

Co-determination of "Codes of Conduct"

Introduction

In the past, it was controversial whether codes of conduct were subject to co-determination by the works council. As expected, co-determination was recently affirmed by the Federal Labor Court (*Bundesarbeitsgericht*) in a decision dated July 22, 2008, which has thus far only been published as a press release.

Decision of the Federal Labor Court (BAG) dated July 22, 2008 (1 ABR 40/07)

The press release of the Federal Labor Court emphasizes that a code of conduct is subject to co-determination by the works council if it regulates the conduct of employees and questions of order in the establishment. This is said to be the case, for example, if employees are required to report conflicts of interest in writing.

The Federal Labor Court however expressly clarified that a code of conduct may include provisions that are subject to co-determination as well as provisions that are not. The fact that certain provisions of a code of conduct are subject to co-determination does not necessarily mean that the code of conduct as a whole, i.e., including the parts that are not subject to co-determination, is subject to co-determination. The Federal Labor Court thus took a more limited view of the works council's co-determination right than the lower court had done. The Regional Labor Court of Hesse had ruled that the various provisions of the code of conduct in dispute were related and therefore were, as a whole, subject to co-determination.

Finally, the Federal Labor Court clarified that laws of other countries that provide for the introduction of codes of conduct did not defeat the co-determination right of the works council. Accordingly, the laws of other countries are, in the view of the Federal Labor Court, not determinative and as such cannot exclude the co-determination right of the works council under German Labor-Management Relations Act (*BetrVG*) § 87 (1) subclause 1.

Conclusion

The press release of the Federal Labor Court alone already settles a number of key legal issues. In practice, employers will have to get used to the idea that they will generally have to include the works council when introducing codes of conduct. Most companies have already done so, anyway. Moreover, employers will no longer be able -- as was often the case in the past -- to keep the works council at bay by invoking the laws of other countries, such as the U.S. Sarbanes Oxley Act (SOX). If in doubt, the arbitration committee will decide what effect, if any, the laws of other countries have on a particular code of conduct.

Hopefully, the Federal Labor Court will clarify in the upcoming rationale for its decision under what circumstances provisions of a code of conduct that are subject to co-determination and provisions that are not subject to co-

determination are necessarily related and therefore as a whole subject to co-determination. Depending on how this issue is decided, the negotiating position of employers may be substantially strengthened. If an employer voluntarily permits the works council to co-determine provisions of a code of conduct that are not subject to co-determination by law, the employer will be able to demand concessions from the works council in return on other matters that are subject to co-determination.

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