

**From a German perspective:  
Works council 4.0 – Digital and global?**

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## Introduction

Companies as well as the world of work are both currently undergoing a massive transformation. In addition to digitalisation, globalisation of enterprises and flexibilisation of their organisational forms the socio-political conditions are also changing with significant consequences for the firm and for work within the firm. Without going into details it has to be stressed that there is a change of values referring to the society as a whole and in particular to family arrangements as well as time distribution between work and private life. Work life balance plays an ever increasing role. The digitalization in everybody's daily life ('always on'), the demographic development, environmental problems such as energy policy or the electrification of drive-trains in the automobile industry, the migration issue and people's increasing desire for participation, in particular for employee involvement in management's decision-making are key factors of the indicated transformation. All these social developments also affect the activities of works councils and trade unions, of codetermination and the shaping of working life in enterprises. The following considerations, however, merely will focus on current company strategies and their effects on the works council's role.

## I. Digitalisation

Under this heading three topics shall be discussed: Industry 4.0, Services and Office 4.0 and the platform economy.

### 1. Industry 4.0

The current development of Industry 4.0<sup>1</sup> is not comparable with previous developments, such as the introduction of CAD or CAM in the 1990s. The existence of the internet, the advanced globalisation of enterprises, the extraordinary increase of the capabilities of computers and at the same time a tremendous 'decline of price level' clearly illustrate this development. This fourth industrial revolution is taking place on the basis of cyber-physical systems. Information and production technologies are networked via a data infrastructure, such as the internet. The aim is for machines to communicate with one another directly and also with work-pieces. Ideally they are supposed to issue 'instructions' to one another via the data infrastructure and govern themselves. The work-piece passes the production process together with a digital twin

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<sup>1</sup> Also known as Internet of Things; on this and the following presentation see, for example, IG Metall Executive Board, *Industrie 4.0 in der Praxis [Industry 4.0 in practice]*, 2017; *Wintermann*, NZA 2017, 537; *Gunther/Böglmüller*, NZA 2015, 1025; *Ittermann/Niehaus/Hirsch-Kreinsen*, *Arbeiten in der Industrie 4.0 [Work in Industry 4.0]*, 2015 (see also Böckler-Impuls 14/2015).

which 'communicates' the necessary measures to be taken. Human beings are involved only through interfaces, such as smartphones or tablets.

Such a development is possible only by means of real-time processing and the storage of enormous amounts of data ('Big Data') and their 'learning' processing in simulation systems. Effective potential is exploited and prompt adjustment of production to the current order situation and customers' wishes is possible, together with predictions about customer behaviour, early fault detection and thus preventive maintenance and repair. It is also important in this context that a variety of employee data are gathered, simply by virtue of the fact that they can be assigned to certain production processes and machines. Ultimately, the objective of Industry 4.0 is vertical and horizontal networking. Vertical networking is supposed to take place by means of a continuous flow of data in the company from product development and production to servicing and sales. Horizontally, a flow of data is supposed to be ensured throughout the value chain from suppliers/service providers via the companies themselves up to the customers. Digitalisation and globalisation accelerate each other in this process. Such models have already been realised, to some extent, in the control units of large company groups, but also among SMEs.

There are now also a number of cases in which further components of Industry 4.0 have been realised. One such area is cooperation between human beings and robots. While traditional robots operate autonomously behind a safety barrier and there is no or very little direct collaborative cooperation with people, so-called 'cobots' ('collaborative robots') operate hand in hand with workers, as in the automobile industry, in which cobots assist workers to attach door seals. The number of industrial robots is expected to rise to 2.6 million in 2019, rising from 1.6 million in 2015.<sup>2</sup>

Another example are exoskeletons. These are motorised power suits, which enable people to lift heavy objects. Besides their use in medical rehabilitation they are currently used primarily on construction sites and in shipyards.

In the case of IT-supported systems of plant management workers in networked vehicles can see on a display whether and if so what materials should be retrieved from the warehouse for production purposes. This is done by means of a light that indicates the material needed ('pick by light'). With an acknowledgement button a notification is sent to the stock control, which is thus updated about the stock.

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<sup>2</sup> International Federation of Robotics (IFR), Welt-Roboter-Report 2016, 29.9.2016; Frankfurter Allgemeine Zeitung, 30.9.2016, p. 26, Die Roboter sind nicht mehr aufzuhalten [The robots can no longer be stopped]; see also *Wenzel*, Frankfurter Rundschau 22.5.2017, p. 2, Hand in Hand.

A further example is the giving of instructions via a touch screen or data glasses, such as Google Glass.<sup>3</sup> This makes it possible to tailor the information provided to the user's level of experience and qualifications. There can also be an electronic display of the cycle time or the worker can obtain help with problems on the screen. Finally, 'smart' gloves are in use with which information can be read from machines manually and work stages can be documented/monitored.

## 2. Services and Office 4.0

Service jobs and office work stations are also undergoing massive changes due to digitalisation.<sup>4</sup> Basically, this is a continuation of ongoing developments in offices, in distribution and in research and development. This is often referred to as the 'lean office' or automated processing. More traditional examples include digital assistants, by means of which workers are networked, enabling them, for example, to find out who the right contact person is for their technical questions, with whom they can share knowledge. On top of that, document and knowledge search is made easier and more flexible ways of working are supported. Database access even outside the firm is also possible. Finally, this also facilitates work planning, for example, concerning the daily routine, meetings, trips and deadlines.

Other examples include electronic translations, the categorisation of emails with response suggestions (robotic process automation), the processing of invoices, autonomously constructed programs and similar applications which roughly can be categorised as artificial intelligence. *Der Spiegel* already foresees 'robot lawyers', as it named them recently.<sup>5</sup> One might also mention chat-bots that understand human speech and answer questions and thus may make call centres obsolete.

## 3. Platform economy

In this domain, internet platforms –according to their self-understanding - carry out job intermediation. The spectrum of activities is broad and ranges from transport (Lyft, Uber), through domestic help (TaskRabbit, Instacart), consultants (NBA Consultants), doctors (Medicast) and lawyers (Advocado) to crowdworking (AMT, Upwork) – in other words, in almost every sector. Millions of people are now employed in the platform economy. Amazon Mechanical Turk (AMT)

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<sup>3</sup> On this see *Terhoeven/Wischniewski*, Datenbrillen im Einsatz [Data glasses in use], *Gute Arbeit* 5/17, p. 24 ff.

