

Legal Update Webcast: Employment Law and Data Protection in the Successful Implementation of IT Systems: Best Practice Approaches

Presentation & Structure

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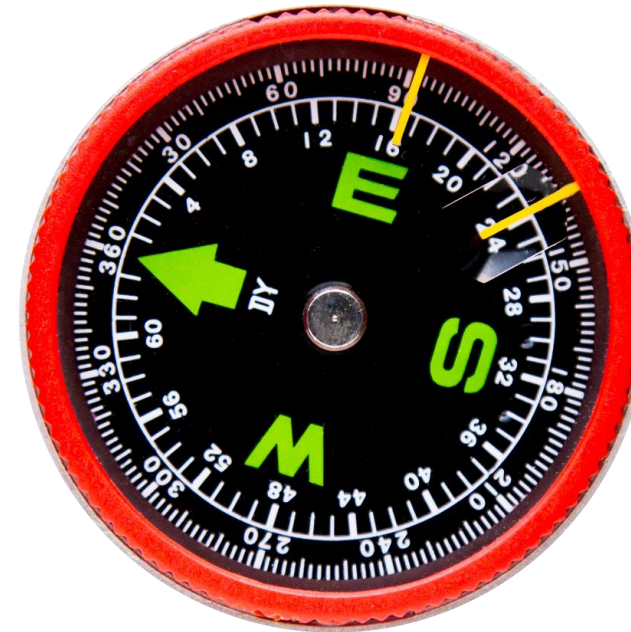


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Structure

- I. Co-determination rights of the works council in the introduction, application and expansion of IT systems
- II. Data protection requirements for the introduction, application and expansion of IT systems
- III. Case Study: Works Agreement and Testing in Workday
- IV. Use and Necessity of Real Data for Testing Purposes
- V. Q&A



Co-determination rights of the works council in the introduction, application and expansion of IT systems

I. Co-determination rights in the introduction, application and expansion of IT systems

The essential co-determination rights under the German Works Constitution Act (*Betriebsverfassungsgesetz – BetrVG*)

The essential co-determination rights in the introduction, application and expansion of IT systems

Co-determination pursuant to Section 87 para. 1 No. 6 BetrVG
(Introduction and use of technical equipment designed to monitor the behavior and performance of employees)

Best practice in attracting the works council to support the implementation of IT systems

- Early involvement of the works council and comprehensible information also about data protection and technical aspects in the implementation of the IT system
- Interdisciplinary consistent implementation of the IT system from an employment law, data protection and technical point of view
- Incorporation of works agreement negotiations into the implementing partner's schedule

Co-determination pursuant to Section 87 para. 1 No. 1 BetrVG
(co-determination in issues relating to the organization of the company and the conduct of employees in the company)

Co-determination pursuant to Section 87 para. 1 No. 7 BetrVG
(co-determination on health protection within the framework of the statutory provisions)

Co-determination pursuant to Section 87 para. 1 No. 14 BetrVG
(co-determination in the design of mobile work performed using information and communication technology)

Co-determination pursuant to Sections 94, 95 BetrVG
(co-determination in personnel selection and appraisal principles)

Co-determination pursuant to Sections 111, 112 BetrVG
(co-determination in the event of operational changes)

