

FAQ on reconciliation of interests agreements and social compensation plans

1. What impact does the coronavirus crisis have on the procedure for agreeing a reconciliation of interests and establishing a social compensation plan?

The coronavirus crisis does not change the employer's duties regarding agreeing a reconciliation of interests and establishing a social compensation plan as described below. There are also no moves as yet to simplify the procedures involved. If short-time working (reduced working hours) has been introduced in the establishment or in individual departments, this does not generally prevent changes in operations being planned. Both measures should, however, be carefully coordinated.

2. What is an agreement on a reconciliation of interests (also known as a balance of interests)?

A reconciliation of interests is an agreement between the employer and the works council as to whether, when and how a change of operations planned by the employer can be implemented.

3. When should a reconciliation of interests be sought?

An attempt should always be made to agree a reconciliation of interests with the relevant works council (local works council, central works council or group works council) if the employer is planning a change of operations as defined in section 111 of the German Works Constitution Act (BetrVG). A change of operations could be a fundamental change in the organisation of the establishment, for example a transfer (relocation) of the establishment or of important departments of the establishment, the amalgamation or splitting up of establishments, or collective redundancies within the meaning of section 17 of the German Act on Protection Against Unfair Dismissal (KSchG) (see also FAQ on collective redundancy). There is no need to attempt to agree a reconciliation of interests for what are known in Germany as Tendenzunternehmen ("undertakings... which pursue directly and essentially the aim of ideological guidance with respect to information and the expression of opinions", Article 8(3), Council Directive 94/45/EC on European Works Councils).

Practical tip for companies: Careful consideration is needed at the outset to establish whether planned action constitutes a change of operations that requires a reconciliation of interests.

4. What does “attempt” to agree a reconciliation of interests mean? How long does it take?

The works council cannot insist on such an agreement. The employer is merely required to make a genuine attempt to reach an agreement. This initially requires an attempt to reach an agreement at the establishment level. If the parties are unable to reach an agreement, the employer must continue the attempt to reach an agreement in the “conciliation committee” (see below). Only at the conciliation committee stage can the attempt to reach an agreement on a reconciliation of interests finally be regarded as having failed. Since the employer must bring a court action to institute the conciliation committee if the works council objects to this step, a “worst case” reconciliation of interests procedure can take up to six months.

Practical tip for companies: The possible duration of the procedure must be taken into account in overall planning. It is advisable to draw up a timeframe and action plan.

Since a reconciliation of interests is not a legal requirement, the works council cannot prevent implementation of the planned measures, it can only delay them.

Practical tip for companies: In practice, a delay often also occurs if the employer does not strictly adhere to the original plan and changes it (multiple times) in the course of the negotiations.

5. When must the relevant works council be informed?

The relevant works council must be informed when the employer takes the decision to implement a specific, planned change of operations. As long as the employer is merely considering whether to take action and weighing up the different options, there is no duty to involve the works council. When exactly the time is right must be assessed on a case-by-case basis and is part of the planning process.

Practical tip for companies: It is generally advisable to involve only a small team when preparing for operational changes and not to let information leak out too soon. Otherwise you run the risk of disruption due to concerns among the workforce.

6. What preparations are needed ahead of the negotiations?

If a change of operations is planned, any economic committee, executive representative committee or other employee representative body that exists must be involved in

addition to the works council. It is also important not to forget to inform the employees. Usually, an information document is prepared in the form of a presentation explaining the planned measures and anticipating possible questions where possible. Experience shows that it is also helpful to compile FAQs for managers. For more complex measures, it is also advisable to draw up a timeframe and action plan. Finally, the draft reconciliation of interests agreement and the draft social compensation plan (see below) should be finalised by the time negotiations begin.

Practical tip for companies: Information documents for the works council, other employee representative bodies and the employees, FAQs, a timeframe and action plan and a draft reconciliation of interests agreement and draft social compensation plan all need to be prepared.

7. What are the legal consequences if no attempt is made to reach a reconciliation of interests?

If the employer seeks to implement a change without attempting to reach a reconciliation of interests, there is a risk not only of reputational damage but also of the works council objecting to planned dismissals, combined with a wave of actions for protection against unfair dismissal. If the duty to consult with the works council in cases of collective redundancies is also ignored, any notices of termination could be invalid. In addition, a labor court injunction prohibiting the employer from implementing the change may be issued. Moreover, the employer risks claims for compensation for disadvantages suffered (typically, claims for severance pay) by the employees concerned, pursuant to section 113 of the German Works Constitution Act (BetrVG). Furthermore, implementation of operational changes without involving the works council would constitute an administrative offence and cause lasting harm to the relationship between the works council and the employer.

