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Prof. Dr.
Thomas Wegerich
Editor
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Dear Readers,

Veta T. Richardson, President and CEO of our long-standing cooperation partner, the Association of Corporate Counsel, reports on the key topics that keep Chief Legal Officers awake at night. As you will learn, regulatory uncertainty and massive geopolitical threats are putting a lot of stress on legal teams in Germany and Europe. It is well worth a read – don't miss it.

Freelancer or employee? The distinction makes quite a difference for companies regarding social security contributions. In addition, false self-employment involves several threats for businesses – from financial losses to criminal consequences that might even affect the management personally. Andreas Kössel knows what to do in order to avoid legal risks.

AI is everywhere – and to a certain extent this is also true for the European General Data Protection Regulation (GDPR). Our author Paul Voigt provides a very good and practical overview of what companies should be aware of when (web-)scraping and using personal data for AI training purposes. This topic is becoming more and more relevant. Which is why you should keep an eye on the facts.

Sincerely yours,

T. Wegerich

Thomas Wegerich

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From risk to protection factor – The human element in cyber security

In the digitalized economy, ransomware attacks, technical errors, and human misbehavior are among the biggest cyber risks for companies. The Allianz Risk Barometer 2025 ranks cyber risks as the biggest business threat worldwide, ahead of business interruptions and natural disasters. While technical protection measures are improving, the human factor remains a key challenge for cyber defense.

The Verizon Data Breach Investigations Report 2024 shows that human behavior plays a role in 68% of all security incidents. Even the most modern firewalls can be bypassed if employees click on malicious links. Attackers are using humans as a "gateway" as IT systems become increasingly complex. Phishing attacks are particularly quick to succeed: It often takes less than 60 seconds for users to disclose confidential information after opening a fraudulent email.

However, employees are also an important protection factor. With the right level of awareness, they can recognize and fend off attacks. Typical attack methods include social engineering, which exploits human characteristics such as trust, fear, or curiosity. Phishing, spear phishing, and tailgating are common techniques. The use of deepfakes, in which AI tools enable personalized attacks, is particularly threatening.

Training and awareness strategies are crucial to strengthening the human firewall. Companies should conduct regular training programs tailored to different roles and risk levels. Phishing simulations have also proven their worth. Employees should be encouraged to report suspicious activity without fear of reprisal.

Furthermore, strong technical controls are essential, such as multi-factor authentication (MFA), robust email filters, and anti-malware solutions, as well as regular software updates. Clear contingency plans and incident response procedures are necessary so that employees know how to respond in the event of a compromise.

The legal department also plays a central role in cyber resilience by ensuring legal requirements are met, conducting risk assessments, and developing security policies.

Cyber security is an ongoing process that requires constant attention. A culture of security awareness is crucial. The further development of AI will give rise to both new threats and more advanced defense mechanisms. Technology, processes, and people must work together to create a robust line of defense.

Editorial note:

You can find a detailed German version of this article in our new online magazine CyberSecurityQuarterly. **(tw)**

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BusinessLaw

Adapting to shifting regulations and global pressures

European CLOs face growing economic uncertainty in addition to long-standing regulatory uncertainty

By Veta T. Richardson

European CLOs are leveraging advanced technology, such as AI-driven compliance tools, to efficiently monitor and adapt to diverse regulatory changes across different jurisdictions.

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The global landscape has shifted considerably since German CLOs and their European counterparts responded to the 2025 Association of Corporate Counsel (ACC) Chief Legal Officers Survey. Driven by changes in international tariffs, potential supply chain disruptions, and ongoing geopolitical threats, increasing economic uncertainty continues to take hold. Nonetheless, the debate over regulations in Europe has remained in the headlines, underscoring the survey's findings that regulatory uncertainty was the most pronounced challenge for European legal teams and remains a key challenge while facing new, global developments.

What challenges are European CLOs facing?

Law departments in Germany, throughout Europe, and globally face a host of challenges, externally and internally. From geopolitical risks and supply chain complications to budgetary pressures, understaffing, and antiquated technology, CLOs have a lot to navigate. Additionally, European CLOs must also contend with a lack of clarity when having to comply with local laws and pan-European regulatory obligations. This, coupled with the escalating volume and complexity of internal investigations, creates a unique set of pressures legal teams across the continent are being asked to mitigate.

To complicate matters further, the lack of guidelines and inconsistent enforcement surrounding this patchwork of regulations can impact many areas and business functions, including industry-specific regulations, sanctions, artificial intelligence regulation, ESG, third-party risk management, and more.

The rapidly evolving ESG regulatory landscape has compelled CLOs to identify and implement a range of operational changes to maintain compliance. The General Data Protection Regulation (GDPR) has already introduced significant complexities across multiple business functions for any organization operating within Europe. More recently, the EU Corporate Sustainability Reporting Directive (CSRD) has added another layer of regulatory burdens. Starting this year, approximately 15,000 companies in Germany alone must provide detailed reports on their adherence to environmental and socio-political sustainability criteria. This new requirement has sparked concern at the highest levels of government. Outgoing German Chancellor Olaf Scholz (SPD) has openly criticized the directive, arguing in a letter to EU Commission President Ursula von der Leyen that the added value "is out of all proportion to the bureaucratic burden" and suggesting a two-year postponement alongside adjustments to the reporting thresholds.

"The rapidly evolving ESG regulatory landscape has compelled CLOs to identify and implement a range of operational changes to maintain compliance."

In addition to ESG reporting, recent rulings by the European Court of Justice have intensified compliance challenges. The court has significantly tightened the requirements for company agreements regulating the processing of employee data, limiting the ability of employers and works councils to establish their own rules. As a result, existing company agreements and related documentation must undergo critical review and revision to align with the new legal framework. These regulatory shifts not only increase administrative complexity but also impose substantial financial costs on affected companies.

The Mario Draghi report, **The Future of European Competitiveness**, released in September, 2024 summarized the effects of the current environment stating, "...innovative companies that want to scale up in Europe are hindered at every stage by inconsistent and restrictive regulations." The issues are so pronounced that the EU is taking notice, announcing recently that aspects of the GDPR will be simplified and that plans are being discussed to reduce the regulatory burden caused by several sustainability laws.

