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Legal Monitor Q4/2024.

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Ladies and Gentlemen,

In the following, we summarize significant compliance developments due to new or ongoing legislative acts or decisions until mid-November 2024. The overview does not claim to be exhaustive, nor does it constitute or replace specific legal advice.

Should you have any questions or require further information, please do not hesitate to contact us at any time.

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Yours sincerely from Frankfurt am Main

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1. Environment & Sustainability.

1.1 EU: New EU Deforestation Regulation (EUDR).

The new EU regulation on the deforestation-free supply chain applies to all companies that supply, place on the market or export from the EU market the products listed in Annex I of the regulation, i.e. products made from the relevant raw materials cattle, coffee, cocoa, palm oil, rubber, soy or wood. The regulation obliges companies to ensure that the products are deforestation-free and have been produced in accordance with the relevant legislation of the country of production. To this end, comprehensive information, including the geolocation of all land used for the production of raw materials, must be collected and made available. On the basis of a risk analysis, companies must carry out an annual risk assessment and, if necessary, risk mitigation measures. Furthermore, the submission of a due diligence declaration is mandatory. Violations can result in high fines amounting to 4% of the EU-wide annual turnover.

The EUDR was originally intended to be applicable from December 30, 2024 and for micro and small enterprises from June 30, 2025. However, an extension of this transitional period by a further 12 months is currently being negotiated, which would mean applicability from December 30, 2025 and for micro and small enterprises from June 30, 2026. The Council's approval is still pending for this and for the amendment to introduce a new category of so-called non-risk countries.

The EU Commission recently amended its guidelines for the EUDR (status: November 2024). The German Federal Ministry of Food and Agriculture (BMEL) has published a draft bill for the national implementation of the EUDR. According to this, the German Federal Office for Agriculture and Food (BLE) is to be responsible in particular.

More on this topic at:
https://www.schulte-lawyers.com/schulteblog/entwaldungsfreie-lieferkette

1.2 Germany: First Adaptation Strategy for Climate Change.

The new Climate Change Adaptation Act, which came into force on July 1, 2024, obliges the German federal government to present a corresponding adaptation strategy. The draft that has now been launched lists detailed individual measures to prepare infrastructure, agriculture, and healthcare for the consequences of climate change. So far, however, the draft primarily contains general objectives and few verifiable and measurable targets. The draft is currently being discussed by the federal states and the relevant associations.

1.3 German Supply Chain Due Diligence Act (GSCDD): Reporting Obligation Suspended.

The reporting obligation under the German Supply Chain Due Diligence Act (GSCDD) has been suspended for reports due before January 1, 2026. The impetus for this change is the pending national implementation of the European Corporate Sustainability Due Diligence Directive (CSDDD), which is scheduled to be transposed into national law by July 2026. According to Section 13.3 of the updated FAQs on the GSCDD, the German Federal Office of Economics and Export Control (BAFA) will only review compliance with the reporting obligations under the German Supply Chain Due Diligence Act from January 1, 2026. Companies therefore have until December 31, 2025 to submit their reports without having to fear sanctions for missing or late submission. However, this cut-off date does not affect compliance with the other due diligence obligations under Sections 4 to 10 (1) GSCDD, which will continue to be monitored and sanctioned by the BAFA.

2. Marketing.

2.1 ECJ: Crossed-Out Price Must Be the Lowest Price of the Last 30 Days.

In its ruling of September 26, 2024 (C-330/23), the European Court of Justice (ECJ) clarified that when advertising percentage discounts (e.g. -30%), the lowest price of the last 30 days must be used to calculate the percentage. Otherwise, retailers could artificially inflate the pre-discount price used for calculations, allowing them to advertise illusory price reductions that could potentially mislead consumers. Specifically, the percentage reduction must be calculated based on the definition of the 'prior price' as stipulated in Art. 6a Para. 2 of Directive 98/6/EC (the so-called Price Indication Directive), which was implemented nationally in Germany in Section 11 Para. 2 of the Price Indication Ordinance (PAngV).