I. Co-determination rights in the introduction, application and expansion of IT systems

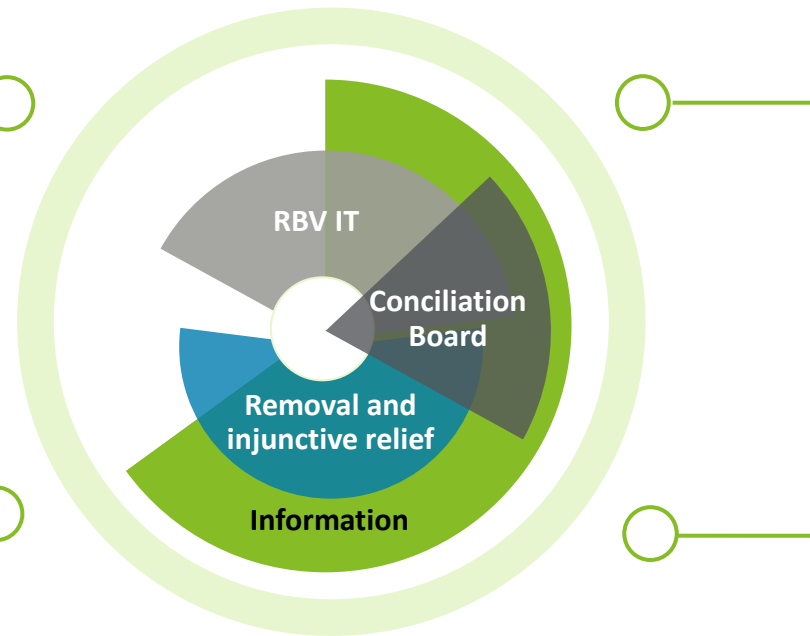
Realization of co-determination rights

Framework Works Agreement IT (*Rahmenbetriebsvereinbarung IT - RBV IT*)

- Framework for the introduction, application and expansion of IT systems
- If necessary: additional works agreements on special IT systems
- RBV IT is customary in the market, preserves co-determination rights and creates legal certainty

Conciliation Board

- The conciliation board replaces the lack of agreement between the employer and the works council
- The establishment of a conciliation board can only be enforced for a specific IT system; but not to an RBV IT



Claim for removal and injunctive relief

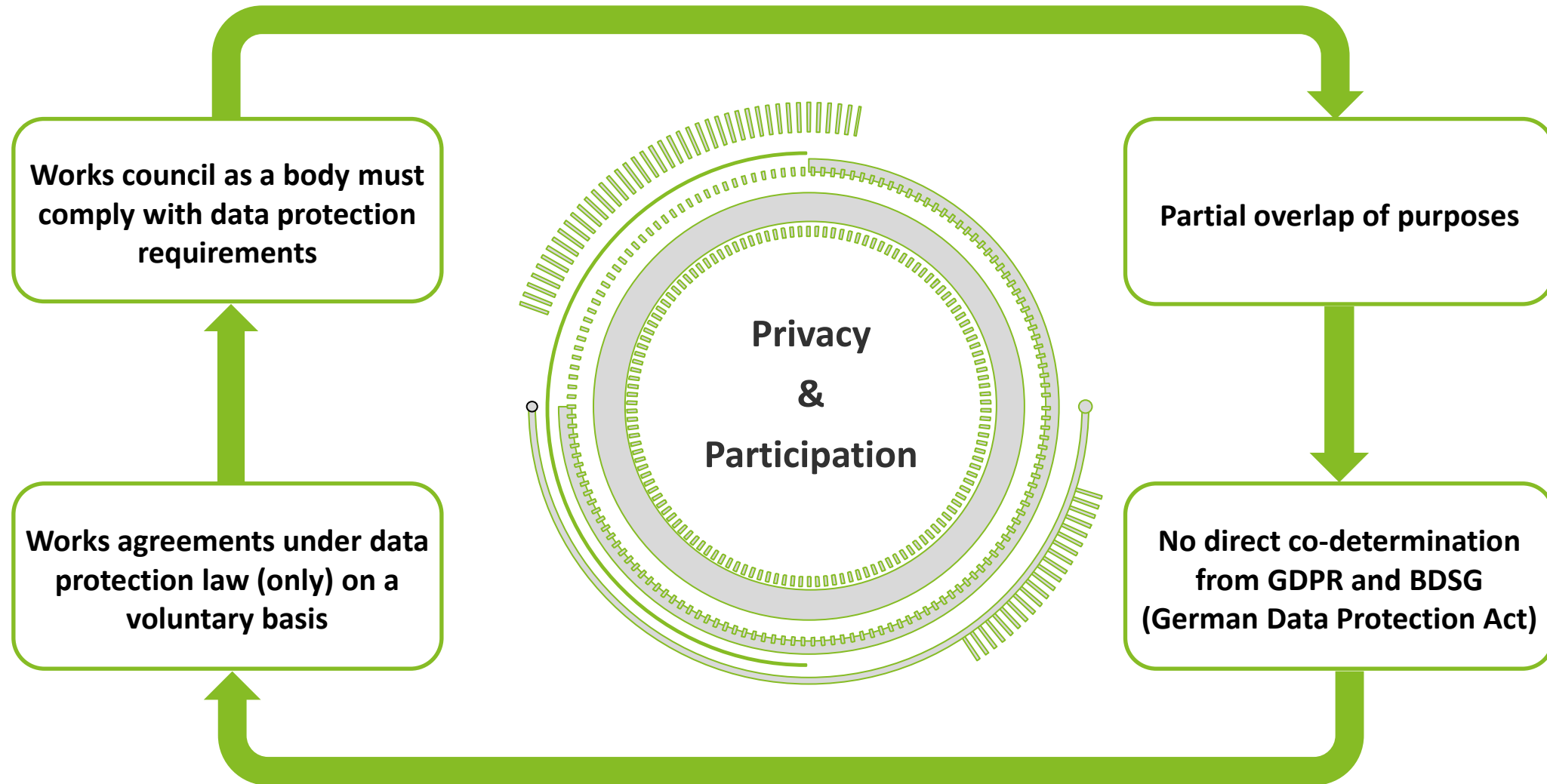
- Exists in the event of a violation of the co-determination rights pursuant to Section 87 para. 1 BetrVG
- Enforcement in court, also by means of a preliminary injunction, possible