To be clear, these regulatory challenges are certainly not unique to Europe. The ACC global survey data found that one in five organizations have been subject to a regulatory investigation over the past year. With this overall global trend, and the specific uncertainties and fragmented regulations Europe is experiencing, these figures are likely to increase if additional action is not taken to help ease the EU's regulatory burden.

How are European CLOs responding to these challenges?

CLOs are employing a multifaceted approach to navigate the challenges caused by this fragmented regulatory landscape in the context of larger global changes. They are leveraging advanced technology, such as AI-driven compliance tools, to efficiently monitor and adapt to diverse regulatory changes across different jurisdictions. CLOs are also fostering stronger collaboration with outside counsel and consultants, as well as the regulatory bodies themselves, to ensure a nuanced understanding of how regional laws and practices interact with overarching European Union (EU) regulations.

In-house counsel, individually and through organizations like the ACC, advocate for harmonized EU regulations. By building agile legal teams, investing in continuous training, and leveraging technology, CLOs enhance compliance, minimize risks, and strengthen operational resilience. As Europe's regulatory landscape evolves, they lead through strategic innovation, collaboration, and advocacy, navigating complexities to ensure legal departments remain adaptable and effective despite regulatory fragmentation, which many argue hampers economic growth and sustainability. While legal teams will continue to simultaneously face impacts from recent elections in Germany and the United States, ongoing geopolitical challenges, and a rapidly changing global business environment, regulatory uncertainty is likely to remain top of mind for European CLOs into the foreseeable future. ←

To fix the EQ crisis look to spies

Bringing spy tradecraft to business communications

By Jeremy Hurewitz

To address the emotional intelligence crisis in the legal world, particularly among junior employees, businesses can enhance communication skills by adopting spy tradecraft techniques like active listening, mirroring, and elicitation.

Introduction

There is a quiet crisis of emotional intelligence (EQ) in the legal world. Firms around the world are struggling with this post-pandemic trend, specifically with their junior employees.

To understand the EQ crisis, consider the challenges the youngest generation in the workplace has faced. They grew up with ubiquitous screens distracting them, and sociologists are only beginning to understand the impact on their psyches. As they were pursuing degrees, the pandemic hit, and they were forced to learn remotely, which took away a critical period of socialization. Now they have entered the workforce, and many have found themselves in largely remote working environments. They have been denied the water cooler chatter, the impromptu happy hours and lunches that so many of us benefited from earlier in our careers when older colleagues mentored us.

While each generation tends to complain about the ones that follow, something more concrete seems to be occur-

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ring with this trend. Frustrations over communication and behavior are widespread when you speak to executives. The remedy towards ameliorating the issue could come from a surprising source: spies.

Spies are gifted communicators

Spies are gifted communicators, highly adaptable, and with elevated emotional intelligence they use to connect with their targets. My work involves bringing spy tradecraft to business communications, and I have tips on how to help your team improve their communication skills.

One of the hardest but most essential things to do is to be a good active listener. When we feel listened to, we feel respected, which should be the goal when dealing with a colleague or a client. But active listening is hard because of the way we are wired, which is to listen with an intention to reply, not to understand. Because of these natural impediments to listening, we need to commit ourselves to increasing our active listening practice – there is no trick that turns you into a great active listener, but it is the skill that all good communication strategies flow from.

Becoming a good active listener

One of the challenges to listening is that we have evolved to comprehend four times faster than we speak, so we are typically ahead of our conversational counterparty, which makes concentrating on what they say quite difficult. When speaking with someone, have you noticed them become restless as you're speaking and that they may even finish your sentence for you? That's because they know where you are going before you've finished. It requires commitment to steady your body language, make consistent (but not creepy) eye contact, and, most difficult of all, to ask a clarification question rather than the reply you're dying to share.

Mirroring is the physical replication of another person's body language, and it has been shown in countless studies to augment the rapport-building process. Simply put, if your client is leaning forward, elbows on the table, eager to hear what you have to say, mirror their posture.

Verbal mirroring is an important tool in the toolkit of hostage negotiators – who can't be right in front of the targets they seek to influence – and it works similarly. If you use the same language as your target, it will signal that you're on their side. Look in particular for colloquialisms or pet words – the little sayings we all tend to favor. In corporate life, we are bombarded with sayings like "let's circle back" or the countless campaign slogans that businesses utilize – look for these colloquialisms and bits of corporate jargon to repeat back to your clients.

Making both physical and verbal mirroring an integral part of your communications will help to build better connections with clients to make them feel like you're an auxiliary member of their team. A word of caution though: mirroring should be used subtly, and you should practice with friends before you use it in your career. When done badly, mirroring can backfire and make it appear that you're mocking your target.

Elicitation is a skill savvy spies use to subtly collect information and can be an effective way for lawyers to gather information in depositions and other situations. When we meet someone of interest, we want to learn about that person, but if we ask lots of questions, we risk eliciting a reaction that is the opposite of our goals – suspicion of our intentions, for instance.

There are a variety of triggers for elicitation that behavioral science can point to. One is known as the tendency to correct. The idea is that all human beings are vain, and there is no detail too small about ourselves that we don't feel compelled to correct. So if I was to say to you, "Isn't your favorite color blue?" you wouldn't simply say, "No, it's not blue." Rather, you would correct the record about what your favorite color is and say, "It's green."

Takeaway

The corporate EQ crisis is real, but the good news is that with a little training it can be improved. Investing in your team's communication skills can increase workplace morale and grow your business. The world of spies can uncover the secrets on how to do so. ←

Editorial note:
For further details on this topic, see the book Sell Like a Spy, which was written by our author. **(tw)**

LaborLaw

Avoiding the risks of false self-employment

The increasing prevalence of innovative employment models heightens the relevance of the issue

By Andreas Kössel

The distinction between false self-employment (also known as bogus self-employment) and employment subject to social security contributions is a perennial issue in both corporate practice and legal advisory work – not least due to the significant liability risks involved. In practice, it repeatedly becomes apparent that individuals ostensibly engaged as "freelancers" are, in fact, employees. The increasing prevalence of innovative employment models has further heightened the importance of structuring employment relationships in a legally compliant manner. From a corporate perspective, the prevention of false self-employment is a central issue in HR compliance, carrying financial risks as well as personal liability risks for the management.