2.2 ECJ: EU Organic Logo Requirements also for Imported Food.

The European Court of Justice (ECJ) ruled in its judgment of October 4, 2024 (C-240/23) that food may only bear the EU organic logo regardless of its origin if it complies with all requirements of Union law. This also applies if the food comes from a third country whose production regulations are recognized as equivalent. The EU organic logo is intended to inform consumers that the product in question complies with all the requirements of EU law. The use of other logos from third countries, which are also intended to provide information about organic production, remains unaffected by the decision.

2.3 ECJ: Distribution of Meat Substitutes.

The European Court of Justice (ECJ) clarified in its ruling of October 4, 2024 (C-438/23) that member states may not generally prohibit the use of the names commonly used for meat products for plant-based products. This is only possible if a member state has introduced legally prescribed names for these products. For products subject to specific regulations, such as fruit juices, honey, or milk, foods must meet certain criteria to legally use the corresponding designation. In this case, the legally prescribed designation serves to protect the consumer, who can then trust that the product meets the intended requirements. If there is no corresponding regulation, however, the manufacturer must choose a customary or descriptive name for his product. Provided that Regulation (EU) No. 1169/2011 on the designation of food is complied with, consumers are adequately protected in the case of customary or descriptive designations.

2.4 ECJ: Ruling on the Use of "Skin-Friendly" in Advertising.

In its ruling of June 20, 2024 (C-296/23), the European Court of Justice (ECJ) specified the requirements for advertising biocidal products, such as disinfectants, in accordance with the Biocidal Products Regulation (BPR). Claims such as "non-toxic", "harmless", "natural", "environmentally friendly" or "animal-friendly" are prohibited. The ECJ emphasized that advertising for biocidal products must not contain misleading statements regarding the health and environmental risks and the effectiveness of the products. The term "similar indications" must be interpreted broadly. The lower courts had already interpreted the terms "organic" and "ecological" as misleading. The ECJ also considered the term "skin-friendly" to be misleading.

3. Corporate, Contracts & Beyond.

3.1 Legislative Process in Light of Upcoming German Elections.

In light of the unexpectedly announced early elections for the German Federal Parliament (Bundestag) scheduled for February 23, 2025, attention now turns to which pending national legislation can be enacted before this date. Due to the principle of legislative discontinuity, any bills not passed by the outgoing Bundestag expire at the end of the legislative term and do not automatically carry over to the new parliament. In principle, the legislative procedure can also be shortened, but this requires a political majority. However, bills that have already been conclusively dealt with by the Bundestag can pass through the Bundesrat regardless of the

results of the Bundestag elections. The so-called draft bills of the federal ministries, on the other hand, are likely to be dropped.

3.2 EU: New Product Safety Regulation (GPSR).

The new EU General Product Safety Regulation (GPSR) will be applicable from December 13, 2024. It replaces the previous EU Directive on General Product Safety from 2001. The new GPSR applies directly to consumer products as a regulation. It extends the personal scope of application to fulfillment service providers and providers of online marketplaces. The regulation introduces new obligations for economic operators, including the performance and documentation of an internal risk analysis and the preparation of technical documentation by manufacturers. For distance selling, the mandatory information for online trading has been specified. It is important to note that a significant (physical or digital) change to the product may result in a change of role (manufacturer status). In addition, the assessment criteria for product safety have been expanded to take greater account of cyber security and interactions between products, as well as aspects such as the appearance and labeling of a product. The GPSR aims to increase transparency in the exchange of information in the non-food sector through a modernized Europe-wide rapid alert system (so-called Safety Gate Portal, formerly: RAPEX).

3.3 EU: New Product Liability Directive.

The revised European Product Liability Directive strengthens manufacturers' civil liability for damages caused by defective products. It expands both the definition of 'product' and the criteria for determining product defects. The aim is to increase consumer protection and ensure that consumers can more easily claim compensation in the event of damage. To this end, the burden of proof will be eased in court. In future, courts will also be able to oblige companies to disclose evidence. Furthermore, immaterial damage and the destruction of or damage to private data can also be claimed as compensable damage items. Publication in the Official Journal is pending.