<sup>4</sup> See, for example, *Seibold/Stieler/Schwarz-Kocher*, Digitalisierung der Bürotätigkeiten [Digitalisation of office work], IMU-Institut, 10.8.2016.

<sup>5</sup> Cf. *Bosse*, Spiegel-Online, 5.1.2017.

claims to have 500,000 users and Upwork more than 8 million with 250 permanent employees.<sup>6</sup> According to management consultants PWC, by 2025 the turnover in the five key sectors is likely to be around 335 billion USD.<sup>7</sup> If anything, this is regarded as a conservative estimate. As already mentioned, the platforms want to be treated as mere intermediaries; that is, all employees are independent and have no employment protection rights, no social insurance and bear all the risks, such as liability or a lull in assignments. With the platform economy the general trend towards independence (or self-employment) gains even more momentum. For example, in recent years the increase in the proportion of solo self-employed out of all those in active employment in the United Kingdom has been grossly disproportionate. In the United States 53.7 million people are classified as self-employed, 36 per cent of all those in active employment; for 27 per cent of people in active employment this is their main job (2015). Only around 20 per cent of hotel workers in the largest US cities are employees of those hotels. The rooms are thus serviced by independent contractors or sometimes by their employees.<sup>8</sup>

In Germany the proportion of solo self-employed was 6.5 per cent in 2014 (2.34 million people), with average gross earnings of 13 euros an hour. Around 25 per cent of the solo self-employed earn below 8.5 euros an hour and 118,000 are under the level of social assistance. It must be taken into account here that gross amounts are taxable and the solo self-employed would be well advised to make provision for their social security.<sup>9</sup>

Another area of the platform economy is crowdwork. Crowdwork can be carried out in-house, as in the case of IBM's Liquid/Open Generation and Daimler's Business Innovation, or externally. Thus a call for someone to undertake a certain task or commission can be sent out to a more or less defined group of people. Crowdwork occurs in basically all parts of the value chain and may include simple microtasks, as well as highly complex scientific questions in medicine, mathematics or design. Worldwide, there are around 2,300 crowdwork platforms, 32 of which have at least a physical location in Germany (February 2017).<sup>10</sup>

According to a World Bank report of June 2015,<sup>11</sup> by 2020 turnover is estimated as likely to rise to around 25 billion USD, with the involvement of 112 million crowdworkers. Other estimates assume 46 billion USD. Even these predictions seem very conservative. The larger platforms, such as Topcoder in the United States, with around 750,000 registered crowdworkers or Freelancer in Australia, with around 14.5 million, employ huge numbers of people. As

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<sup>6</sup> Cf. Also Klebe, *Arbeit und Recht* [AuR] 2016, 277 (278).

<sup>7</sup> Peterson, Washington Post 17.4.2015, The FTC wants to talk about the 'sharing economy'.

<sup>8</sup> Klebe, AuR 2016, 277 with further references.

<sup>9</sup> Klebe, AuR 2016, 277 with further references.

<sup>10</sup> Leimeister, Crowdsourcing – die Arbeit der Zukunft? [Crowdsourcing – the future of work?] Presentation at the Hans-Böckler-Forum, Berlin 5.3.2015, slide 22, [www.hugo-sinzheimer-institut.de/2015/10-hans-boeckler-forum.html](http://www.hugo-sinzheimer-institut.de/2015/10-hans-boeckler-forum.html) and Leimeister, Crowdsourcing-Plattformen in Deutschland [Crowdsourcing platforms in Germany], Working Paper Series No. 16, April 2017.

<sup>11</sup> 'The Global Opportunity in Online Outsourcing'.

already mentioned, Upwork claims more than 8 million registered crowdworkers, with only 250 'normal' employees. A large German platform, such as Clickworker, claims around 700,000 crowdworkers. In total, the number of crowdworkers in Germany is around 1 Fmilion For most of them it is an additional job. For the United Kingdom the figure is around 5 million., For one-third of them crowdwork is their main source of income And for the United States there are around 8 million crowdworkers,<sup>12</sup> for whom this is their main source of income (this applies to around 66 per cent of those working for AMT, for example).<sup>13</sup>

The customers of the crowdwork platforms read like a Who's Who of industry and services, starting with Google, NSA, Intel, AOL, Telekom, BMW, Honda, Panasonic, Microsoft, Unilever, Audi and Airbus.<sup>14</sup> Working conditions are often precarious for crowdworkers. In the case of AMT 90 per cent of tasks are paid at less than 0.10 USD (10 cents). Average earnings seem to be around 2 USD an hour. Absolute professionals are supposed to be able to earn around 8 USD an hour, according to Eurofound.<sup>15</sup> However, these sums are likely to be higher now (no more recent data are available at present). Substantially higher average earnings can be obtained on platforms such as Upwork.

For Germany a BMAS (Ministry of Labour and Social Affairs) report lists 200 euros a month as average earnings.<sup>16</sup> A Hans-Böckler-Foundation research project cites the following figures: in the main activity (around 20 per cent of crowdworkers) a monthly average income of 1503 euros is obtained, while in additional activities it is 326 euros before tax.<sup>17</sup>

Characteristically, crowdworkers are treated as self-employed and thus have no employment protection rights. They thus have no protection against dismissal and no holiday or minimum wage entitlements. Collective agreements and protection provided by works councils do not apply to them. The rules governing the legal relationship with the platform or the customer are usually laid down in the company's terms and conditions. In Germany, generally speaking, these are pretty fair, but internationally they are often extremely unfair and may contain a rejection of offered services without stating the reasons why, unilateral changes to general terms and conditions even once a project is under way, a communication ban and similar things.<sup>18</sup> It is therefore not surprising that in surveys crowdworkers mention such problems as uncertain

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<sup>12</sup> FEES, University of Hertfordshire, Crowd Working Survey February 2016 on the United Kingdom and Crowdfunding Study April 2016 on Germany; *Klebe*, AuR 2016, 277 (278).

<sup>13</sup> *Mandl, Curateli, Riso, Vargas and Gerogiannis*, Eurofound, New Forms of Employment, 2015, p. 115, with further references.