What is false self-employment?

False self-employment occurs when a contractor is formally engaged as a self-employed individual by a company but, in reality, works under instructions and in a state of personal dependence akin to an employee. The conse-

The distinction between self-employment and employment subject to social security contributions involves a complex assessment based on various criteria, which is crucial for avoiding legal risks.

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quence is that the individual is subject to the rights and obligations of an employee, liable for social security contributions.

Distinction between self-employment and dependent employment

In employment law, the distinction between self-employment and dependent employment is based on the concept of an employee under § 611a of the German Civil Code (BGB), whereas in social security law, it is determined by the concept of employment under § 7 of the German Social Code, Book IV (SGB IV). In both employment law and social security law contexts, two key criteria play a central role in making this distinction: integration into the business organization and the degree of instruction-bound work. However, the question of whether an individual has to be classified as self-employed or as an employee cannot be answered by a simple checklist. The distinction involves a complex process based on an overall assessment of various criteria. The following points serve as the basis for this assessment.

Specifications regarding place, time, and duration of work

A self-employed contractor typically determines where, when, and for how long they work. There are no fixed specifications from the client regarding the place of work or working hours. In contrast, an employer sets the place of work and working hours. An employee is bound by a fixed time system and has limited flexibility in planning their working hours.

Specifications regarding the manner of service provision

A self-employed contractor independently decides how to fulfill the tasks assigned to them. In the case of dependent employment, however, the employer typically provides detailed instructions on how the work is to be carried out. The Federal Social Court (BSG, Case No. B 12 R 9/21 R) ruled that a "pool doctor", although acting with medical autonomy and not subject to instructions, is classified as a dependent employee. In cases involving highly skilled personnel who are not given instructions, the decisive factor is whether they are integrated into the organizational processes and thus into the client's business organization.

Integration into the work organization

A self-employed contractor is not integrated into the operational processes or hierarchies of the company. They work independently of the client's business. In contrast, an employee is typically part of the internal organization and subject to the company's structures.

Comparison with the client's employees

A contractor is treated differently from permanent employees in terms of working hours, supervision, and instruction-bound work. In its ruling of 18 August 2023 (Case No. L 7 BA 72/23 B ER), the Bavarian State Social Court compared contractors with permanent employees: A fitness trainer working as a course instructor without assuming entrepreneurial risk and integrated into the business organization of a gym is regularly classified as a dependent employee. The gym determines the courses offered and assumes responsibility for customer acquisition. The trainer's task is to implement the prescribed program without the ability to independently modify or replace the courses offered.

Provision of work equipment

A contractor typically uses their own equipment to provide their services. Exceptions to this rule are only possible within narrow limits, such as for reasons of data security or to protect business and trade secrets. For example, it may be permissible for a self-employed IT expert to be prohibited from using their own hardware and software. In an employment relationship, however, it is standard practice for the employer to provide the employee with the necessary work equipment.

Remuneration structure

A self-employed individual is typically remunerated on the basis of contracts for work or services, often billing for time spent at an agreed hourly rate. Employees, on the other hand, typically receive a fixed salary. In relation to remuneration, the Wiesbaden Social Court (Case No. S 8 R 312/16) ruled that an above-average fee is not a decisive indicator of self-employment.

Non-competition and secondary employment restrictions

Another characteristic of self-employment is that a freelancer may work for multiple clients. However, a client may have a legitimate interest in agreeing to a non-competition clause during the term of the contract. According to case law (Federal Labor Court, Case No. 9 AZR 778/95), such a clause does not automatically preclude self-employment. Employees, by contrast, are subject to a non-competition obligation and may only engage in secondary employment to a limited extent.

Participation in internal meetings

Self-employed contractors only participate in internal meetings on an exceptional basis. Employees, however, are regularly involved in internal meetings.

Personal performance of services

A contractor is not obliged to perform services personally and may engage third parties to fulfill their obligations. An employee, on the other hand, must perform their work personally.

The weighting of the criteria varies depending on the industry and the individual case. However, the decisive factor is the actual practice of the working relationship. Even if a contract describes a self-employed activity, divergent working conditions may establish an employment relationship subject to social security contributions. According to the consistent case law of the Federal Social Court (see, inter alia, Case No. B 12 R 11/18 R), an overall assessment is always required.

Social security contributions in the case of a single-person corporation?

The Federal Social Court (Case No. B 12 BA 1/23 R, B 12 R 15/21 R, B 12 BA 4/22 R) applied the principles for classifying an activity as dependent or self-employed employment to cases where the contractual relationship exists between two legal entities, but the services are performed by a natural person who is also a shareholder and managing director of one of the legal entities. The decisive factor for the distinction is not the contractual structure but the actual nature of the activity.

Legal risks in engaging false self-employed individuals

The risks involved with false self-employment are significant for companies. They include not only financial losses but also criminal consequences that may personally affect the management.

If it is subsequently determined that a supposedly self-employed contractor is in fact classified as an employee, the company will be liable for all outstanding (total) social security contributions. These must typically be paid retroactively for the last four years. In cases of intent, the claims may even extend back up to 30 years. In addition, high late payment penalties are often imposed. The late payment penalty amounts to 1% of the outstanding amount for each month or part thereof that the payment is overdue.

Under § 266a of the German Criminal Code (StGB), those responsible in the company face imprisonment of up to five years if social security contributions are not properly paid. Regulatory sanctions may also result in substantial fines.

If false self-employment is retrospectively established, the individual is entitled to all the rights of an employee. These include protection against dismissal under the German Protection Against Dismissal Act (Kündigungsschutzgesetz), entitlement to paid leave under the German Federal Leave Act (Bundesurlaubsgesetz), continued payment of wages in the event of illness, and compliance with working time regulations under the German Working Time Act (Arbeitszeitgesetz).

Prevention: How can companies minimize the risk of false self-employment?

Companies can significantly reduce the risk of false self-employment through preventive measures. At the contract drafting stage, it must be ensured that the working relationship genuinely meets the criteria for self-employment. The actual implementation of the working relationship is crucial. The contractor should not be integrated into the business organization like a permanent employee. For legal certainty regarding the classification of the activity, companies may apply to the German Pension Insurance (Deutsche Rentenversicherung) for a status determination procedure.