3.4 BGH: Audit Obligations of Online Marketplace Operators.

In its ruling of October 23, 2024 (case no. I ZR 112/23), the German Federal Court of Justice (BGH) specified the obligations of platform operators to check and act in the event of possible copyright infringements. The BGH ruled that operators of online marketplaces, similar to operators of video sharing and share hosting platforms, are obliged to check posted offers for similar infringements and to block or delete infringing content after a clear indication of an infringement, insofar as

this is technically and economically reasonable. However, when applying this case law to online marketplaces, their special features must be taken into account. If it is not the offered item itself that infringes copyright, but only its presentation, the platform operator's duty to check is generally limited to similar offers and not to all representations of the copyrighted work.

3.5 OLG Koblenz: Design of the Termination Button.

In its ruling of September 19, 2024 (2 U 437/23), the Koblenz Higher Regional Court (OLG) specified the requirements for the design of a termination button on a website. According to the provision in Section 312k (2) German Civil Code (BGB), the consumer should be redirected to a confirmation page immediately after clicking the first button. On this page, the consumer should be able to enter the necessary data for termination directly and easily and send it via a second button. The Higher Regional Court of Koblenz ruled that if a second, very conspicuously designed button with similar lettering (e.g. "Termination Assistance") is placed on the confirmation page, which leads to the possibility of canceling the contract via login, this does not comply with the legal requirements. This is because this button could give the impression that the termination declaration must be made via it and would thus distract from the statutory termination option without login. In such a case, the statutory termination option is no longer easily accessible within the meaning of Section 312k (2) sentence 4 German Civil Code.

3.6 OLG Zweibrücken: State Court Interim Measures despite ongoing Arbitration Proceedings.

In its decision dated October 1, 2024 (4 U 74/24), the Higher Regional Court (OLG) of Zweibrücken once again emphasized that urgent legal protection by state courts is permissible even if arbitration proceedings are already pending. The court clarified that state courts have concurrent jurisdiction for interim measures to arbitral tribunals. In practice, summary proceedings before state courts in parallel to arbitration proceedings can be useful from a procedural point of view, as this means that enforceable measures can be ordered and enforced more quickly.

3.7 OVG Münster: No Isolated Revocation of Ancillary Provisions for COVID-19 Emergency Aid.

In its decision of October 1, 2024 (4 A 357/21), the Münster Higher Administrative Court (OVG) declared a reclaim of coronavirus emergency aid to be unlawful, as ancillary provisions may not be revoked in isolation. The Court ruled that these ancillary provisions are an integral part of the decision and specify the conditions

of approval. They would ensure that state aid in connection with the COVID-19 pandemic was granted in accordance with the EU Commission's requirements. The European Commission's approval is restricted to grants aimed at alleviating liquidity shortages and ensuring the viability of companies affected by COVID-19-related disruptions. Without the specifications made by the ancillary provisions, the emergency aid would not have been covered by this approval, which would have meant that it would not have been lawful and the granting of funds would have violated EU law.

4. Digital & Cyber Security.

4.1 EU: New Cyber Resilience Act.

The new European Cyber Resilience Act establishes mandatory cyber security requirements for manufacturers and developers of hardware and software products throughout the entire life cycle, from planning and development through to maintenance. CE marking is also provided for this purpose. The aim of the new EU directive is to uniformly improve the cybersecurity of products with digital elements within the EU and thus prevent ransomware attacks. Manufacturers are to be responsible for the cyber security of their products. Publication in the Official Journal is pending.