<sup>14</sup> *Klebe/Neugebauer*, AuR 14, 4 and *Klebe*, AuR 2016, 277 (278).

<sup>15</sup> *Mandl, Curateli, Riso, Vargas and Gerogiannis*, Eurofound, New Forms of Employment, p. 115, with further references.

<sup>16</sup> Forschungsbericht 463, Foresight-Studie, 'Digitale Arbeitswelt' [Digital working world], February 2016, 23 f.

<sup>17</sup> *Leimeister, Durward, Zogaj*, Crowdwork in Deutschland – Eine empirische Studie zum Arbeitsumfeld auf externen Crowdsourcing-Plattformen [Crowdwork in Germany – an empirical study on the working environment on external crowdsourcing platforms], 2016.

<sup>18</sup> Cf. *Däubler/Klebe*, NZA 2015, 1032 (1036 ff.); *Klebe*, AuR 2016, 277 (278).

or delayed payments, disingenuous formulation of targets or goals, and intolerable time frames.<sup>19</sup> Finally, the screenshots sometimes used by platforms, such as Upwork, to check whether crowdworkers are actively working or not are highly dubious from the standpoints of data protection and privacy.

*In summary*, all these developments have consequences for the permanent workforce and the work of works councils and trade unions, not least because the labour market for crowdworking is global, encompassing not only Europe and the United States, but also Asia and Africa. All anyone needs to take part in it, is internet access and a computer terminal.

## **II. Globalisation**

The globalisation and digitalisation of companies are mutually accelerating processes. Global companies are characterised by worldwide distributed functions, such as production, development, purchasing and so on. Development, for example, takes place in accordance with the principle 'follow the sun', with work on development projects commencing in Japan and China, followed by Europe and finally the United States. Big data has brought into being an unprecedented transparency for companies, accelerating their decision-making, often with central targets and decentralised implementation. Globalisation also provides for companies enormous flexibility as regards production. Often, for example, in the automobile industry, models are manufactured in multiple locations. As a result, if difficulties arise in one location, it can be shifted somewhere else. Finally, worldwide information systems offer detailed possibilities of governance.

The globalisation of companies has been going on for decades in large company groups, followed by SMEs from the 1990s. Even when, on occasion, this development slows down or even starts to go into reverse, in the form of renationalisation, ultimately the big companies have tended to go all out in this direction and their suppliers have followed suit. When, for example, an automobile plant is established in the United States or in Mexico the suppliers necessarily follow in its wake and set up in its vicinity. The influence of multinational companies has been growing continuously all over the world. According to the WTO, for example, apart

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<sup>19</sup> *Berg*, 'Income Security in the on-demand economy: Findings and policy lessons from a survey of crowdworkers', *Comparative Labour Journal*, Vol. 37, No. 3, 2016 (ILO survey 2015); *Irani/Silberman*, 'Turkopticon', in *Benner* (ed.), *Crowdwork – Zurück in die Zukunft? [Crowdwork – Back to the future?]* 2014, pp. 131ff.; *Klebe/Neugebauer*, *AuR* 2014, 4 (6).



from agriculture, almost a quarter of the employees work for the 104,000 multinational companies and their approximately 900,000 subsidiaries.

### **III. Flexibilisation of companies**

Since quite a while companies have achieved a 'new mobility' as regards company patterns and cooperative structures. It makes sense to talk of a 'volatility' of legal structures, as virtual corporate networks emerge (especially multinational companies using matrix organisations), areas are outsourced or brought in-house again, companies are run without formal group structures and projects are characterised by global cooperation. But not only companies, workforces, too, are being flexibilised, a process that started in the 1980s and now involves temporary agency work and service contracts, fixed-term contracts or, more recently, crowdworking. This is increasingly creating problems for works councils and trade unions.

### **IV. Summary of company-level developments**

There continue to be massive changes at company level, with a multitude of challenging tasks for works councils and trade unions, while the existing problems remain. More forms of working, such as 'agile' working, networked or distributed working or project-based working, call out for answers from workers' representatives at company level. Furthermore, outsourcing and globalisation put more pressure on works councils and unions. Finally, it is often difficult to get in touch with decision-makers, for example, in the case of a matrix organisation, given the rapid acceleration of their decision-making across an ever increasing spectrum. At the same time, as Adidas CEO Kasper Rorsted put it: 'Everyone has to be on board if digitalisation is to be successful.'<sup>20</sup>

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<sup>20</sup> In *Becker/Knop*, *Digitales Neuland*, 2015, 103ff.; cf. however, *Kontio*, *Handelsblatt Online*, 16.8.2017 11:56:22, 'Wo geht's hier bitte zum Arbeitsplatz der Zukunft?' [Could you tell me the way to the workplace of the future?] with reference to a Siggate study (published: 20.9.2017): only 31 per cent of employees receive regular information on the transformation process.

## V. Works council areas of activity

What have been the effects of these developments and what rights do works councils have to have a voice? All this will be discussed in what follows, as well as legislative considerations, taking what I regard as the six main areas of activity as examples.

### 1. Employment and qualifications

Prognoses of the employment effects of digitalisation vary considerably. A Deutsche Bank report of June 2015<sup>21</sup> assumes – and I quote – a ‘bleak future’ with major job losses and concludes that ‘people will have to cope with longer working time and lower wages’. The Economic Forum in Davos expects a decline of 5 million workplaces in the industrialised countries by 2020<sup>22</sup> and Frey and Osborne regard 47 per cent of jobs – although they might better be described as ‘activities’ – in the United States as endangered over the next 10 to 20 years.<sup>23</sup> The current employment outlook for the OECD foresees on average around 9 per cent of jobs under real threat from automation and a further 25 per cent can expect to undergo ‘massive changes’.<sup>24</sup> On the other hand, the Economix-Institut, in a report for the BMAS, estimates that there will be an additional 250,000 jobs in Germany by 2030 in the event of accelerated digitalisation.<sup>25</sup> The Institute for Employment Research (IAB), a special office of the German Federal Employment Agency, by contrast, estimates 60,000 job losses by 2025 as a result of digitalisation. At the same time, it assumes that around 920,000 jobs will undergo changes in terms of the qualifications required of employees and will undergo restructuring in terms of areas of occupation.<sup>26</sup>

Taking into consideration the, on average, very good qualifications of employees in Germany and the range of options arising from what I regard as an open future, the IAB’s prognoses seem to be reliable. On one hand, many areas – especially in manufacturing – have already been automated to a considerable extent. On the other hand, new areas of business will open up. Ultimately what all this amounts to is that there will be fewer operating functions in production and more services and IT work. This has been demonstrated by previous empirical studies, as IAB asserted in its Aktuelle Berichte 5/2017 (Current Report),<sup>27</sup> namely that investments in digital technology in recent years have led neither to massive job losses nor to significant

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<sup>21</sup> Deutsche Bank Research, # 5, 2015, pp. 46 ff.

