

A NEWSLETTER FROM
MANNHEIMER SWARTLING

21 AUGUST 2009

Focus German Employment Law



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Editorial

DEAR READER

We hope that you have the chance to enjoy summer despite of huge challenges of today's economy, in particular the labour market. Even if some observers are of the opinion that the crisis has reached its bottom, it can be seen that this is not likely to be true for the employment market. In Germany we expect a further increase of unemployment, since in particular German industry has to wide extend introduced "short time work", explained in our FOCUS of February 2009, in order to avoid redundancies. Our new edition of the FOCUS reports on new legislation on remuneration for board members in German Stock Corporations ("Vorstände"), new data protection rules in favour of employees and reflects also the actual discussion on "terminations without notice" in particular if it comes to theft of employers' belongings of minor, if not insignificant value.

We hope that the FOCUS is interesting for you and your everyday work. Me and my colleagues are happy to assist you in your Labour Law matters in Germany, but feel free to contact us also in other Germany related matters.

YOURS SINCERELY
DR. CHRISTIAN BLOTH



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Limitation of Salaries for Executives (“Vorstände”) of Joint-Stock Companies

The bank crisis has initiated a debate over executive pay in Germany. Amendments to the German Stock Corporations Act (*Aktiengesetz*) and the Commercial Code (*Handelsgesetzbuch*) were discussed in Parliament’s Legal Committee, after the two governing parties in Germany’s coalition government (CDU/CSU and SPD) had prepared a draft law concerning enhanced regulation of management compensation. Despite criticism during the legislative process the German Parliament adopted the Act on the Appropriateness of Executive Remuneration (*Gesetz zur Angemessenheit der Vorstandsvergütung*) on 18 June 2009.

Two of the main objectives of the new act are to assure the appropriateness of executive remuneration and to tighten the liability of the supervisory board (Aufsichtsrat) in case of inappropriate remuneration of the management board (Vorstand).

First of all, remuneration must be in an explicitly appropriate relationship to the performance of the member of the management board. The supervisory board is required to ensure that such compensation is in relation to “typical compensation”. The remuneration structure shall be oriented towards a sustainable business development and variable compensation shall be determined on a longstanding assessment basis. In the case the business situation of

the company has worsened or the compensation paid to the management board appears unreasonable, the new provisions provide the supervisory board with an obligation to reduce the salary of the executive directors.

In future, the German Stock Corporations Act contains an explicit provision stating that members of the supervisory board can be held liable if they resolve upon inappropriate remuneration. Supervisory board approval of unreasonable compensation may be challenged by shareholders on behalf of the corporation. If such a challenge is successful, board members may personally be held liable to pay damages in the amount of the excessive compensation.

Furthermore, in order to more closely align management incentives with the long-term stability of the company, stock options shall become exercisable for the first time after four years.

In order to increase transparency, a resolution of the “personnel committee” of the supervisory board is no longer sufficient for resolutions regarding the remuneration of management board members. From now on, the supervisory board – in many cases including employee representatives – is responsible for such decision. “Bazars” behind closed doors in special committees – without transparency – shall be avoided.

Additionally, the amendments in the German Commercial Code include that companies shall disclose benefits for management board members in cases of premature termination as well as regular termination of the employment.

BY DR. CHRISTIAN BLOTH, CBL@MSA.SE & LUDWIG SEVERIN

Important changes in German Law concerning Employee Data Protection

In December 2008 the German Federal Government passed a resolution on draft legislation containing amendments to the German Federal Data Protection Act (the "Bundesdatenschutzgesetz"- BDSG). The legislation initiative was triggered by the recent increase in data surveillance scandals in German companies (e.g. Lidl, Deutsche Bahn, Deutsche Telekom). Although such incidents may to a certain extent violate German data protection law and employee protection law – and even may be criminal – they have prompted the Federal Government to tackle the issue of imposing tighter restrictions on the use of personal data in employment relationship.