4.2 NIS-2: Current Status of the German Implementation.

The German Federal Government has again revised the draft of the NIS-2 Implementation and Cyber Security Strengthening Act (NIS2UmsuCG) following the opinion of the German Federal Council (Bundesrat). The Federal Council's numerous demands for adjustments have now been implemented in the revised draft law, including stricter identity checks when registering .de domains to protect against fake stores, regular cyber security training for employees in sensitive areas and a standardized online reporting procedure for security incidents. The criteria for classifying critical infrastructures have also been revised to include smaller hospitals. Model contracts for IT services are also to be provided. The draft law serves the national implementation of the European NIS-2 Directive, which has already come into force. There is a fundamental political will to pass the bill before the planned new elections of the German Federal Parliament (Bundestag). The NIS-2 regulations not only affect large companies, but also small and medium-sized institutions, which significantly expands the scope of application. Companies are obliged to implement risk management measures and report security incidents in a timely manner. In addition, the sanction options for violations are being

tightened, which also entails greater responsibility for company management under company law.

More on this topic at:
https://www.schulte-lawyers.com/schulteblog/nis-2-verzoegert-sich

4.3 NIS-2: New EU Implementing Regulation for IT Services.

The EU Commission's Implementing Regulation on the NIS-2 Directive for Digital Infrastructure Providers and Digital Service Providers entered into force on November 7, 2024. The European Commission's new implementing regulation defines EU-wide minimum standards for risk management measures from Section 30 BSIG-E in accordance with the planned NIS-2 Implementation Act, which must be observed by providers of digital infrastructures and digital services. It also defines criteria according to which a security incident in these areas is to be classified as significant. The implementing regulation is directly applicable in Germany.

4.4 New German Regulation on Cookies on Websites.

The German Federal Government has initiated a regulation to establish recognized cookie consent management services. A voluntary, user-friendly and transparent alternative to the multitude of cookie consent banners is being created for internet users. These services will allow users to manage their consent decisions optionally and review them at any time through so-called Personal Information Management Systems (PIMS). The services are approved by the Federal Commissioner for Data Protection and Freedom of Information, with the stipulation that providers must be independent and have no commercial interests in the consents.

4.5 ECJ: New Limits on Personalized Advertising.

In its ruling of October 4, 2024 (C-446/21), the European Court of Justice (ECJ) ruled that Facebook's storage and processing practices for the purpose of personal advertising violate the principle of data minimization laid down in the European General Data Protection Regulation (GDPR). Specifically, it is not permitted to store more data than is necessary for the respective application; in particular, storage for an unlimited period of time and not separated according to purpose of use is not permitted. Although data made public by a person may be processed, no further data from third parties may be added in order to create targeted advertising. This public statement could therefore not be interpreted as consent to the processing of further data associated with the statement. However, the ECJ

avoided making a precise distinction in relation to making data public in the digital space.

4.6 ECJ: Standing to Sue for GDPR infringement under Unfair Competition Law.

The European Court of Justice (ECJ) has ruled that the European General Data Protection Regulation (GDPR) does not prevent a competitor from bringing an action based on a breach of the GDPR in connection with the prohibition of unfair commercial practices. In its ruling of October 4, 2024 (C- 21/23), the ECJ rather welcomes the right of competitors to bring an action, as this would contribute to a high level of protection of the rights of data subjects. The ECJ included the information provided when ordering pharmacy-only medicines in the concept of health data within the meaning of the GDPR. On the basis of this data, conclusions could be drawn about the state of health of a natural person; the purpose and accuracy of the information were not relevant for this. The correct assignment of the order to a specific natural person is not important.

4.7 ECJ: Requirements for Legitimate Interest in Data Processing.

The European Court of Justice (ECJ) ruled in its judgment of October 4, 2024 (C-621/22) that the processing of personal data on the basis of the legitimate interest pursuant to Art. 6 para. 1 lit. f) GDPR is only permissible if it is absolutely necessary for the realization of the interest. The specific case concerned the transfer of member data of a tennis association to sponsors in return for payment, whereby the ECJ left the examination of admissibility to the referring court. The ECJ ruled that legitimate interest is not defined by law but must be lawful. The ECJ emphasized that a balancing of interests must take place, taking into account in particular the reasonable expectations of the data subject, the scope of the data processing and its impact on data subjects. The decision could be seen as a tightening of the requirements for legitimate interest and raises questions about the future application of this legal basis.