<sup>22</sup> *Hank/Meck*, Frankfurter Allgemeine Sonntagszeitung, 17.1.2016, Mio. Jobs fallen weg [1 million jobs on the way out].

<sup>23</sup> *Frey, Osborne*, The Future of Employment: How Susceptible Are Jobs to Computerisation?, 2013.

<sup>24</sup> *OECD* (2017), OECD Employment Outlook 2017; see also FAZ 14.6.2017, p. 17, Digitalisierung bedrängt die Mitte des Arbeitsmarkts [Digitalisation besetting the labour market mainstream].

<sup>25</sup> Arbeitsmarkt 2030 (2016).

<sup>26</sup> Forschungsbericht 11/2015.

<sup>27</sup> *Lehmer/Matthes*, Aktuelle Berichte 5/2017; see also *Warning/Weber*, IAB-Kurzbericht 12/2017.

profits. Most probably employees assisting in services for which no knowledge base is needed tend to lose their jobs.

At the same time, however, it is clear that what digitalisation requires of employees will change significantly. As is often the case, there are both risks and opportunities. It is evident that context-based assembly instructions, such as 'pick by light' or Google Glass, require fewer qualifications. If they are approached in the wrong way such arrangements will increase stress. Finally, mathematical control systems and decision-making based on data analysis will reduce the need for experienced specialist workers. On the other hand, technology also harbours opportunities. Context-based assembly instructions can also facilitate familiarisation with and mastery of difficult situations; if set up properly they can *reduce* stress. Electronic assistance systems can provide older or handicapped employees with effective support. The upshot is that the impending changes have to be properly managed and requirements in terms of qualifications – especially as regards processing and IT knowledge – will increase substantially. However, this is nothing to worry about if the right attitude is taken. As industrial sociologist *Sabine Pfeiffer* has explained, 'specialist workers do not do dull routine work. They tend to be highly qualified people with enormous experience'. On top of that, she also points out that 67 per cent of employees (at least) have dual occupational qualifications and 71 per cent of them already have to cope with constant change, uncertainties and complexity.<sup>28</sup> In these circumstances there are concerns, however, that a majority of companies – at least hitherto – have neglected further training. A survey by Bitkom, a German Association for IT, Telecommunications and new Media, representing more than 2500 companies of the digital economy,<sup>29</sup> among companies with below 10 employees in Germany reached the conclusion that adequate further training was not going on in 62 per cent of them. This applies to 36 per cent of companies overall. In 68 per cent of companies there is no central strategy and in 70 per cent there is no fixed budget for such further training.<sup>30</sup>

The current legal position with regard to safeguarding employment and qualifications provides in section 92 BetrVG (Works Constitution Act) for a right for works councils to put forward proposals on the maintenance and promotion of employment. The employer has to consult with the works council on these proposals and, if he does not accept them (in companies with 100 or more employees) has to reject them in writing. Further rights apply in case of operational changes, in accordance with sections 111f et seq. BetrVG. Operational changes may occur in

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<sup>28</sup> *Pfeiffer*, Beschäftigungssicherung und Qualifizierung, presentation given on 4.2.2016 at the expert workshop organised by FES and the DGB; Rauner, *Die Zeit*, 9 .3. 2017, p. 7, Die Pi-mal-Daumen-Studie.

<sup>29</sup> <https://www.bitkom.org> (10.6.2018).

<sup>30</sup> Bitkom Research, 2016; *Dirks*, Neue Arbeit - wie die Digitalisierung unsere Jobs verändert [New work – how digitalisation is changing our jobs], Berlin, 30.6.2016, <https://www.bitkom.org/NP-Themen/NP-Standort-Deutschland/Bildung-Arbeit/Neue-Arbeit/Bit-kom-Charts -PK-Neue-Arbeit-30-06-2016.pdf>.

the event of downsizing of the company or of considerable parts thereof, as well as – in particular – fundamental changes in business organisation or operational facilities and the introduction of fundamentally new working methods and manufacturing procedures – all likely effects of digitalisation. In the wake of this the works council is entitled to conduct negotiations with a view to interest reconciliation. Even the arbitration committee can be involved in the debate whether and how restructuring can be performed. But the arbitration committee in this case only is supposed to mediate, the works council cannot enforce an agreement. The works council only is entitled to enforce a social plan on the social consequences implied by the intended measures. In the future it also will be important how the courts fix the beginning of the plan to take restructuring measures. This not only is relevant for a realistic perception of the company's strategies but indicates the time frame in which the works council is supposed to have the opportunity to exert serious influence on the measures to be taken.<sup>31</sup>

The rights in the domain of further training, in accordance with sections 96 et seq. BetrVG, are far-reaching. Besides information and consultation rights, as well as the right to codetermination in the event of the implementation of in-house measures in section 98 BetrVG, since 2001 pursuant to section 97 par. 2 BetrVG there has also been a right of initiative for works councils in the event that changes planned by the employer lead to a situation in which the employees' occupational knowledge and skills no longer suffice.

Effective employment protection would require that reconciliation of interests for the works council – namely participating actively in the implementation of planned changes in the firm – be enforceable, at any rate implementable if an agreement is in place.<sup>32</sup> Alternatively, a right to codetermination with regard to safeguarding employment – in other words, the lifting up in section 92a BetrVG from an information and consultation right to a codetermination right – would be a good idea.<sup>33</sup> At least the works council – for example, in the event of outsourcing – should be entitled to rules of procedure in which, if need be by decision of the conciliation committee, its information and consultation rights are specified, and which possibly also lay down a right of veto ('make or buy').