8. What is the specific procedure for the negotiations?

There are no fixed templates for the negotiation process at the establishment level. The works council and the employer normally each create a negotiating team with the specific expertise required. On the employer side, this is usually the HR manager, possibly a representative from the department affected and perhaps legal counsel. On the works council side, several members of the works council and their advisers are often involved. The first meetings are frequently taken up with answering questions from the works council about the planned measures. This is also known as the “information phase”. The more detailed the information put together by the employer in advance, the quicker the questions can be answered, thus enabling the draft

reconciliation of interests to be addressed (“negotiation phase”). The parties usually agree on a reconciliation of interests only if an agreement is also reached regarding the social compensation plan (see below), which ultimately depends on the conditions of the former. It is important for the employer to identify critical “pinch points” up front and be ready to appeal to the conciliation committee if talks get bogged down. This will help to keep the timetable for implementation on track.

Practical tip for companies: In order to have an escalation option available, it is not advisable for a member of the management team/board of directors to take part in the negotiations on the employer side. All questions expected from the works council should be anticipated and answered in advance of the negotiations.

9. Does a reconciliation of interests require a specific form?

The reconciliation of interests agreement must be set out in writing and signed by the employer and the works council.

10. What is the conciliation committee?

The conciliation committee is an internal mediation committee made up of an equal number of members from the employer side and the works council side (usually two to three each). The conciliation committee is headed by a chairperson. This is usually a (former) labor judge. A conciliation committee must always be formed if the works council and the employer fail to agree on a reconciliation of interests and/or a social compensation plan (see below) at the establishment level. If a conciliation committee cannot be formed by mutual agreement, a court must establish it. In the course of the conciliation committee procedure, the chairperson will again attempt to “unite” the parties. If no agreement can be reached, the employer can declare the attempt to reach a reconciliation of interests in the conciliation committee a failure and then implement the planned measures (e.g. issue notices of termination).

Practical tip for companies: Take early steps to identify possible conciliation committee chairpersons and check their availability.

11. What does a social compensation plan cover?

A social compensation plan is intended to compensate for or alleviate any economic disadvantages suffered by employees as a result of a change in operations. These plans typically comprise severance payments upon termination of employment or

compensation arrangements (e.g. reimbursement of travel or moving expenses) when a change of work location occurs. It is important to consider carefully in advance whether the workers concerned will suffer any disadvantages, and if so, what these disadvantages will be. For example, merely splitting an establishment into separate operating units frequently does not involve any disadvantages for the employees. It is also important for the employer to gather information at an early stage about the prospects of the relevant employees in the labor market.

Practical tip for companies: Compile personnel lists including social data in good time; calculate the possible cost of a social compensation plan in good time; obtain information on the labor market situation in good time.

12. Can the works council force the employer to establish a social compensation plan?

Unlike with a reconciliation of interests, the works council can force the employer to establish a social compensation plan. Like a reconciliation of interests, the social compensation plan must first be negotiated at the establishment level. If these negotiations fail, they must be continued in the conciliation committee (see above). If the parties are unable to reach an agreement there either, the social compensation plan can be adopted by the conciliation committee via a so-called “ruling of the conciliation committee”, which requires a majority of the votes of the conciliation committee members. This means that the social compensation plan can be imposed against the votes of the works council or against the votes of the employer.

If the operational change consists exclusively of a staff reduction, a social compensation plan can be enforced in the conciliation committee only if the staff reduction exceeds certain thresholds specified in section 112 a of the German Works Constitution Act (BetrVG). In certain cases, a social compensation plan is also not enforceable for newly founded companies; see section 112 a II, German Works Constitution Act (BetrVG).

13. How is the size of the social compensation plan calculated?

In determining the individual benefits under the social compensation plan, the conciliation committee is bound by the principles of equitable discretion pursuant to section 112 (5) of the German Works Constitution Act (BetrVG). It follows from this that in order to compensate for or mitigate the economic disadvantages suffered by the employees concerned, the conciliation committee must provide for benefits that typically reflect the circumstances of the individual case, and also consider the employee's prospects in the labor market. In doing so, the conciliation committee may take into account all “freely disposable” funds in determining the size of a social

compensation plan. The limit is dictated by the “economic viability” for the company. Meeting the obligations under the social compensation plan must not lead to illiquidity, balance sheet over-indebtedness or an unacceptable reduction in equity.

Special rules apply in the context of insolvency, which must be taken into account.

Practical tip for companies: Check economic viability carefully.

14. What role do trade unions play in the process?

The works council is responsible for the negotiations on a reconciliation of interests and social compensation plan. At companies subject to collective bargaining agreements, however, it is not unusual for the relevant trade union secretary to assist with the negotiations. It is also to be expected that the trade union will try to influence the negotiations by means of a corresponding communication strategy (including in public). It is possible that the trade union will call for negotiations on a collective social compensation plan – in addition to the social compensation plan negotiations with the works council – and attempt to enforce a collective social compensation plan through strike action.

Practical tip for companies: Check whether social compensation plan arrangements are included in relevant collective bargaining agreements, meaning that the obligation to maintain industrial peace applies; assess the risk of strike action and review possible responses.

15. When can measures be implemented, e.g. notices of termination issued?

Implementation of the planned changes is possible when the reconciliation of interests agreement has been signed or the attempt to agree a reconciliation of interests in the conciliation committee has failed. This is not contingent on concluding a social compensation plan. Premature implementation may result in court injunctions and other consequences (see no. 7 above).

(Last updated: 2 April 2020)