4.8 ECJ: Apology as Compensation for Damages.

The European Court of Justice (ECJ) ruled in its judgment of October 4, 2024 (C-507/23) that a breach of the European General Data Protection Regulation (GDPR) alone does not constitute non-material damage within the meaning of Art. 82 para. 1 GDPR. Rather, the plaintiff must substantiate that it has suffered concrete material or non-material damage as a result of the data protection breach. An apology (in this case granted by the national Latvian courts) could be

recognized as appropriate compensation for non-material damage, especially if it is not possible to restore the original situation. The motives and intentions of the controller are irrelevant for the assessment of damages, as the claim for damages under the GDPR has a compensatory and not a punitive function. The ECJ's decision could have an impact on practice, in particular with regard to the possible consideration of excuses as a mitigating circumstance in fine proceedings by data protection authorities. Communication following a cyberattack is therefore becoming increasingly important.

4.9 BGH: Loss of Control over Data justifies Liability for Damages.

The Federal Court of Justice (BGH) has strengthened the rights of users following a major data leak at Facebook in its first leading decision (judgment of November 18, 2024 – case no. VI ZR 10/24). In its decision, the BGH specified the requirements for a sufficiently substantiated presentation of the damage under Art. 82 para. 1 of the European General Data Protection Regulation (GDPR). Affected parties only need to prove that they were victims of the incident in order to receive compensation. In particular, it is therefore not necessary for the data to have been demonstrably misused or for the data subjects to have been particularly affected by the incident. The BGH ruled that the mere loss of control over one's own data already constitutes damage. The BGH ruling concerns an incident from 2021 in which data of 533 million Facebook users from 106 countries was published on the internet. As a guideline for damages, the BGH named around 100 euros per case. The procedural instrument of the leading decision procedure, which only came into force in October 2024, enables the BGH to quickly clarify important legal issues before the highest court, which is important for many other first-instance proceedings. The aim is to reduce the burden on the judiciary in mass proceedings.

4.10 Belgium: Requirements for Cookie Banners.

Following several complaints from the data protection organization noyb from 2023, the Belgian Data Protection Authority has ordered four major news sites to adapt their cookie banners to the requirements of the European General Data Protection Regulation (GDPR). The affected sites, including De Standaard and Het Nieuwsblad, must now include a "refuse" button on the first level of their cookie banners. They have also been asked to change the currently misleading color scheme of the buttons. If the responsible parent company does not comply with the request, it could be fined EUR 50,000 per day and website.

5. Artificial Intelligence and Law.

5.1 High-Risk AI: New Policy Brief.

The EU Science Hub has published a first policy brief on high-risk artificial intelligence (AI). It reiterates the risk-based approach of the EU's new AI Regulation ("AI Act"), which sets out specific requirements for high-risk AI applications to ensure their safety and transparency. Providers of high-risk AI must take appropriate technical and organizational measures, including a comprehensive risk assessment and mitigation. They are also required to use high quality data and provide clear documentation on the functioning of their systems. Finally, it is emphasized that human oversight is required to minimize risks and ensure compliance.

5.2 LG Hamburg: Copyright in Training Data.

The Hamburg Regional Court ruled on September 27, 2024 (case no. 310 O 227/23) that a non-profit association was allowed to use a copyright-protected photo in a data set for AI training. The plaintiff, a photographer, lost his lawsuit against the Laion research network, which provides a database of nearly 6 billion image-text pairs available for free on the internet. The Court did not consider the use to be permissible under Section 44b of the German Act on Copyright and Related Rights (UrhG), as a (machine-readable) disclaimer on the image agency's website excluded the application of the exception for text and data mining. In the Court's opinion, however, the reproduction of the photo was covered by the provisions of Section 60d UrhG for text and data mining, as the defendant was engaged in (non-commercial) scientific research and the data set had been made publicly available free of charge. However, the Court emphasized that it was not a question of permission to use the image for AI training, but solely of whether Laion was allowed to download the image in order to compare it with the image description for its database.