Information of the works council

- The works council has a right to information within the scope of its duties
- When introducing and using IT systems, it must be comprehensively informed about the IT system and the relevant data processing

I. Co-determination rights in the introduction, application and expansion of IT systems

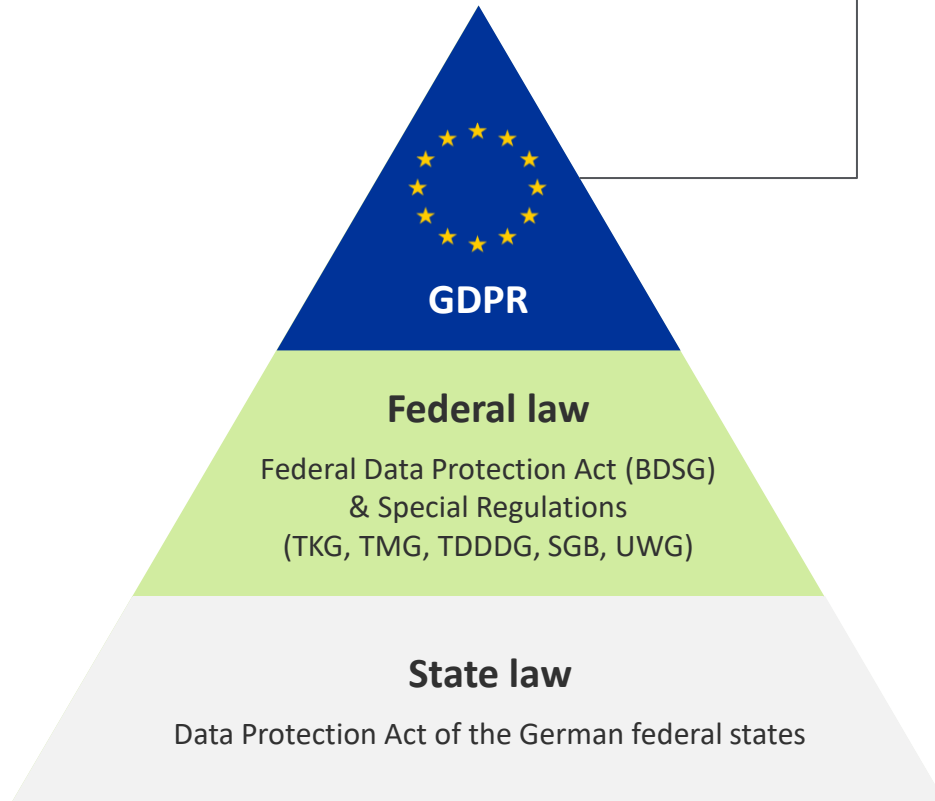
Data protection and co-determination



Data protection requirements for the introduction, application and expansion of IT systems

Data protection law in a business context

Legal basis



Significant fines, Art. 83 GDPR

- Up to € 10 million or 2% of the annual turnover generated worldwide for violations of the GDPR organisation and administrative obligations
- Up to € 20 million or 4% of the annual turnover achieved worldwide for violations of substantive regulations and rights of data subjects

€ 35.3 million fine – H&M

Spying on employees (including private living conditions)

€ 10.4 million fine – notebooksbilliger.de

Video surveillance of employees without legal basis



Strict liability, Art. 82 GDPR

- Liability and right to compensation against the controller or against the processor
- Personal liability of managing directors/board members (in conjunction with Section 43 (2) GmbHG, Sections 93 (2), 91 (2) AktG)

Legal Update: Revision of employee data protection

No (specific) legal basis in employee data protection?