In German public there is – not at least in employment relationships – an awareness of Data Protection issues which foreign employers – in particular as it comes to measures of data processing concerning group companies imitated by the groups' management outside Germany – are not used to in their home countries.

The Federal Government had first planned a separate employee data protection act but finally decided to at least incorporate a fundamental regulation on employee data protection into the German Data Protection Act. Although the Federal Data Protection Act already applies clearly on employment relationships in its current version, the objective of the regulation was to stress that "the Federal Data Protection Act also applies to all employees".

The changes to the Federal Data Protection Act will come into force 1 September 2009. The most important changes which may be of interest for companies acting in Germany are summarized below.

It can be said that due to the high awareness of German public and new legislation data protection issues – importance will further increase. There are typically highly sensitive matters which should be considered carefully with legal advisors before building up unnecessary conflicts with employees and their representatives, in particular works councils.

CONSOLIDATION OF THE POSITION OF THE INTERNAL COMMISSIONER FOR DATA PROTECTION

In general, a commissioner ("Datenschutzbeauftragter") for data protection has to be appointed in the case of automatic data processing regarding personal data. In companies, however, such a commissioner is only required, if at least ten persons are working with data processing.

Such a commissioner for data protection will in future enjoy special protection against ordinary dismissal. It will only be possible to dismiss such commissioner extraordinary based on "good cause". In addition, the commissioner will remain protected from ordinary dismissal for one year after his revocation from the position as commissioner. The commissioner should participate in continuous education and professional training programs. The Act offers also the possibility to appoint an external commissioner for data protection, which is recommendable due to the high degree of protection an employee appointed as commissioner enjoys in such function.

NEW PRINCIPLES OF EMPLOYEE DATA PROTECTION

The new principles of employee data protection are stipulated in the new Section 32 of the BDSG. Data from employees can only be collected and used, if this is "necessary" for the establishment or continuance of an employment. The term "necessary" has to be interpreted in a restrictive way, it does not mean simply "use-" or "helpful".

Although the new regulation grants rights to the companies to collect and use data in case, an employee is suspected to have committed an offence during the employment, these rights are restricted. The general suspicion is not enough; there has to exist actual evidence for a concrete offence committed by the employee. The collection and use of data has to be "compulsory" – not useful or helpful – for the disclosure of the offence. Furthermore, it has to be ensured that interests worth protection from the employee are not violated. The action has to be reasonable.

These regulations are also expanded to non-automatic data processing in section 32 paragraph 2 of the BDSG. Even hand written notes for the file or notices by the employer could fall within the scope of the new section 32 of the BDSG.

The difficulty employers have to face is the ambiguity. According to the motivation of the legislator the new section 32 of the BDSG shall not effect a change of law, but summarize the legal principles which have been developed by jurisdiction. It is also not clear how the new section 32 will relate to the other existing regulations.

DATA PROTECTION AND THE WORKS COUNCIL

Besides the new regulation of the German Federal Data Act the existing rules according to the Works Constitution Act ("Betriebsverfassungsgesetz") have to be considered, especially the role of the works council: The employer has to inform the works council of all forms of processing data referring to employees enabling it to observe whether or not the directives of the Federal Data Protection Act are being adhered to. In the future it is clear that the works councils will have an even stricter look on the compliance with the new regulations. This is even the case if actions are imitated by outside Germany established Groups, which have a data protection implication. There are no exceptions, that a foreign jurisdiction may look on such issues differently or does not require employee co-determination.

Furthermore, the appointment of a commissioner of data protection requires the approval of the works council.

There is no explicit codetermination right of the works council regarding the procedure of data processing as such. The works council, however, has a codetermination right for the introduction and application of technical facilities which can be used for efficiency control and control of behaviour. As all individual-related data can be used to control efficiency and behaviour, the concrete conditions of the processing may be subject to the codetermination right of the works council.

OUTLOOK

The changes in the BDSG are not to be the final action on employee data protection but only a first step. It is planned that in the next parliamentary term the different regulations on employee data protection will be combined into a single employee data protection act.