5.3 LG Kiel: Liability of a Portal Operator for Incorrectly Programmed AI.

In a recently published judgment dated February 29, 2024 (case no. 6 O 151/23), the Regional Court (LG) of Kiel affirmed liability for interference due to incorrect information provided by an artificial intelligence (AI). The infringement of the company's right of personality pursuant to Section 1004 of the German Civil Code (BGB) by analogy was affirmed, as the portal of the defendant business information service had falsely communicated the lack of assets of a company by means of AI. The defendant was to be regarded as a direct disturber, as it used its own software

to answer search queries, which extracted and processed information from published mandatory notifications. The defendant could not claim that it had not been involved in this automatic process, as it had deliberately used an incorrectly programmed AI. The Court ruled that the defendant claimed ownership of the data provided and explicitly assumed responsibility for its content.

5.4 LG Munich: GEMA's Lawsuit against OpenAI.

The German collecting society GEMA has filed a lawsuit against OpenAI at Munich Regional Court I (LG) for the unlicensed use of protected song lyrics in ChatGPT. GEMA accuses OpenAI, as the developer of ChatGPT, of having trained the AI-system with copyrighted lyrics without compensating the authors. The aim of this model lawsuit is to prove that OpenAI systematically uses GEMA's repertoire to train its AI-systems. Well-known German musicians such as Rolf Zuckowski, Reinhard Mey and Kristina Bach support the lawsuit, as their song lyrics were demonstrably exploited by the chatbot. In the USA, the publishing division of the world's largest music company filed a lawsuit against the AI-company Anthropic in mid-October 2024.

5.5 USA: Lawsuit against OpenAI Dismissed for Copyright Infringement.

In the USA, two American online news organizations have failed for the time being with their lawsuit against OpenAI for alleged copyright infringements. They had accused OpenAI of using thousands of their articles without permission to train ChatGPT's-AI system. The plaintiffs argued that OpenAI had removed important copyright information (e.g. author names and titles) from the articles, in violation of the US Digital Millennium Copyright Act (DMCA). They sought damages and an injunction to remove their works from OpenAI's training data. However, a US federal judge in New York dismissed the lawsuit as the plaintiffs could not prove any concrete damage caused by the removal of the copyright information. Although the Court granted the plaintiffs the opportunity to file a revised statement of claim, it was skeptical as to whether the fundamental flaws in the complaint could be remedied.

More on this topic at:
https://www.schulte-lawyers.com/schulteblog/urheberrechtsverletzung-ki-training

6. People and Culture Management (HR).

6.1 New German Fourth Bureaucracy Relief Act.

The German Federal Parliament (Bundestag) adopted the Fourth Bureaucracy Relief Act (BEG IV) on September 26, 2024. The bill, which requires approval, will now be forwarded to the Bundesrat, i.e. it is independent of the planned new parliamentary elections. In future, employment contracts no longer have to be concluded in writing; changes to key contractual conditions can also be agreed in text form in future. Sectors at risk of undeclared work, such as construction or catering, are to be exempt from this. In the area of temporary work, text form is to be introduced for temporary employment agreements so that these can be concluded by email. The written form requirement for rental agreements for commercial premises will also be replaced by text form. Retention periods for accounting documents under commercial and tax law will be reduced from ten to eight years. Furthermore, listed companies will in future only have to make planned remuneration-related resolutions accessible to shareholders via the website.