*) "BDSG" refers to the German Federal Data Protection Act

*CJEU Judgment of March 30, 2023 – C-34/21: "Apart from having a **normative content specific to the area regulated, which is distinct from the general rules of that regulation, those more specific rules must seek to protect employees' rights and freedoms in respect of the processing of their personal data in the employment context and include suitable and specific measures to protect the data subjects' human dignity, legitimate interests and fundamental rights.**"*

Practical consequences

There may be a need for adaptation to consent forms, privacy policies, records of processing activities, works agreements that are based on Section 26 para. 1 sentence 1 BDSG

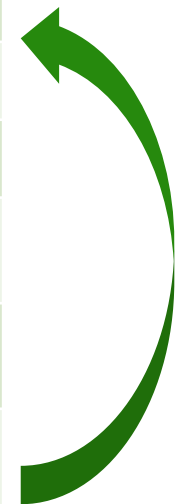
Assessment and documentation of suitable legal bases (e.g. Art. 6 para. 1 lit. b or f GDPR) when introducing new IT systems, taking into account current developments

Observation of current developments (e.g. statements from the supervisory authorities and initiatives of the German legislator)

Data protection law in a business context

Principles of data protection law

| Principle | Regulation - GDPR | Meaning |
|---|-----------------------|---|
| Lawfulness, fairness, transparency | Art. 5 para. 1 lit. a | Legal basis and transparent processing for data subjects (for employee data, e.g. Art. 6 para. 1 sentence 1 lit. b GDPR) |
| Purpose limitation | Art. 5 para. 1 lit. b | Data collection and further processing for specified, explicit and legitimate purposes (further processing compatible?) |
| Data minimisation | Art. 5 para. 1 lit. c | "As much as necessary, as little as possible" |
| Accuracy | Art. 5 para. 1 lit. d | Data must be accurate and up-to-date |
| Storage limitation | Art. 5 para. 1 lit. e | "As long as necessary, as short as possible" |
| Integrity and confidentiality | Art. 5 para. 1 lit. f | Do not disclose data to unauthorized third parties and protect it from unauthorized access, loss and/or damage |
| "Privacy by Design" | Art. 25 para. 1 | Technical and organisational measures to guarantee compliance with the data protection principles |
| "Privacy by default" | Art. 25 para. 2 | Privacy-friendly default settings ensuring that only necessary data is processed |
| Accountability | Art. 5 para. 2 | Controllers are responsible for compliance with the principles and must be able to demonstrate compliance (documentation) |



Data protection law in a business context

Data Processing in the Group

| Constellations (Examples) | What to consider? |
|---|--|
| <ul style="list-style-type: none">• Intra-group outsourcing (e.g. IT, HR, payroll accounting, etc.)• Group controlling by parent company (requires corresponding reports/data access)• Active data exchange (e.g. shared Active Directory, Data Lake, Data Warehouse)• Other cooperations (e.g. group-wide software with a mutual database/tenant) | <ul style="list-style-type: none">• General Data Protection Principles• No particular privilege for groups of companies• Documented legal basis for intra group data transfer (exception: order processing)• Necessary data protection agreements (e.g. Data Protection Agreements pursuant to Art. 28 GDPR, Joint Controller Agreement pursuant to Art. 26 GDPR, purpose limitation clause)• Compliance with the "need-to-know" principle (e.g. through adapted role and authorization concept, anonymization and pseudonymization)• Data deletion (group-wide data retention concept?)• Third country transfers?• Centralized data protection governance? |

Case Study: Works Agreement and Testing in Workday

IV. Case Study: Works Agreement and Testing in Workday

Using the example: State Labour Court Baden-Württemberg, Ruling as of February 25, 2021 – Case 17 Sa 37/20

and German Federal Labour Court, Decision to submit to the ECJ as of September 22, 2022 – Case 8 AZR 209/21 (A)

Facts of the case

- Claim for damages by an employee (plaintiff) against his employer (defendant) for violation of GDPR
- When implementing the cloud-based HR system "Workday", the employer processed personal employee data ("real data") for testing purposes.
- There was a works agreement / toleration agreement for the implementation, but the employer used employee data for the implementation that was not covered by the works agreement.