**BY DR. CHRISTIAN BLOTH, CBL@MSA.SE
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Termination of Employment without Notice

To terminate an employment contract without notice is possible only if a “good/important cause” (wichtiger Grund) can be shown. According to Sec. 626 German Civil Code (BGB) such termination is possible “if facts are present on the basis of which the party giving notice cannot reasonably be expected to continue the service relationship to the end of the (ordinary) notice period or to the agreed end of the service relationship, taking all circumstances of the individual case into account and weighing the (reasonable) interests of both parties to the contract.”

These rules apply to both employer and employee and as with any termination of an employment contract the written form (i. a. not orally, not by facsimile or e-mail) is required. The good cause does not have to be explained in detail in the termination notice, but the other party can request such explanation in writing. The employment contract is generally terminated with effect as to the point in time in which the other party receives the termination notice.

Upon obtaining knowledge of a good cause for termination without notice, the termination must be declared within a time limit of two weeks, otherwise the right to termination for good cause is forfeited. Not clearly defined is, when “knowledge” has been obtained. Decisive is the knowledge of the persons entitled to decide on termination and it is required by legal practice that the employee had a chance to give a statement on the reasons, on which the employer intends to base the immediate termination notice. In general, first after such statement is given the 2 weeks period begins to run. If a works council exists, it must be heard by the employer before notice of termination is given to the employee. The works council has three days to comment on the intended termination. In these cases, it is therefore important to inform the works council in due time in order to be able to meet the two week time limit.

Key issue with respect to termination of employment without notice is, of course, under which requirements a good cause for termination is given. Unfortunately, it is usually not easy to establish the exact requirements and it therefore is quite difficult to outline general rules for its validity. However, groups of cases have been established and the jurisprudence on the area gives certain guidelines. Important in legal practice are cases as breach of essential duties, e.g. non-compete and/or secrecy obligations. But also incidents leading to minor damages

may give rise for termination. Some of such cases have even been discussed intensively in the German public, even in German politics.

On 24 February 2009, the Higher Labour Court of Berlin (7 Sa 2017/08) (“Landesarbeitsgericht”) gave a judgement – which even now has been granted leave for appeal on points of law by the Federal Labour Court (“Bundesarbeitsgericht”) – that a supermarket had validly terminated the employment of a cashier who had defrauded two deposit receipts for empty bottles with a total value of EUR 1.30. The good cause was seen as not based on the value of the defrauded items, but in the loss of trust in the employee – a cashier! – making it unreasonable for the employer to continue the employment relationship. The notice was under these circumstances – the employee’s position of trust was essential – justified despite of the fact that the employee was in service more than twenty years. Above that had the employer given clear and exact guidelines for the handling of such deposit receipts, which were known to the employee. Another factor which supported the termination was certainly that the employee consistently denied the accusation, even if several facts indicated clearly that the cashier committed the fraud.

The Labour Court of Dortmund (7 Ca 4977/08) on 10 March 2009 ruled in a case, in which an employee of a bakery was given immediate notice based on the theft of a spread with a value of less than EUR 1. The Court deemed this termination invalid. Although the court confirmed that the theft of a low-value item is generally suitable to establish a good cause for termination. It took into consideration, that the employee had been employed for more than 24 years and thus had a strong interest in the continuation of employment with the bakery. Further the employee had in the first enquiry by the employer admitted to have taken the spread. This reaction justified – for the court – a good prognosis for a good cooperation of the parties in future.

The second judgement underlines the importance of weighing the interests of both parties. Finding a fair balance requires that all individual circumstances of the involved parties are carefully considered. Thereby it should be kept in mind that the termination of the employment contract must always be the unavoidable and last possible measure for the party giving notice. Of importance are the positions of the employee in particular in relation to the rule he is in breach of and shall held be responsible for. Further, a clear, undoubtful wording of the guidelines on the conduct expected by the employer is essential.

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