In summary, awareness and legal advice are essential. The avoidance of false self-employment is a central HR compliance issue. Through early legal advice and regular review, companies can significantly reduce the risk and avoid legal pitfalls. Systematic risk management and sensitizing those responsible are crucial to prevent unpleasant surprises. ←

Certificates of incapacity for work from abroad

The BAG ruling of 15 January 2025

By Miriam Siemen

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The Federal Labor Court has clarified that the substantiating value of a certificate of incapacity for work can be placed in doubt by a comprehensive overall assessment of all circumstances, especially in the case of repeated sick notes in connection with vacations.

Holidays, sun, sea, and suddenly ill? "Extending" the holiday with certificates of incapacity for work is a negative trend among employees. Employer representatives are requesting stricter controls, such as home visits or the loss of pay on the first day of illness. The Federal Labor Court (BAG) recently clarified once again under which circumstances the evidential value of a certificate of incapacity for work from abroad can be questioned (Federal Labor Court ruling of 15 January 2025 – 5 AZR 284/24). We explain the significance of this decision and what employers and HR managers should look out for when receiving certificates of incapacity for work.

Legal introduction to the topic

If an employee becomes sick, they are generally obliged to submit a certificate of incapacity for work to their employer in accordance with § 5 (1) 2 of the German Continued Remuneration Act (EFZG). This usually applies if the inability to work lasts longer than three calendar days.

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However, an employer may set different rules. The certificate of incapacity for work must clearly state that the employee is unfit for work and is unable to perform their contractual duties due to illness. Consequently, it is not sufficient to simply submit a certificate of "illness". In addition, the name of the employee, the attending physician as the issuer, and the expected duration of the incapacity for work must be noted in the certificate.

A certificate of incapacity for work generally has a high evidential value. It is primarily the employer's obligation to refute this evidential value. However, reasonable doubts – whether about the certificate itself, the information provided by the employee, or other aspects – can contest the evidential value. The consequence of such contestation is a change of the burden of proof: The employee now has to prove that they really were unfit for work.

Previous case law on the contestation of the value of evidence

In the past, the Federal Labor Court has often ruled on the evidential value of certificates of inability for work and has developed several representative case groups in which this evidential value is regularly successfully challenged:

Announcement of illness (Federal Labor Court ruling of 4 October 1978 – 5 AZR 326/77)

In one of the earliest rulings from 1978, there was an allegation that the employee had announced a so-called "sick party". Such suspicion arises if the employee announces that they will soon be unable to work in response to certain actions by the employer or colleagues. Such a statement raises considerable doubt as to whether the announced illness has occurred and regularly undermines the evidential value of the certificate of incapacity for work submitted.

Activity for a competitor (Federal Labor Court ruling of 29 June 2017 – 2 AZR 597/16)

A judgment from 2017 concerned an employee who was working for a competitor company during his alleged incapacity for work. He obtained a certificate of incapacity for work and presented it to his employer. This not only undermines the evidential value of the certificate of incapacity for work, but also regularly constitutes an important, extraordinary reason for termination of employment by the employer.

Incapacity for work after resignation (Federal Labor Court ruling of 8 September 2021 – 5 AZR 149/21)

A case from 2021 concerned an employee who resigned from her job and then submitted a certificate of inability for work dated that day, which lasted exactly until the end of the notice period. In the case decided by the Federal Labor Court, the employer was able to contest the evidential value of the certificate of incapacity for work by showing that it covered exactly the remaining term of the employment after the employee's resignation. In the opinion of the Federal Labor Court, the congruence of the notice period and the sick period in the certified incapacity for work gave rise to serious doubts about the certified incapacity for work.

Sickness on summer vacation – the facts of the new case

The current Federal Labor Court ruling of 15 January 2025 (5 AZR 284/24) concerns a warehouse worker who had been employed by his employer for 22 years and spent his summer vacation in Tunisia from 22 August to 9 September 2022. Towards the end of his vacation, he became sick, which is why he presented his employer with a certificate of incapacity for work issued by his Tunisian doctor on 7 September 2022. This diagnosed him with severe sciatic pain. As a result, the employee was prohibited from moving and traveling for 24 days and prescribed absolute bed rest. The employee booked his ticket home for around three and a half weeks later, immediately after receiving the certificate. The warehouse worker started his return journey on 29 September 2022, during the ordered rest period. This was the 4th time in several years that the employee had become sick during his vacation. Each year, the employee submitted certificates of incapacity for work during, shortly before, or after the end of the vacation.

The employer then refused to continue to pay him for the sick period and reduced his remuneration accordingly. The employee filed a claim for continued remuneration.

Munich Regional Labor Court ruled in favor of the plaintiff

Munich Regional Labor Court initially confirmed the warehouse worker's claim in its ruling of 16 May 2024 – 9 Sa 538/23. The evidential value of the certificate of incapacity for work at issue was not contested, and the employee was entitled to continued remuneration for the sick period.

The Regional Labor Court emphasized that it is irrelevant in which country the certificate of incapacity for work was issued. A certificate from another European or non-European country has the same evidential value as one from Germany if it shows that the foreign doctor has differentiated between a mere illness and the incapacity for work.

Furthermore, the individual aspects of the case presented were each not sufficient to challenge the evidential value.

Federal Labor Court demands a comprehensive overall assessment of all individual aspects

The Federal Labor Court decided the case differently and overturned the ruling of the Regional Labor Court. The core statement of the ruling is the necessity of carrying out a comprehensive overall assessment of all individual circumstances of the case. In particular, the Federal Labor Court criticized the isolated evaluation of the individual aspects in the previous court instance, each one not sufficient to contest the evidential value.

The inability to work for more than three and a half weeks without a further visit to the doctor, the early purchase of the ticket for the journey home, and ultimately the fourth repetition of this procedure are, taken as a whole, likely to create considerable doubts on the validity of the certificate of inability for work. This could lead to the evidential value being challenged and to a shift in the burden of proof.