With regard to qualifications a general right of initiative is needed for works councils in section 97 BetrVG, even if job positions simply cease to exist and retraining is necessary for continued

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<sup>31</sup> On this see *Klebe*, NZA 2017, 226 (on BAG, NZA 2016, 894).

<sup>32</sup> See for example, *LAG München*, AuR 1998, 89; *Fitting*, Betriebsverfassungsgesetz [Works Constitution Act], 28th ed. 2016, §§ 112, 112a recital 45, citing further literature; *Däubler* in *Kittner/Klebe/Wedde*, 15th ed. 2016, §§ 112, 112 a, recital 23ff.; see also *Karl Fitting*, Interessenvertretung in Betrieb und Verwaltung – zur rechtspolitischen Entwicklung [Interest representation in operations and management – on legal policy development], Tagungsberichte/Dokumente der Hans-Böckler-Stiftung, vol. 19 (1986), p. 27 (42); for a different view, see BAG, NZA 1992, 41.

<sup>33</sup> On an employment pact that rules out plant closure, see *LAG Köln*, AuR 2017, 317; see also *Däubler*, Die Unternehmerfreiheit im Arbeitsrecht [Entrepreneurial freedom in labour law], HSI-Schriftenreihe vol. 5, 2012.

employment. It would also be important to establish an individual entitlement to further training, as has been provided for, in a first step, in the collective agreement on part-time vocational training in the metal and electrical industry since February 2015.<sup>34</sup> This could be formulated in accordance with section 97 par. 2 BetrVG.

## 2. Working time and ways of working

Digitalisation erases the boundary between work and non-work. This concerns not only the location of work – which may be on the firm’s premises, but also at home, on the train or in a restaurant – but also the distinction between working time and private time. In 2014, according to Bitkom,<sup>35</sup> 70 per cent of employees responded to work-related communications; 25 per cent of workers are frequently or regularly contacted by their employer either during free time or while on holiday. The most recent BAUA<sup>36</sup> Working Time Report (2016) cites similar figures. Accordingly 35 per cent of employees are contacted from their workplace sometimes or often during leisure time.<sup>37</sup> Furthermore, 11 per cent already work longer than 48 hours and, according to IAB, 12 per cent of total vacation time is not used, but lapses. In 2016 more than half of the 1.76 billion overtime hours were unpaid.<sup>38</sup> In a nutshell: ‘Japan has come to Germany’.

In light of all this, employers’ relentless demands for further ‘flexibilisation’ of the Working Hours Act seem primarily ideological. The following seems to be particularly important: even if, for example, rest time is not always respected the statutory regulations nevertheless provide an important reference for employees, a basis on which they can turn work down and switch off during their own time. Furthermore, it also is working time if merely tolerated by the employer.<sup>39</sup> Better implementation of working time regulations by employers is thus urgently necessary. Also, it should be recalled that a right to be left alone outside work already exists because working time is usually agreed in strictly fixed terms. In this case availability is limited and employees are in principle not obliged to make themselves available for work-related activities

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<sup>34</sup> Cf. *Schönhardt*, AIB 4/201 7, pp. 15 ff.

<sup>35</sup> Bitkom Research, 2016; Bitkom press release 21.6.2016; ‚2017 sind laut Bitkom Research 71% der Beschäftigten im Urlaub dienstlich erreichbar‘ [According to Bitkom Research 71 per cent of employees are reachable from work even when on holiday] (dpa 18. 7.2017, 13:51 pm).

<sup>36</sup> The German Federal Institute for Occupational Safety and Health.

<sup>37</sup> Bundesanstalt für Arbeitsschutz und Arbeitsmedizin (BAUA), 2016, Arbeitszeitreport 2016 [Working time report 2016], 75f; see also NZA 11/2017, VIII.

<sup>38</sup> IAB, Durchschnittliche Arbeitszeit und ihre Komponenten [Average working time and its components], 7.3.2017; even for the metal and electrical industry an IG Metall survey of around 681,000 employees indicates that 15 per cent of overtime hours are either partly or entirely uncompensated (IG Metall Vorstand, Arbeitszeit – sicher, gerecht und selbstbestimmt [Working time – secure, fair and self-determined], 5/2017, pp. 30f).

<sup>39</sup> *BAGE* 110 , 252 = NZA 2004, 670; *ArbG Berlin*, AIB 12, 500.

beyond that or at least without restriction. It is also crucial that remuneration entitlements are not forfeited.<sup>40</sup>

Besides all that, here too it is very important to make use of the opportunities to shape flexible and mobile working. With the right regulations it is crucial to actively involve the employees. As the examples of BMW, VW, Daimler and Bosch show, in the absence of this regulations will not actually be applied. In this context constant availability must be opposed. Switching off the server at 6 p.m.– in other words, no access to e-mails after this time – is not necessarily the best solution. In my view, this should happen only if the employees want it; otherwise, they will feel that they do not have a say. It would be more important, it seems to me, to work consistently to improve management behaviour and work organisation and in this way ensure that working time is adhered to. In particular, weak management, poor work organisation and understaffing often result in expectations of permanent availability and may sometimes make it necessary. During vacation time, Daimler's solution seems to me a step in the right direction: the employees can 'disconnect' in such a way that they may opt to have their e-mails automatically deleted while they are on holiday and the sender receives a message suggesting to contact a designated substitute.

Flexibilisation of working time should also be in the interest of employees, as in the case of individual working time models with long part-time working, short full-time working or working time tailored to particular phases of life. It is also vital that working time regulations are conducive to health. Certain forms of working time, such as shift work, are detrimental to health. This is also the case with regard to constant availability.<sup>41</sup> In any event, limiting working time and reducing stress are also in the interest of the employer, because they boost productivity.<sup>42</sup>

New 'agile' working methods, such as 'scrum',<sup>43</sup> also require clear regulations. As in the case of matrix organisations, teams, management and their responsibilities, working time issues, performance evaluation, holidays and absences, as well as opportunities to acquire qualifications have to be regulated. The role of the works council also has to be specified taking into consideration this particular circumstances.

Section 87 numbers 2 and 3 BetrVG provide for codetermination for the works council in the event of the location and distribution of working hours and of temporary reduction or extension of working time. Prevailing opinion holds that the length of working time falls outside the right to codetermination and is rather a matter for the parties to the collective agreement.