State Labour Court Baden-Württemberg, Ruling as of February 25, 2021 – Case 17 Sa 37/20

- Works agreement is the legal basis for the use of real data in the implementation of Workday.
- Section 26 para. 1 sentence 1 BDSG* or Art. 6 para. 1 lit. f GDPR are not legal bases for the processing of real data during the implementation of Workday, because the testing is not necessary for the implementation of the employment relationship or personnel administration.



German Federal Labour Court, Decision to submit to the ECJ as of September 22, 2022 – Case 8 AZR 209/21 (A)

Questions:

- When processing employee data on the basis of a works agreement, must the other requirements of the GDPR – such as Art. 5, Art. 6 Para. 1 and Art. 9 para. 1 and para. 2 GDPR – always be complied with, and if so, to what extent can this be reviewed by the courts retrospectively?
- It is not precluded that real data may be processed for "test purposes" as part of the provisional operation of Workday if so-called "dummy" test data is not sufficient. This must be substantiated in detail by the party that bears the burden of proof in this respect.



Works agreement according to the GDPR

A closer look



Works agreement as a legal basis for the data processing, Art. 88 para. 1, recital 155 GDPR, [Section 26 para. 4 sentence 1 BDSG]

- The fate of Section 26 para. 4 sentence 1 BDSG is unclear.
- What we hope for: Works agreement deemed to be generally possible as a permission for corporate data processing, i.e. even if no other legal basis applies.

Requirements for regulatory content, Art. 88 para. 2 GDPR, [Section 26 para. 4 sentence 2 BDSG]

Article 88 para. 2 GDPR: *"Those rules shall include suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity and monitoring systems at the work place."*

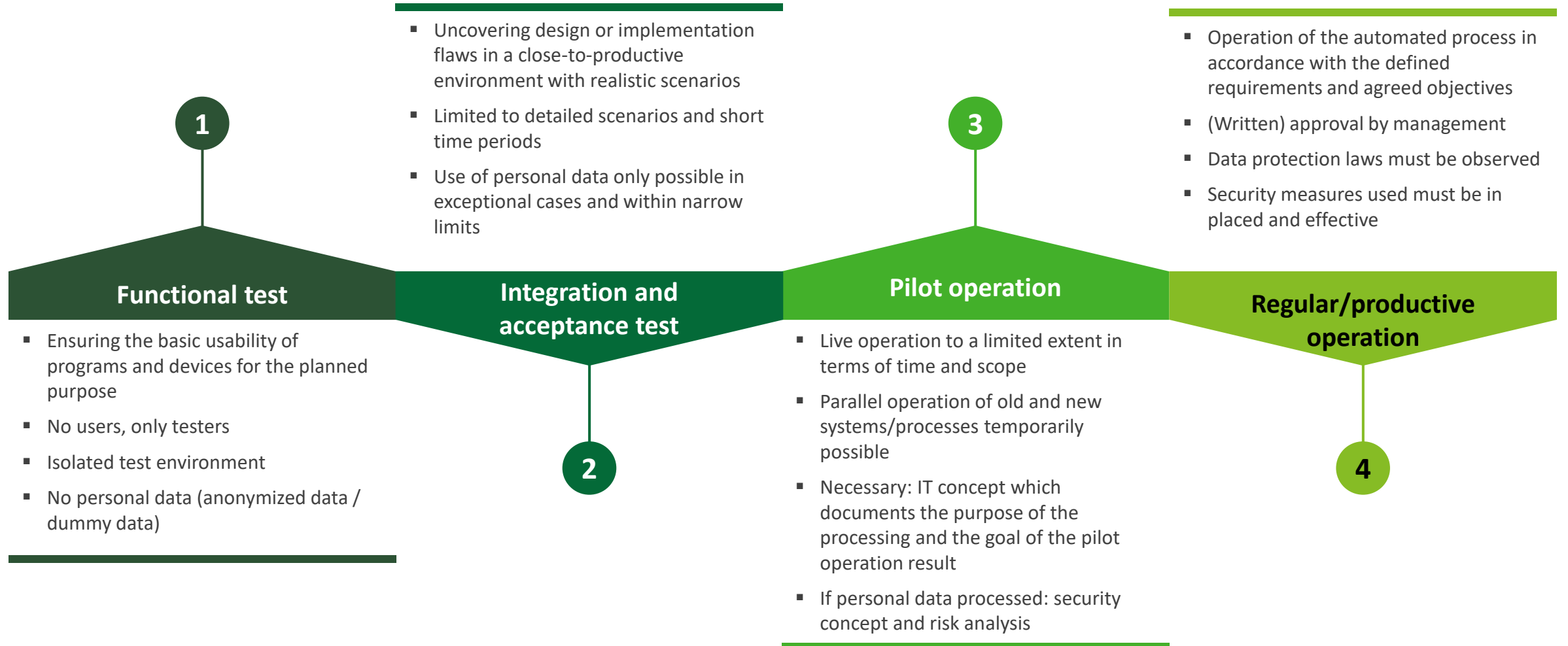
Possible regulatory content from a data protection point of view:

- If applicable, clarification of the applicable legal basis
- Specific measures to protect the data subjects
- Purpose of data processing, description of the system(s)
- Interfaces to other systems, if necessary
- Data and data subjects (categories, if applicable)
- If necessary, reporting mechanisms
- Retention periods

IV. Use of Real Data for Testing Purposes

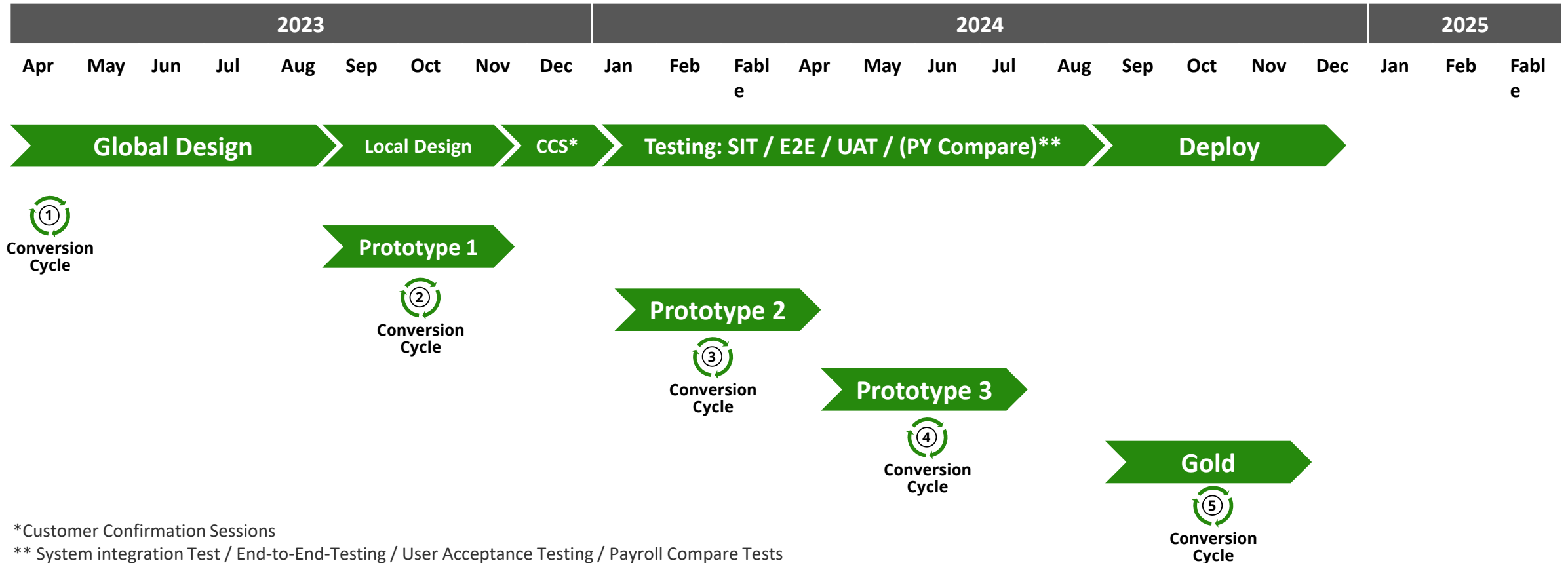
Orientation Guide DSK "Datenschutz und Datensicherheit in Projekten: Projekt- und Produktivbetrieb"