6.2 Future of German Employee Data Protection.

The German draft bill for an Employee Data Protection Act provided for extensive requirements for the processing of personal data in the employment relationship. The scope of application was very broad and also covered the periods before the establishment of an employment relationship and after its termination. Regulations for the monitoring of employees were also included. For the first time, the permissibility of using artificial intelligence (AI) in the processing of personal data was also stipulated. Due to the planned German parliamentary elections on February 23, 2024, the draft bill for the Employee Data Protection Act is only likely to be passed if the legislative process is shortened. However, following the ruling of the European Court of Justice (ECJ) that the current version of Section 26 (1) of the German Federal Data Protection Act (BDSG) is contrary to European law, the German Federal Government is obliged to reorganize employee data protection (see ECJ, ruling of March 30, 2023 - R. C-34/21) In its ruling, the ECJ emphasized that the minimum requirements of Art. 88 (2) of the European General Data Protection Regulation (GDPR) were not met in the absence of specific concretization regarding the employee context in the German legal standard. Due to the primacy of EU law, the processing of employee data in the private and public sector is governed by the provisions of the GDPR.

6.3 BAG: Co-Determination of the Works Council in Cases of Mandatory Headset Use.

In a ruling dated July 16, 2024 (case no. 1 ABR 16/23), the German Federal Labor Court (BAG) decided that the planned mandatory use of headsets for internal communication within a branch is subject to co-determination pursuant to Section 87 (1) no. 6 of the German Works Constitution Act (BetrVG). The BAG emphasized that this is considered as a technical monitoring device. In theory, superiors could listen in on the conversations at any time and thus monitor the behavior of the employees, which would create a general monitoring pressure. However, according to the BAG, the lack of assignment of the devices to specific persons and the non-recording of conversations are irrelevant.

6.4 BAG: New Requirements for Bonus Regulations.

Many companies use variable remuneration to motivate employees to achieve company targets. The German Federal Labor Court (BAG) has now ruled in its judgment of July 3, 2024 (case no. 10 AZR 171/23) that contractual clauses that allow the employer to unilaterally set targets in the event of failed target agreements are invalid. This decision is based on the assumption that such clauses unreasonably disadvantage employees and restrict their freedom of negotiation. In the event of failed target agreements, employees can now assert claims for damages, with the courts taking into account possible contributory negligence on the part of the employee. Companies should therefore review their bonus regulations and adjust them, if necessary, whereby precise documentation of the negotiations is important. As an alternative, companies can consider setting unilateral targets from the outset, which is still permissible.

More on this topic at:
https://www.schulte-lawyers.com/schulteblog/bonusregelungen-ohne-backup

6.5 LAG Lower Saxony: Ineffective Termination despite Consulting Fees.

In a ruling dated September 10, 2024 (case no. 10 SLa 221/24), the Lower Saxony Higher Labor Court (LAG) dealt with the extraordinary dismissal of a managing director of an association. According to the Court's findings, the accusation of unjustified payment of consultancy fees was not tenable as a reason for termination without notice. This was because the association's board at the time had approved and initiated the project and the associated financial obligations.

6.6 OLG Munich: Termination for forwarding Business Emails.

In a ruling dated July 31, 2024 (case no. 7 U 351/23), the Munich Higher Regional Court (OLG) decided that the forwarding of business emails by a board member to a private email address justifies extraordinary termination as a violation of the European General Data Protection Regulation (GDPR). This is especially the case if sensitive data of the company or third parties is affected. The Munich Higher Regional Court also reemphasized the requirements for the start of the two-week preclusion period for the extraordinary termination of a management board employment contract. This period only begins when the supervisory board as a collegial body becomes aware of the relevant facts. However, the knowledge of an individual member of the supervisory board is not sufficient for the period to begin. An exception may apply if the supervisory board convenes with unreasonable delay despite the awareness of individual members.

6.7 LAG Berlin-Brandenburg: Receipt of Notice of Termination by Registered Mail.

In a ruling dated May 16, 2024 (case no. 5 Sa 893/23), the Berlin-Brandenburg Regional Labor Court (LAG) ruled that proof of posting and delivery of a registered letter does not constitute prima facie evidence of the day of delivery if the delivery receipt shows an incorrect zip code. As a result, however, the receipt could be proven by the letter carrier's certificate. The LAG also stated that employees bear the full burden of proof for a disadvantage due to a dismissal, whereby the burden of proof can be eased according to the principles of prima facie evidence. A close temporal connection between the discriminatory measure and the exercise of rights could constitute prima facie evidence, unless there was also a close temporal connection to other possible reasons for termination. The plaintiff had argued that he had applied for leave for various periods several times before receiving the letter of termination, but without success. However, the Court refused to allow the plaintiff to provide evidence, as only the last vacation request was closely related to the termination and the end of the six-month probationary period was also closely related to the termination.