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<sup>40</sup> See also *BAGE* 110, 252 = *NZA* 2004, 670 and *NZA* 2014, 675.

<sup>41</sup> *BAUA* 1/17.

<sup>42</sup> See, eg *Meissner/Wolf*, *Frankfurter Allgemeine Zeitung* 22.5.2017, p. 16, *Schlafen erhöht die Produktivität* [Sleep boosts productivity].

<sup>43</sup> On this see, eg *Litschen/Yacoubi*, *NZA* 2017, 484.

The issues of not adhering to working times, the overloading of employees and the lapse of overtime compensation are scarcely new. It therefore makes sense to reflect on legal policy options, notwithstanding codetermination rights. Evidently, working time duration is closely connected to work organisation and staff allocation. As early as 1986 *Karl Fitting* proposed that works councils be given codetermination rights in both areas.<sup>44</sup> This ought to be considered at least with regard to instances in which working time accounts to exceed beyond limits. Furthermore, a right to codetermination where work is actually carried out would make sense. Collective agreements will play a significant role in all these issues, for example, with framework provisions that have to be complied with by the firm.

In terms of individual rights it would be a good idea to introduce an entitlement to determine the circumstances of working time and where the work will be carried out, taking its bearings from section 8 TzBfG (Part-time Work and Fixed Employment Contracts Act).<sup>45</sup> The right to remain unavailable outside working time should be clarified and the obligation of the employer to ensure that working time is adhered to should be reinforced. There is no need for any relaxation of the Working Hours Act; even in the era of digitalisation, as company regulations show, it is flexible enough.<sup>46</sup>

### **3. Safeguarding occupational safety and health**

As we have seen, physical burdens can be alleviated, in particular with the use of robots. It must be ensured, however, that the remaining tasks are not monotonous. Google Glass, as already mentioned, can function either to reduce stress or to intensify it. That means that the respective parties at company level have much to do. Risk assessment (para 5 ArbSchG [Industrial Safety Act]) has a key role in this.

The substantial increase in psychological illnesses and early retirement due to stress speaks for itself. Furthermore, the connection between level of qualifications and work overload/stress, as well as working time duration and errors or accidents at work is undisputed. The need to take action here too is therefore obvious.

Sections 87 par. 1 (7) and (97) BetrVG [Works Constitution Act] provide for codetermination rights for the works council. In particular section 87 par. 1 (7) BetrVG bestows far-reaching

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<sup>44</sup> *Karl Fitting*, *Interessenvertretung in Betrieb und Verwaltung – zur rechtspolitischen Entwicklung* [Interest representation in operations and in management – on legal policy development], *Tagungsberichte/Dokumente der Hans-Böckler-Stiftung*, 1(9) (1986), p. 27 (37ff.).

<sup>45</sup> *Industrie 4.0 - Wie das Recht Schritt hält* [Industry – How the law keeps pace], findings document *Plattformindustrie 4.0*, p. 24 (October 2016).

<sup>46</sup> On this see *Bispinck*, *Arbeitszeit – Was bietet der tarifvertragliche Instrumentenkoffer* [Working time – what the collective agreement toolbox has to offer], *Elemente qualitativer Tarifpolitik* No. 82, November 2016.

scope for action on the works council, insofar as a framework provision on safeguarding occupational safety and health exists and the employer has a range of options available with regard to the assessment of conditions or the choice of requisite measures (discretion). Furthermore, some thought should be given to addressing the issue of stress-related illnesses specifically, for example, in an anti-stress regulation.

#### 4. Data protection

Digitalisation makes it possible to capture and model all stages of work and the entire behaviour of employees – in other words, ‘big data’. The promises to its customers implicit in Kärcher’s slogan are illustrative in this respect: ‘You can’t be everywhere at once but you can know everything that’s going on’.<sup>47</sup> This also applies to Daimler CEO *Dieter Zetsche*’s remark:

We have already made great strides. Our factories have already been digitalised. From head office in Stuttgart we can see whether a robot in Mexico is moving to the left or to the right.<sup>48</sup>

Data collection of this kind is almost always linked to personal data, recording the behaviour of employees. As digitalisation marches on it will thus become more and more important to protect employees’ personal rights and to minimise personal data. Generally speaking, personal references are avoidable and data gathered can also serve its purpose for the employer in anonymised/pseudonymised or aggregated form.

Authoritative in this context are the right of codetermination pursuant to section 87 par. 1 (6) BetrVG and the Data Protection Act, to be joined in future by the EU’s general data protection regulation. The right to codetermination kicks in when either personal data are collected technically and/or technically evaluated. The Federal Labour Court<sup>49</sup> wrongly rejects a right of initiative on the part of the works council with regard to the introduction of surveillance equipment. More correctly, it should be affirmed, because technological monitoring is evidently in the interest of the employees and can also be included within the scope of the purpose of protection, for example, for the time keeping required for verifying one’s work performance or for the purpose of health protection or medical examinations.<sup>50</sup> Technical implementation must be confined to monitoring. It is all the same from the standpoint of the right of codetermination whether the processing of data is for an assessment of performance or conduct in the sense of a target/actual comparison; whether the employer wants such an assessment at all; whether he

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<sup>47</sup> Kölner Stadtanzeiger 30.7.2015.

<sup>48</sup> Handelsblatt 14.9.2015; see also, concerning constant monitoring at Amazon, tageszeitung 13.7.2017, p. 9, Sie rennen durch die Hallen [Racing though the warehouses].

<sup>49</sup> NZA 1990, 406 = DB 1990, 743; see also *Fitting*, BetrVG, § 87 recital 251.

