However, the prevailing opinion appears to point toward a workplace-oriented approach.

First, if the individual temp rather than the workplace were relevant, this would ultimately require a decision on the basis of a certain point in time rather than a prognosis period of 16 to 24 months. This approach would also counteract the principle that frequent changes in the codetermination structure should be avoided.

Second, the requirement could easily be circumvented by consecutively hiring a number of different temps with a comparable skills profile so the six-month threshold is not exceeded for any of these individual temps. Avoidance strategies would be particularly successful in workplaces requiring lower skill levels as these temps can be more easily replaced. –>

Finally, codetermination laws and the applicable threshold numbers generally consider the number of positions rather than the identity of individuals filling such positions. These laws were introduced as a means of institutionalizing participation to compensate for the anonymity and distance existing between the workforce and management as a result of a company's size. The size and organization of the company also depends on the number of temps regularly hired rather than on the individual temp.

If the civil courts were to ultimately consider the workplace a relevant criterion, maneuvering room to obviate the law appears rather limited. Conversion to a legal format that does not necessitate employee codetermination given the circumstances of the case may be the last resort. Nonetheless, until there is further guidance from the civil courts, it may make sense to limit the term of service of any particular temp to six months and to request different individuals for a position on the basis of a defined skills profile for any period in excess of such a term. In addition, temporary positions could be established where feasible for only six months or less within a period of one year.

In the final assessment, the *AÜG* reforms will result in a number of improvements to the legal position of temporary workers. At the same time, it will also add a layer of uncertainty and the potential for litigation as far as the details of the interaction between *AÜG* and existing German codetermination structures are, in practice, concerned. Companies of a certain size that regularly use temporary workers are well advised to monitor legal developments in this regard. ←

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