> "'Extending' the holiday with certificates of incapacity for work is a negative trend among employees."

The Regional Labor Court must therefore consider all these individual aspects in an overall view to assess the evidential value of the certificate of incapacity work submitted.

With this ruling, the Federal Labor Court confirms and continues earlier case law on the change of the burden of proof to the effect that individual aspects that are not sufficient in themselves can, in combination with other facts, justify a change of the burden of proof. The Federal Labor Court confirms that serious doubts can contest the evidential value of a certificate of incapacity for work.

Consequences and practical implications of the ruling for employers

Employers and HR managers can gain important insights from the new Federal Labor Court ruling. In particular, certificates of incapacity for work that are submitted during or directly after vacations should be checked carefully. Attention should be paid to the following aspects:

- Is there a direct time connection between the end of the leave and the beginning of the incapacity for work?
- Is an incapacity to work repeatedly reported directly after a vacation?
- Does the employee's behavior before or after the certificate was issued speak against the existence of incapacity for work or illness? Are there any anomalies?
- Have all requirements set out in § 5 of the German Continued Remuneration Act for the certificate of incapacity for work been met?

These principles are not limited to illnesses during vacations. They apply generally to all certificates of incapacity for work, whether from abroad or not, and can be used to contest the evidential value of the certificate. ←

Intellectual Property

German Federal Court of Justice dismisses copyright protection of specific Birkenstock sandals

Utility objects require proof of creative freedom

By Dr. Ricardo Vocke-Kerkhof

On 20 February 2025, the German Federal Court of Justice (BGH) announced its ruling in the copyright case of Birkenstock. In the course of three revisions of appeal rulings by the Higher Regional Court of Cologne, the BGH ruled that the well-known Birkenstock models "Arizona", "Madrid", "Boston" and "Gizeh" do not enjoy copyright protection. These models do not constitute works of applied art pursuant to § 2 (1) No. 4 (2) of the German Act on Copyright and Related Rights (UrhG), as Birkenstock was unable to demonstrate that the design of

The Federal Court's ruling affirmed that the design of Birkenstock sandals is largely determined by functional requirements and therefore does not exhibit artistic freedom in the sense of copyright law.


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the sandal models utilized existing creative leeway in an artistic manner. This ruling is in line with the BGH's previous case law, according to which everyday objects can enjoy copyright protection even if the level of design is low. However, an individual intellectual creation must still be proven, which the court stated did not apply in the Birkenstock case.

Background to the verdict

The plaintiff Birkenstock Group distributes the world-famous Birkenstock sandals.

In 2023, Birkenstock filed a lawsuit against three companies before the Regional Court of Cologne. The defendant companies sold sandal models that were very similar to those of the plaintiff. The Regional Court upheld these actions and ruled that the plaintiff's sandal models in dispute were protected by copyrights, which had been infringed by the defendant's imitations.

The defendants appealed against these verdicts to the Higher Regional Court of Cologne. In response to these appeals, the Higher Regional Court dismissed Birkenstock's claims on the grounds that Birkenstock's sandals do not enjoy copyright protection. The court concluded that the sandals in question are not to be regarded as "protected works" within the meaning of copyright law, as the plaintiff had not proven that the design of the sandals utilized creative freedom in an artistic manner. In the case of utility objects like the Birkenstock sandals, it is necessary to distinguish between protection under copyright law and protection under design law. The purpose of protection under design law is determined by the fact that a certain form follows a function. Objects that are protected by copyright law on the other hand, are personal individual creations that do not have to follow any functional requirements and can stand on their own without a purpose. Although the BGH and the European Court of Justice have recognized that designs and copyrights may overlap, according to the Higher Regional Court of Cologne, this only occurs in exceptional circumstances.

When determining copyright protection, it is relevant whether the object of use is the result of free artistic activity and whether this artistic freedom can be recognized in the object. Mere aesthetics alone are not a criterion for the assumption of copyright protection, as art does not have to be aesthetic in itself in order to be successful. In the opinion of the Higher Regional Court, the Birkenstock sandals did not meet these requirements for copyright protection, as the shape of the sandals is largely dictated by their function. In addition, the sandals did not stand out sufficiently from previous known designs. In the eyes of the court, the sandals remained within the realm of craftsmanship and did not reach the realm of art.

Contents of the verdict of the BGH

The BGH has confirmed the opinion of the Higher Regional Court of Cologne.

The BGH initially stated that the Higher Regional Court was right to assume that copyright protection requires (1) that there is creative freedom and (2) that this freedom has also been utilized in an artistic manner. Free and creative work is excluded if technical requirements, rules or other constraints determine the design.

In addition, the BGH stated that the Higher Regional Court dealt with all relevant design features of the sandals and concluded without error of law that the Birkenstock sandal models did not make full artistic use of the existing creative scope.

Significance for future cases

Due to the long term of protection (70 years after the death of the originator), a copyright is a far-reaching protective right that excludes imitations for a long time. However, since a copyright in Germany cannot be registered, there is a considerable degree of uncertainty regarding the existence of such a right. This uncertainty applies both to the originator and to any competitor, and will ultimately only be clarified if the copyright is successfully (or not) enforced in court.

With this new verdict, the BGH has now substantiated its previous case law and emphasized that when enforcing copyright protection of utility objects in court, it is important to demonstrate in detail whether there was creative freedom in the design of the utility object and that this freedom of design was utilized in an artistic (and not merely aesthetic) manner. The burden of proof lies with the party invoking the copyright.

It is therefore advisable for creators to record their intentions and thoughts on the design of the work during the creative process. Otherwise, due to the long period of copyright protection, there may be a risk that the creator's intentions can no longer be proven at a later date.

In addition, other intellectual property rights (design and trademarks) can be used to ensure accompanying protection for these products. The advantage of this is that these rights are included in a register and there is more certainty about their existence as a result. However, it has to be noted that such an approach is not an option for every utility product and that a registration could even have an adverse effect on copyright protection, as the Higher Regional Court of Cologne considered the coincidence of design and copyright to be an exception rather than the rule. Therefore, it should be considered on a case-by-case basis whether accompanying protection thorough other IP is possible and sensible. ←

GoingDigital

Navigating European data protection law when scraping and processing data for AI training

A practical overview

By Dr. Paul Voigt

Businesses must carefully evaluate the risk of re-identification before using personal data for AI training, ensuring compliance with the GDPR.