ECJ Judgment of October 20, 2022 –
Case C-77/21



Use and Necessity of Real Data for Testing Purposes

An Exemplary Project Timeline of a Workday Implementation



*Customer Confirmation Sessions

** System integration Test / End-to-End-Testing / User Acceptance Testing / Payroll Compare Tests

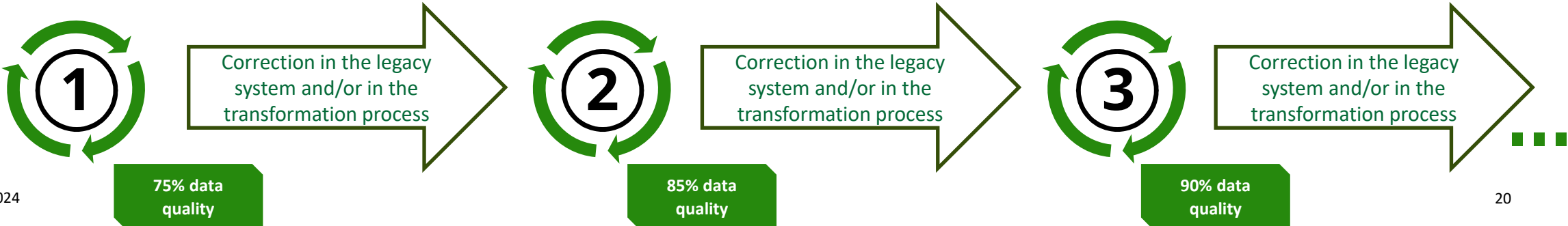
- As part of a Workday implementation, multiple data load cycles must be performed. Here: 5
- The loaded data can still accumulate in the first cycles, also due to the changing **functional requirements** (e.g. new fields through local design)
- Each cycle includes an extract of the data from the legacy systems (often several) and is intended to enable a **repeatable, correct and accurate** run of the data load to practice the final upload

Why real employee data for the prototypes?

- When implementing HR systems, **data quality of HR data** is the most important key element
- The data is usually not available in the **same format/structure in the old systems** as in the new system.
- The process of data transformation is complicated, multi-layered, and error-prone.
- Each employee record has 100+ data points, all of which must be correctly linked to each other, in addition to the personal data, every organizational aspect must also be reflected correctly in the new system.



- The correction of the structures is tested from loading cycle to loading cycle, corrected in order to achieve the best possible result for the final upload. **The errors in data quality are only visible with real data!**



Why doesn't anonymized data reach the desired goal?

- The errors in the employee records can only occur if we use real records. This is due to the **versatility of the errors**, which often come from the local, specific properties of the legacy systems.
- The validation of the data is usually done in 2 ways



Technical:

1:1 comparison (e.g. via reports) whether the same amount of information has arrived in the new system

Typical/exemplary errors:

- In India, all phone numbers have not been transferred
- Dutch employees were only charged 60%



Business:


1:1 comparison (usually manually directly in the system) whether the incoming data also corresponds to the information in the old system

Typical/exemplary errors:

- For German employees, the phone number has a double country code (+4949...)
- In China, the first and last names were swapped

The validation of the data can only be done on real data, otherwise various of the countless possible sources of error cannot be detected.