6.8 LAG Cologne: Dismissal for Personal Reasons due to Illness.

In its ruling of April 11,2024 (case no. 7 Sa 504/23), the Cologne Regional Labor Court (LAG) specified the requirements for dismissal for personal reasons due to an employee's illness. In the case of dismissals due to illness, a three-stage examination is required: First, a negative prognosis for future incapacity to work must be established (stage 1), followed by an examination of a significant impairment of operational interests (stage 2) and finally, as part of a weighing of

interests, it must be clarified whether this impairment constitutes an unreasonable operational burden (stage 3). The LAG ruled that a long-term incapacity to work due to illness in the past could be considered an indication that the incapacity to work would continue in the future, but that there are no fixed limits as to when an illness is considered long-term. If the employer gives notice of termination before the end of the six-week period of Section 3 (1) of the German Act on Continued Remuneration During Illness (EFZG), the employer must in any case present special circumstances that may exceptionally justify a long-term or permanent incapacity to work. The severity of the illness alone is not sufficient, especially since in the present case the illness only began five weeks before the notice of termination was received and medical treatment is being carried out.

7. Antitrust Law.

7.1 ECJ: New FIFA Ruling.

In its ruling of October 4, 2024 (C-650/22), the European Court of Justice (ECJ) found that the provisions of the FIFA Regulations on the Status and Transfer of Players (RSTS) violate EU law in the form of the free movement of workers. The ruling focused on Art. 17 of the FIFA RSTS, according to which a player can unilaterally terminate his contract, but is liable for damages in this case. Should he find a new club, this club would also be liable for the compensation demanded by the old club. The ECJ ruled that although there is a general interest in a certain degree of consistency within the teams, the current regulations go far beyond what is necessary to achieve this. Since the FIFA system includes all major clubs and associations, it is not possible for a player in this situation to find a new employer without the consent of the old employer. The regulations would thus restrict competition and resemble a non-solicitation agreement, while freedom of movement would be hindered by the economic and sporting threat potential.

7.2 ECJ: Confirmation of Merger Prohibition in the Steel Sector.

In its ruling of October 4, 2024 (C-581/22 P), the European Court of Justice (ECJ) confirmed the EU Commission's decision to prohibit the planned merger between ThyssenKrupp and Tata Steel. ThyssenKrupp complained that the relevant geographic market and product market had not previously been correctly defined. However, the ECJ was unable to identify any errors in this respect and confirmed the prohibition.

7.3 AgrarOLkG: Payment Terms Exceeding 49 Days are Ineffective.

The German Federal Office for Agriculture and Food (BLE) has published a decision against the German supermarket corporation EDEKA for violations of the German Agricultural Organizations and Supply Chain Act (AgrarOLkG). EDEKA had agreed payment terms of more than 49 days with a supplier of fresh milk and cream products, which violates the statutory maximum limit of 30 days for perishable products. The BLE argued that the companies in the EDEKA group are to be regarded as affiliated entities as defined by the European recommendation on small and medium-sized enterprises (SMEs) and that the AgrarOLkG is therefore applicable. EDEKA can appeal the decision before the Düsseldorf Higher Regional Court. The decision has a signal effect for other large German retail groups such as REWE, ALDI and the Schwarz Group. Suppliers of dairy, meat, fruit and vegetable products should assess whether they can benefit from the decision and assert their rights.

More on this topic at:
https://www.schulte-lawyers.com/schulteblog/zahlungsziele-unfaire-handelspraktiken

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