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Introduction

As artificial intelligence (AI) development accelerates, businesses increasingly rely on vast amounts of data to train their AI models. Various laws need to be taken into consideration in the process – in particular when personal data is involved. One of the most relevant legal frameworks applicable to the training of AI is the European Union's General Data Protection Regulation (GDPR). Even companies outside the EU may find themselves subject to these rules, which impose strict obligations on how personal data can be collected and used.

This article provides an overview of the key requirements businesses should be aware of when (web-)scraping and using personal data for AI training purposes under European data protection laws.

When does the GDPR apply?

The first step in determining whether the GDPR applies to a business is assessing the nature of the data being collected and used. The GDPR only regulates the handling of "personal data", which refers to any information that relates to an identified or identifiable natural person. Data is fully anonymized if the individual cannot be re-identified, taking into account 'all the means reasonably likely to be used'. Anonymized data only falls outside the GDPR's scope under this condition.

If the data could potentially be re-identified with reasonable effort, it remains subject to the GDPR. This means that even if a dataset appears non-personal, businesses should carefully evaluate the risk of re-identification before assuming they are free from GDPR obligations. The AI to be trained must also be considered as a means 'reasonably likely to be used'. Some AI systems may pose a particular risk of re-identification if they have access to large amounts of data. For example, the training of an AI may corrupt prior randomization, resulting in accidental re-identification.

The GDPR also applies extraterritorially. Even if a company is not established in the EU, it may need to comply with the GDPR if it processes personal data of individuals in the EU.

Legal grounds for web scraping under the GDPR

If a business determines that its data collection activities fall under the GDPR, it must establish a legal basis for processing personal data. The GDPR provides several legal bases, but not all are suitable for AI training. Three legal bases are most likely to be used for scraping personal data for the training of AI:

Consent

The GDPR allows the use of personal data if individuals provide informed, specific, and freely given consent. This may be a feasible option, e.g., if a company only wants to process its own users' data. However, obtaining valid consent at scale for web scraping is impractical in most cases. Furthermore, consent may be withdrawn at any time with effect on future processing.

Legitimate interests

Businesses can process personal data if they have a legitimate interest in data processing that is not overridden by individuals' rights and freedoms. This requires companies to conduct a balancing test, weighing their interests in training AI against individuals' interests in not having their data used for AI training purposes.

Public interest or legal obligations

Some activities may be justified under public interest grounds or legal obligations, though these are rarely applicable to commercial AI development.

Consequently, "legitimate interests" is the most common legal basis for web scraping. Several European Data Protection Authorities have issued guidance emphasizing that businesses can implement safeguards to strengthen their case for legitimate interest by mitigating risks to individuals' rights and freedoms. These safeguards can include:

- Defining precise data collection criteria.
- Filtering out sensitive categories of data (e.g., health information, political beliefs).
- Pseudonymizing personal data, i.e., processing only parts of personal data that do not allow re-identification without additional information.
- Respecting website policies that prohibit scraping (e.g., via robots.txt or ai.txt files).

- Facilitating the exercise of data subjects' rights under the GDPR, e.g., by implementing easily accessible mechanisms to access their personal data or to opt out from the collection or processing.

The trained AI model should also be tested and evaluated to mitigate the risk of unintended data memorization.

Key data protection principles for AI training

Companies must continuously adhere to the GDPR's fundamental principles at all times during data collection and AI training:

Lawfulness, fairness, and transparency

Personal data must not be processed without a legal basis. Individuals must be informed about how their personal data is used, including the purpose of the processing, the categories of personal data processed, and the sources from which personal data has been collected. Businesses should provide clear privacy notices and allow individuals to exercise their rights, such as accessing, rectifying, or erasing their personal data, or objecting to the collection and processing of their personal data.

Purpose limitation

Personal data collected for one purpose (e.g., social media interaction) cannot automatically be used for another (e.g., AI training) unless there is a valid legal basis for further processing.

Data minimization

Companies should be able to explain why the personal data is necessary for training their AI models. Excessive or irrelevant data should not be included.

Accuracy

Data used for AI training must be accurate and up-to-date to avoid biases and errors.

Storage limitation

Personal data must only be stored as long as it is necessary for the AI training. Once the training is completed and the personal data is no longer needed, it must be erased.

Integrity and confidentiality

Companies must implement appropriate technical and organizational security measures to prevent data leaks and unauthorized access to personal information.

Handling data subject rights

Individuals' rights under the GDPR also apply when personal data is used in AI training. These include:

- The right to access their personal data and receive a copy.
- The right to request corrections or erasures.
- The right to object to data processing.
- The right to data portability, allowing individuals to transfer their data elsewhere.

To comply, businesses should implement processes such as "erasure request" forms or maintain "blacklists" to ensure that erased data is not reintroduced into training datasets. Additionally, when AI models output personal data, businesses may need to use "machine unlearning" techniques to remove such data from the system.

The AI Act: Additional obligations for AI training

Beyond the GDPR, businesses developing AI models should also consider the upcoming EU AI Act. The AI Act introduces additional obligations for AI developers, particularly those creating "high-risk" AI systems.

Under the AI Act, businesses must implement strict data governance policies for all dataset training, validation, and testing, including:

- Ensuring datasets are relevant, representative, and free of errors and biases.
- Conducting quality assessments and bias mitigation strategies.
- Documenting data sources and processing activities.