Q&A



Thank you for your
attention

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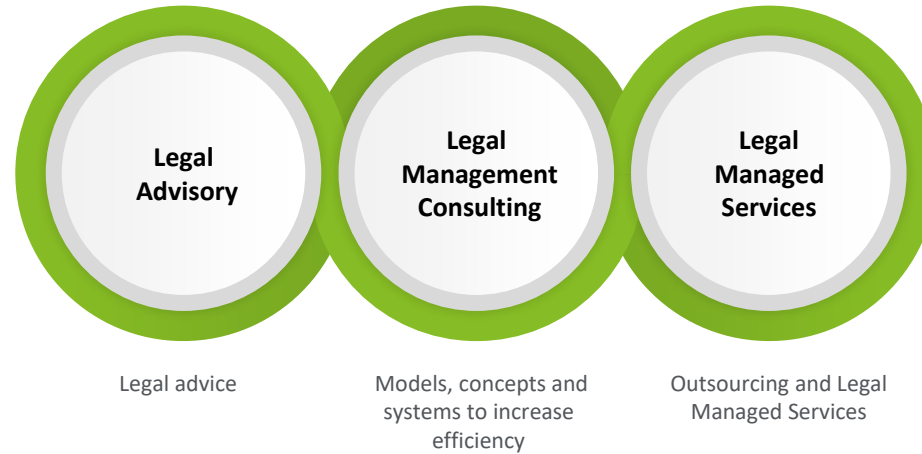
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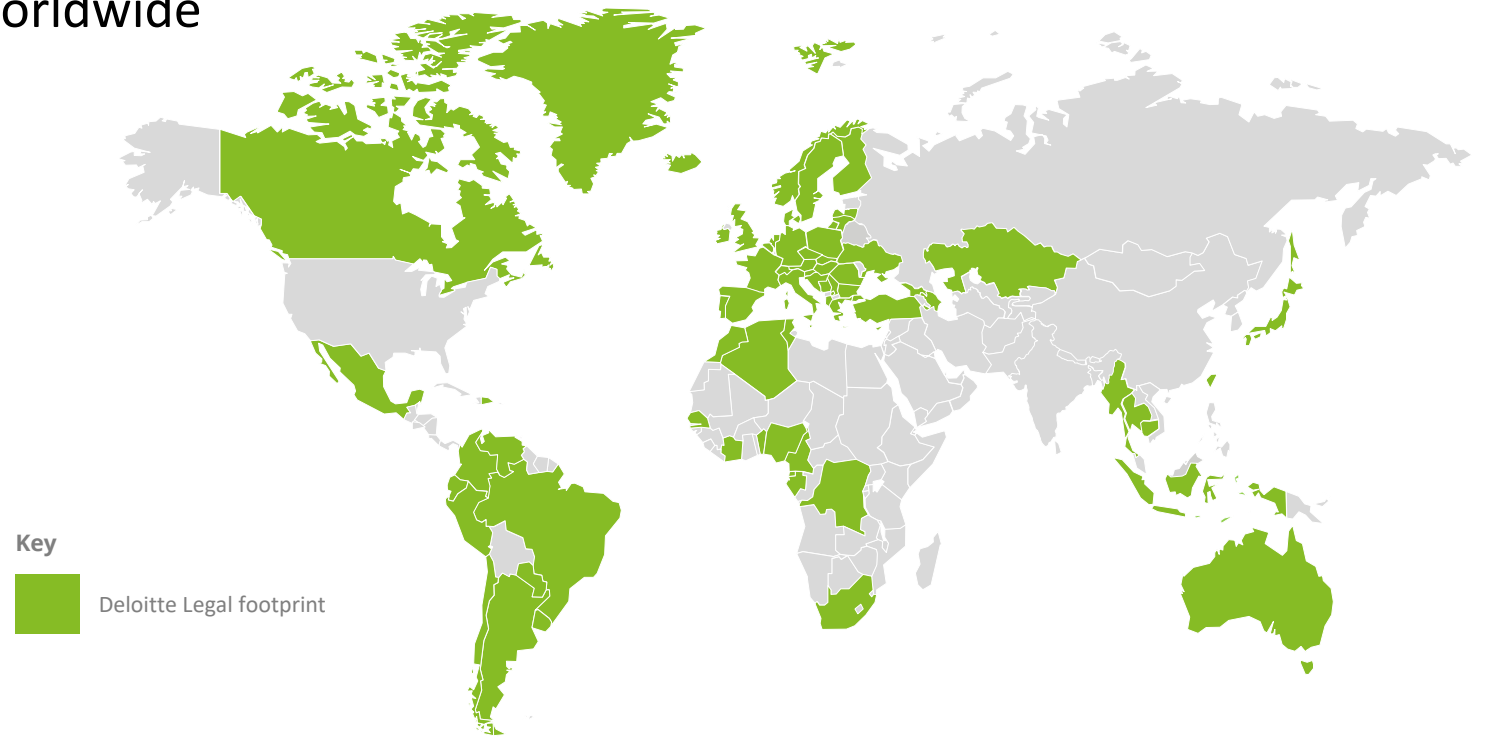


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