<sup>50</sup> *Klebe* in *Däubler/Kittner/Klebe/Wedde*, BetrVG, § 87 recital 166 with further references; see also *LAG Berlin-Brandenburg*, ruling dated 22.1.2015 – TaBV 1812/14, BeckRS 2015, 8190.



therefore has a subjective aim with regard to monitoring; and whether he accesses the collected data. It is not required that the data enable a rational and proper assessment. The conditions of the provision are met when any information is collected or obtained on performance and conduct. This case law was recently confirmed by the Federal Labour Court in the Facebook ruling.<sup>51</sup>

Because comprehensive data capture and evaluation are part and parcel of digitalisation, and new systems are constantly being introduced and existing ones adapted, employers take the view that the right to codetermination pursuant to section 87 par. 1 (6) BetrVG is not guaranteed in each individual case and the employer has a limited temporary right of technical implementation even without prior compliance with codetermination procedures.<sup>52</sup> This should be rejected, however, because even in urgent cases there is no provisional right of implementation with regard to the right of codetermination pursuant to section 87 BetrVG.<sup>53</sup> Rather timely implementation of technical changes can be ensured by concluding a company framework agreement in which technical and normative minimum standards on the protection of personal rights for all company IT applications are laid down. This may contain, for all basic software, for example, delete routines, counterfeit-proof logging and appropriate access rights. This would make work much easier for everyone at the firm.

## 5. Globalisation

The only response to the increasing internationalisation of companies established by law is the European works council (EWC). The EWC is first and foremost an information and consultation body, although in many cases it has developed into a negotiating partner with companies. This is confirmed by a wealth of concluded agreements, ranging from employment and data protection to agreements on changes in companies and in the workplace. European works councils, however, are largely limited to the territory of the European Union. Bodies with a wider remit, such as World Works Councils, are viable only on the basis of trade union self-help and to date have been agreed with the relevant company only in individual cases, such as Daimler, Renault and VW. For this reason global trade union networks are particularly valuable.

In terms of legal policy, because of the ongoing digitalisation European directives need to be adapted so that employees will continue to be able to have a say on questions that arise from

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<sup>51</sup> NZA 2017, 657; on this see also *Klebe*, AuR 2017, 307 (309 ff.).

<sup>52</sup> Industrie 4.0 - Wie das Recht Schritt hält [How the law keeps pace], Plattform Industrie 4.0 findings document, p. 27 (October 2016); BDA, Chancen der Digitalisierung nutzen [Taking advantage of digitalisation], p. 3, 'But that doesn't mean that there should be codetermination on every update that might be imagined' (May 2015).

<sup>53</sup> *Fitting*, § 87 recital 23; *Klebe* in *DäublerKittner/Klebe/Wedde*, § 87 recital 28f.

it in the future. A number of other topics should also be addressed in the Directive on Information and Consultation (2002/14/EC), for example, employment protection, qualifications and outsourcing, as well as health and safety, data protection and working time arrangements. Participation rights should be supplemented by injunctive relief in the event of non-compliance with the Directive (Article 8). The Directive on European Works Councils (2009/38/EC) should also explicitly mention data and health and safety protection in the subsidiary provisions. Injunctive relief is also required in the event of non-compliance with the Directive (Article 11) here. Finally, European minimum standards for workplace participation and employee board level representation would also be a good idea.

## 6. Codetermination on platforms

The scope of application of the BetrVG is limited to employees and home-workers in the sense of section 5 BetrVG. Whether platform workers fall in one of these categories, is doubtful and can be determined only in each individual case because employment can take many different forms. Depending on the specific working arrangements, pursuant to Federal Labour Court case law, a person might be an employee (bound by instructions, integrated in the working organisation of another in personal dependence),<sup>54</sup> an employee-like person (economic dependence, section 12a TVG), a home worker (section 2 par. 1 Heimarbeitsgesetz [Home Working Act, HAG])<sup>55</sup> or – probably the majority – solo self-employed.

In terms of legal policy the question arises of whether the definition of employment contracts and of employees developed by the Federal Labour Court and now taken up by the legislator in para 611 BGB (Civil Code) is adequate in light of modern developments. Especially – although not only – in the platform economy work is often assigned in such a closely defined way that further instructions are superfluous. Furthermore, as *Wank* developed several years ago with regard to doubtful cases,<sup>56</sup> the distinction between employee and self-employed can also be drawn depending on whether the person is or could be managing their own business, whether they, for example, have an independent market presence with their own market opportunities, their own company organisation and possibilities of influencing price setting. If this is not the case these would be important indications of employee status.

The fact that employees in the home working category who mainly work for a firm are covered by the BetrVG, while, generally speaking, employee-like people in the same situation are not

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<sup>54</sup> See the notes to *Wank*, AuR 2017, 140.

<sup>55</sup> See eg *BAGE* 155, 264 = *NZA* 2016, 1453.

<sup>56</sup> Most recently in AuR 2017, 140 and *EuZA* 2016, 143, each with further references; see also *Prassl*, *The Concept of the Employer*, 2015 and *Prassl/Risak*, *Uber, Task Rabbit & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, *Comparative Labor Law & Policy Journal*, 37 (3), 2016, 618.

is a systemic error. This should be corrected by their inclusion in section 5 BetrVG. Furthermore, it should be considered whether the corresponding need for protection is not generally recognised, when, as is already the case among media employees, on average at least one third of someone's pay comes from one person (section 12a par. 3 TVG).

Finally, an alternative/supplement to this would be to apply the Home Working Act (HAG) not only in the case of an assignment by a trader, but already when, as for example in the case of crowdwork, an offer of work is made on a platform,<sup>57</sup> forgoing the criterion of 'economic dependence'<sup>58</sup> that the Act in any case does not apply directly to a home worker. In that case this group of workers would come under the scope of application of the BetrVG more often.

## **VI. Working basis of the works council and a cultural change**

With regard to the new quantitative and qualitative demands on the activities of works councils the very basis of such activities should undergo a re-conceptualization. Elections to works council bodies should be facilitated by making the simplified election procedure obligatory in companies with below 100 employees. The procedure could also apply in companies with up to 150 employees, on a voluntary basis. On top of that it would also be important to protect the initiators of an election before it is held; in other words, before they issue invitations or become candidates or members of the election committee. Experience shows that often already during the run up to an election, when the employer is trying to hinder it by any means possible, obstacles are put in its way and, for example, initiators are sacked. Furthermore, the works council should be permitted to call in experts without prior agreement of the employer pursuant to section 80 par. 3 BetrVG, if necessary; in other words, the regulation from section 111 sentence 2 BetrVG should apply in general, without limitation to companies with more than 300 employees.