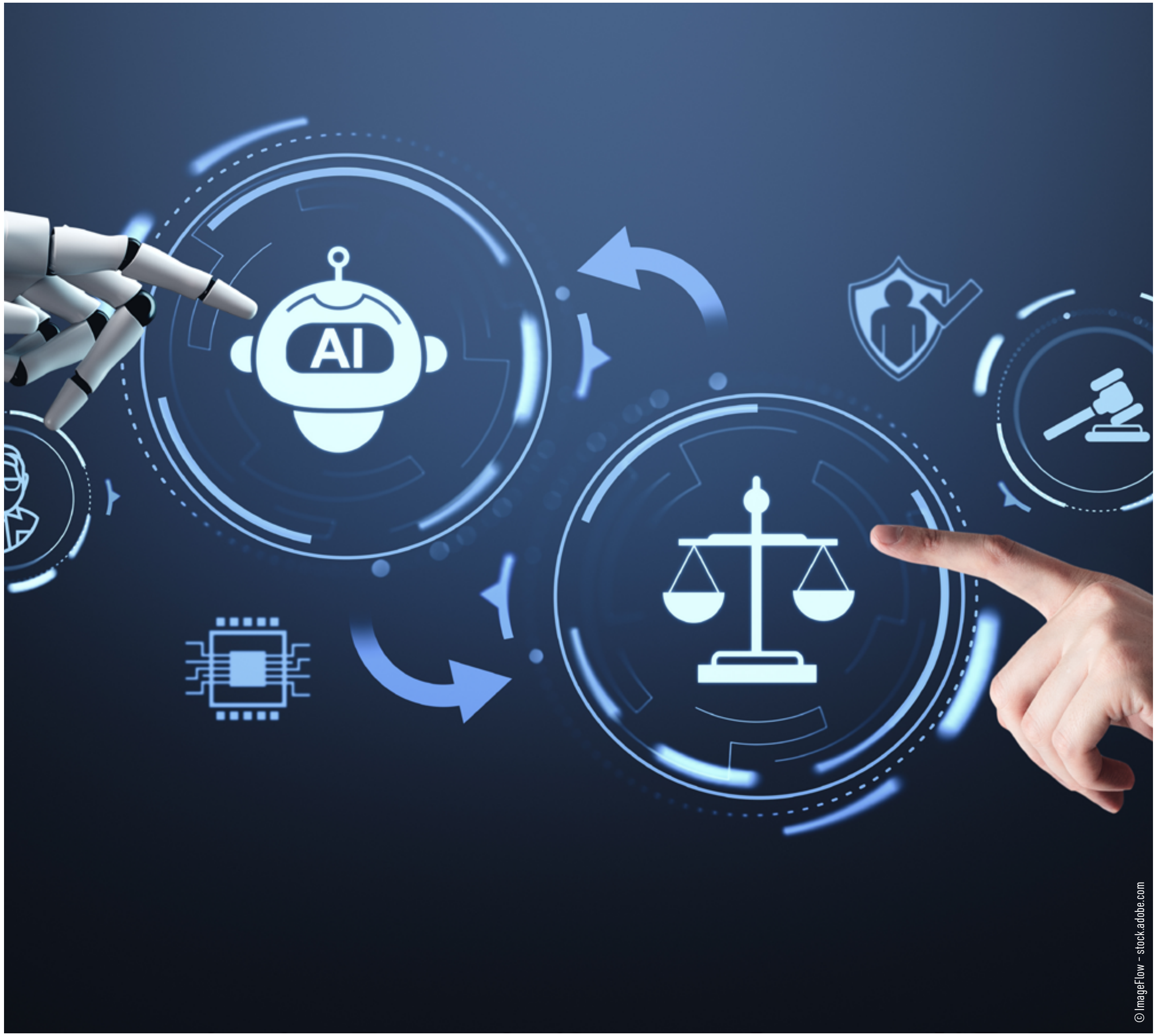
Most companies covered by the AI Act must comply with these new requirements by August 2026. While the GDPR focuses on privacy and data protection, the AI Act adds broader accountability measures for AI development. Thus, the rules on data governance are but a small part of the EU AI Act's obligations applicable to training AI.

Conclusion: Practical steps for compliance

For businesses looking to train AI models using online data, compliance with European data protection laws may be crucial. To minimize legal risks, companies should:

- Conduct a thorough legal assessment to determine if the GDPR applies to their data collection activities.
- Establish a legal basis for scraping and processing personal data.
- Implement safeguards to respect data protection principles and minimize privacy risks.
- Facilitate data subject rights by setting up clear procedures for access, correction, and erasure requests.
- Stay informed about new AI legislation, such as the EU AI Act, to ensure compliance with evolving legal standards.

By taking these steps, businesses can responsibly train AI models while respecting individuals' privacy rights and avoiding regulatory pitfalls. Ensuring compliance not only mitigates legal risks but also helps build trust with users and regulators in an increasingly data-driven world. ←



Lawyers must adapt to the age of digitalization and generative AI by developing key digital and transformative skills to thrive in an increasingly complex environment.

Future skills for lawyers, and how to develop them

How lawyers can prepare themselves to thrive in the age of digitalization and generative AI

By Marion Ehmann

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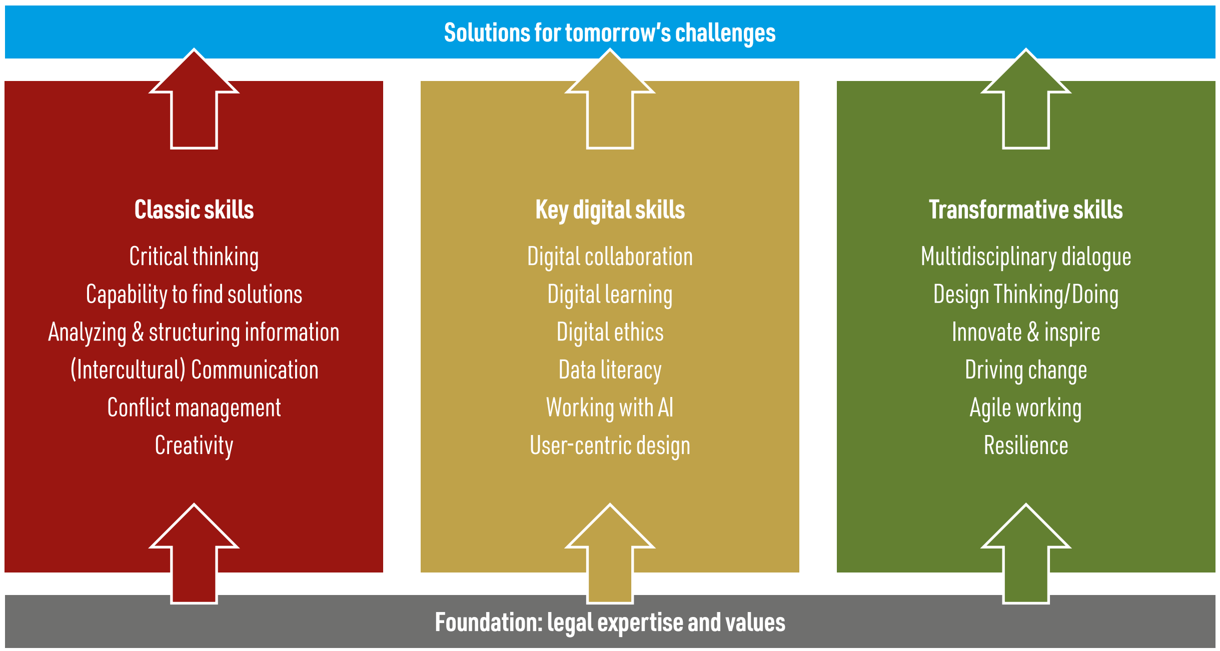
I was in good company when I predicted that AI's transforming power is going to be at least as significant as the internet's: "If the internet changed the way we live and work, AI may have an even greater impact on our profession and our society. Not all of the consequences of AI have been identified yet, but it is clear the future is upon us," wrote Almudena Arpón de Mendívil Aldama, IBA President 2023–2024, in her foreword to the IBA report The Future is Now.

How can we as lawyers – in law firms, in-house legal, or in public service – prepare ourselves for this future? What skills do we need to develop in addition to the skills we already have? What skill sets should we be looking for in recruiting decisions? We can use future skills frameworks as a source of inspiration and adapt them to our legal work. The result could look like this:

The broad foundation is still our legal expertise in various topics and our values (focus on clients' best interests, confidentiality, handling conflicts of interests, etc.). Exactly how we are going to train young lawyers in legal expertise and values in the future is another matter, and something we should think about much more than we do today.

Future skills for lawyers



Inspired by the Future-Skills-Framework by Stifterverband and McKinsey, adapted by Venturis Consulting Group

Our classic lawyer skills are more important than ever

The classic lawyer skills identified in the red section of the diagram on the left will, if anything, be even more relevant in the future. Lawyers' inherent critical thinking and our trained abilities to analyze and structure information will be even more useful when we start working with AI. Our skills at resolving conflicts and in communication are in high demand in a VUCA world (volatile, uncertain, complex, ambiguous). Constant change and increased complexity in our environment (technological, geopolitical, climate-related, etc.) require creativity and the ability to find solutions. When it comes to these classic skills, we have a very good basis to stand on and can further hone those skills to tackle tomorrow's challenges.

Key digital skills for lawyers and how to develop them

What is the state of lawyers' digital skills? It seems that they are quite unevenly distributed. Some lawyers are well advanced in using digital tools for collaboration and learning, are actively looking for AI use cases, and/or understand how to read, understand, and use data for decision-making. Others are struggling with all of the above, and in particular with getting a handle on working with AI. Many lawyers have a really hard time taking the perspective of the users of their legal work products.

What can we do about this? Here are some suggestions:

- **Digital collaboration:** Try out one of the tools available for the legal industry or one of the many available generic ones.
- **Digital learning:** Find a topic that interests you on sites such as Coursera and take the course.
- **Digital ethics:** Discuss these with your colleagues or within lawyer organizations.
- **Data literacy:** Start with understanding the KPIs (key performance indicators) that drive your own organization and/or your clients.
- **Working with AI:** Get a Generative AI account and start experimenting. It's mostly about learning by doing.
- **User-centric design:** Do some research into what this means. Learn how to create client personas. Map the client's journey from first contact with you through the whole matter.

Transformative skills are rare and can be developed too

If key digital skills are unevenly distributed, transformative skills are very rare among lawyers. Collaboration and dialogue between lawyers and other experts often make the latter roll their eyes (we lawyers like to call them "non-lawyers"; thankfully and surprisingly, they have not returned the disfavor by calling us non-software engineers or the like). Very few lawyers have design skills, and legal design is still considered somewhat eccentric by many. Concepts such as innovation and change make many lawyers uncomfortable.

Research by Dr. Larry Richard has shown that 90% of lawyers score in the bottom half of the scale in resilience as a psychological trait. Low resilience people tend to be relatively thin-skinned and defensive. But research has also shown that we can learn to buffer the negative effects of change-induced stress through cognitive strategies that build resilience. These include realistic optimism, i.e., thinking about adverse events with a glass-half-full cognitive strategy. Another important factor to build lawyer resilience is creating a good climate at our workplaces where people feel safe to voice opinions, are appreciated for who they are, and where experimenting and good-intentioned failure is tolerated (these are the places where innovation happens).

The transformative skill set seems harder to acquire than key digital skills, but there is a methodology that helps develop several important transformative skills: design thinking, or design doing, as some prefer to call it. If I were asked for just one piece of advice, I would probably recommend every lawyer wanting to develop their future skills to attend a design workshop (in legal design or otherwise) where they get to actively participate in the design process. In just two to three days, you will gain so many insights that your head will spin. The experience will give you the transformative skills to innovate and inspire. There is even a considerable chance that you will have fun while learning.

You will, inter alia,

- understand the power of multidisciplinary groups with a variety of different expertise (and probably strike the term "non-lawyer" from your vocabulary),
- get to walk in the shoes of the people who have to understand and work with the products you deliver,
- develop professional empathy,
- be creative and innovative on a whole new level,
- learn to defer judgment,
- work iteratively, and
- find the courage to put less-than-perfect ideas and prototypes out there to be tested and improved.

Add to this some of the suggestions above for deepening your key digital skills, in particular for working with AI, and your skill set will be future ready! ←

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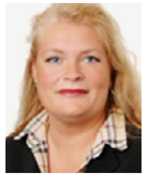

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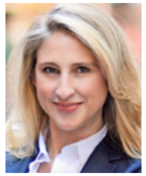

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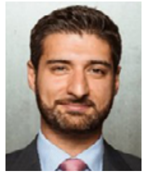

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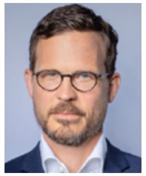

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