Finally, another extremely important point is that company structures are becoming ever more transient as digitalisation marches on. Often the only effective response is through agreements in accordance with section 3 BetrVG. In this case, however, certain gaps would have to be closed. It should be possible to create other structures of employee representation pursuant to section 3 par. 1 (3) BetrVG in addition to the existing ones. In this way, should the need arise, company networks can be covered besides structures already in existence. Also it should be possible that existing codetermination-rights might be transferred to additional bod-

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<sup>57</sup> On this see also *Däubler/Klebe*, NZA 2015, 1032 (1035 ).  
<sup>58</sup> *BAG*, NZA 1991, 267.

ies of workers participation (section 3 par. 1 (4) BetrVG). In conclusion, even the best agreements in accordance with section 3 BetrVG are worth nothing if the employer pulls the rug out from under them by means of organisational changes. While even today there is a possibility of expressly safeguarding their existence in the agreement itself up to and including termination, apart from that the very fact that a binding agreement is concluded with a collective agreement or a works agreement ought to be enough to rule out any changes for the term of the agreement.<sup>59</sup>

The use of IT in works council elections can certainly be reinforced, without jeopardising basic democratic principles. On the other hand, I do not believe that holding works council meetings via video or telephone conferencing is a good idea. The possibilities for discussion, perhaps at the margins of the meeting or during breaks, would be very limited in these circumstances. Anyone who has ever participated in a supervisory board meeting (section 108 AktG) in this way would confirm this.<sup>60</sup>

Trade union rights in the company, too, must be adapted to changing circumstances in the age of digitalisation. Bulletin boards would not be a bad idea in workplaces. However, because more and more workers only visit a workplace on an occasional basis other access points are needed for trade unions. For example, it ought to be a matter of course that trade unions also have a right to use internal communication systems, such as a company's intranet, for recruitment, information and communication purposes.<sup>61</sup> Also general access to the firm granted by Art. 9 Basic Law (GG) cannot, as the Federal Labour Court holds,<sup>62</sup> however, be restricted to six-monthly visits. This is totally unacceptable and fails to satisfy the fundamental right to trade union activity, including recruitment. Finally, employees' individual rights should be strengthened both in the firm and in the works constitution.<sup>63</sup>

In the context of digitalisation and globalisation, changing values among employees and different workforce configurations a change of culture is needed in works council bodies. In order to better reflect changing workforce composition works council members need to be recruited from realms that at present are far away from organs of codetermination, such as research and development. This would be made easier if clear career paths were established within the framework of works council activities, with real options for members to return to their previous careers. Development and evaluation reviews should become part and parcel of everyday works council activities, as in the rest of working life. Furthermore, individual training plans

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<sup>59</sup> See, for example, *LAG Kain*, AuR 2016, 126 = BeckRS2015, 71064; but see also *BAGE* 139, 197 = NZA-RR 2012, 186 (192).

<sup>60</sup> §41a EBRG (European Works Council Act) is a non-generalisable provision for seamen.

<sup>61</sup> On this see *BAGE* 12 9, 145 = NZA 2009, 615 and *Berg* in *Däubler/Kittner/Klebe/Wedde*, § 2 recital 126ff with further references.

<sup>62</sup> NZA 2010, 1365 (1367) = AuR 2011, 361 with critical remarks by *Däubler*, rightly critical also *Berg* in *Däubler/Kittner/Klebe/Wedde*, § 2 recital 109ff.

<sup>63</sup> Cf. *Klebe*, *Soziales Recht* [Social law] 2015, 37.

would be a good idea. As far as possible specialist career paths should be enabled, interlinking works council activities with already acquired occupational qualifications. Other important aspects include forward-looking succession planning and systematic knowledge management. As already mentioned the variety of the workforce needs to be reflected in the works council. Works council members should have the opportunity to specialise, while at the same time retaining their capabilities as generalists.

Finally, the payment structures of works council members liberated from their job duties have not kept up with the times. In my view they need to be modified in such a way that skills acquired through works council activities and responsibilities that, generally speaking, are exercised over a long period are also taken into account, as is usual as regards the wage categorisation of 'regular' employees. An appropriate change in the law would not be an improper preference of those involved in works council activities but equal treatment with employees. The current regulation in section 37 BetrVG, which ultimately goes back to the Works Council Act of 1920, could hardly be described as up to date. The world has changed dramatically over the past century and with it the number and quality of works council activities.

Also part and parcel of cultural change in the works council is the fact that the body does not merely react to the employer's ideas but where possible and where it makes sense develops its own alternatives and initiatives and has its own creative drive. Furthermore, the work of the works council has to be transparent. Modern media also have to be used at works meetings. Therefore, having access to a professional for communication in the works council would certainly be appropriate. Finally, employees would like to participate in decision-making concerning their working lives. Organising such participation, while at the same time assuming its own responsibility as works council must be the goal. In exercising its rights the works council must think and operate in terms of projects. Because often new ground is broken it is advisable to team up with the employer to come up with temporary works agreements or pilot projects.

With regard to the internationalisation of companies appropriate consideration and actions are needed as regards the networks already mentioned, complemented by the acquisition of foreign language qualifications and cultural sensitivity. The works council should also reflect critically on its own operations and undertake appropriate controlling, for example, concerning the effectiveness of works agreements. Finally, the works council needs both to think and act in terms of networks, in order to link together the various levels of the works council structure, the supervisory board and the trade unions.

## VII. Final remarks

Changed conditions, in particular because of digitalisation, have consequences for all areas of the company and for all groups of employees. In this context, especially because of the platform economy, new, often disruptive business models and forms of employment, such as crowd working, are emerging. It is imperative that trade unions and works councils have a voice in managing this change from a social standpoint and play their part in the development of 'Working World 4.0'. Rights do exist in this regard, but they are in urgent need of extension.

And finally, employers have a crucial responsibility for ensuring that the transformation is accomplished in a socially responsible manner. Reducing the requisite planning, by and large, to little more than a small change in the Working Hours Act for instance in respect of the worker's rest time so as to take account of the writing of short emails is totally inadequate and indicative of a lack of seriousness.<sup>64</sup> An active approach has to be taken to digitalisation across the board in order that, in the end, decent work prevails and there are as many winners as possible.

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<sup>64</sup> Cf. BDA, Chancen der Digitalisierung nutzen (Opportunities offered by the gains from digitalisation), May 2015.