

Focus German Employment Law

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FOCUS GERMAN
EMPLOYMENT LAW**

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Dear Reader,

Our Focus on German Employment Law, April 2009, is dealing with developments on the German employment market in the on-going economic crisis, which you as foreign reader may hopefully find interesting. Further, we focus on topics based on European Law which should be also of broader interest for all readers in the jurisdiction of the European Community. We report on the recent decision of the European Court of Justice regarding the term “transfer of business”, in German “Betriebsübergang”. This decision, which has been adopted on submission of the German Landesarbeitsgericht Düsseldorf will – according to our opinion – broaden the term and therefore strengthen employees’ rights in situation when essential assets of a business are transferred to a purchaser, who integrates these assets in an on-going business operation of his own. Further, the EC Commission is working on a strengthening of the rights of European Works Council, a directive which will have to be implemented in the law of the member states within the next two years.

We hope that you find the contents of our Focus interesting and would be glad to assist you in any questions you may have with regard to German employment law.

*Kind regards,
Dr. Christian Bloth*

Developments of the German employment market 2009

The German economy is – as many other economies in the world – still caught up in a deep recession. The gross domestic product has, according to recent data and statistics, shrunk with 2.1% in the last quarter of 2008 and important indicators predict a continuing downswing for the first quarter of 2009. The economic crisis has shown to have a massive impact on the employment market and the numbers confirm the dark forecast showing a decrease of salary earners for the last few months. The unemployment as well as the application for short-time work (German “Kurzarbeit”)¹ has had a significant increase so far this year whereas the announced offers of employment have had a considerable decrease.

January is a month usually known for having the biggest increase of unemployment of the year. In contrast, February and March have reliably shown a decrease when looking back at the development of unemployment in the last two years. In 2007 and 2008 the numbers of unemployed people dropped with 160.000 and 152.000 between January and March. During the same period of time in 2009 the number of unemployed people instead showed an increase of 97.000 (2.8%) and is now counted at 3,586.000 for Germany in total. This is the first time since December 2005 that the number for the same month the year before is exceeded.

The unemployment rate has shown an increase of 0.1% from February and is now, in March 2009, 8.6% in total. In western Germany the rate of 7.1% was only half of the 14.2% rate in the east (however, areas are varying in rates), even if the rate in western Germany had increased by 0.3 %, in eastern Germany it decreased by 0.2%. Highest increase in western Germany could be registered in Baden-Württemberg with 17%, southwest Germany, which is in general one of the federal states with the highest employment rates.

An explanation for the increase of unemployment all over Germany is the global economic crisis from which also Germany

is suffering at the moment. Offers of employment have dropped in the majority of fields and among others German mechanical engineers are suffering a great deal due the lack of incoming orders. In February the quantity of incoming offers were 49% below the number for the same month last year and a cutback in production of 10 – 20% is estimated.

Effective measures are being taken to prevent the increase of unemployment and to stabilize the economic situation. A cure that has proven to be successful and has highly gained in popularity during the last few months is the use of short-time work. It enables companies to continue their production at a slower rate when facing a lower demand without having to lay off their employees. This trend is also shown in recent statistics according to which there has been a massive increase of short-time workers in December 2008 – more recent numbers are not yet available – with a total of 270.000 short-time workers, nearly four times the number of December 2007. The applications for short-time work also showed an increase in 2009 and point to a continuation of such measures. The increase of short-time workers is mainly concentrated on the western parts of Germany which in December 2008 had an upswing of 165.000 compared to last year and a current total of 223.000.

Further measures in order to stabilize and boost the economy and the employment market are expected to come in the course of the year, particularly if the plan presented on the recent G-20- meeting is enforced and the German market among many others will receive vast economic aids. Exactly what the consequences of the decisions made on this meeting, following the motto “Stability/Growth/ Employment”, will be is to be seen in the near future.

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¹ Periods of agreed less working hours with corresponding reduction of income – however employees receive up to approx. 66% of their reduced net income from the Federal Employment Agency („Bundesagentur für Arbeit“)

“Employment transfer” by “business transfer”: European Court of Justice strengthened rights of employees

Transfer of business (“Betriebsübergang”) under German Law (and in the jurisdiction within the EU) often leads to “unexpected” increase in number of employees for purchasers of such businesses. Employees originally not intended to be “purchased” might under special circumstances be transferred with legal effect to the purchaser within “asset deals”, e.g. by buying considerable assets as part of a company, even if the legal entity bearing the business is not acquired. A transfer of employment might take place regardless of the parties’ intent, if the transfer of assets has legally to be regarded as “business transfer”. Since the outcome of an evaluation of the criteria applied by legal practice is often not very clear – or even unpredictable – it is difficult to handle such transactions.

The various kinds of business transfer, respectively a transfer of a separable part of a business operation (“Teilbetrieb”), which both also lead to a transfer of employment, have been subject of numerous labour court decisions. German courts have originally applied a definition of the term “Betrieb” (business) closely related to the term “Betrieb” provided by the German Works Constitution Act (Betriebsverfassungsgesetz), an act not based on European Law and providing for rules of information and co-determination rights and therefore without “natural links” to the European term “Betriebsübergang”. According to such definition the term “Betrieb” was interpreted as “organizational business entity” to be transferred, and consisting of resources, utilities and equipment necessary to fulfil the business purpose. Accordingly, a business transfer and thus an employment transfer were usually found to have only taken place if the transferred assets could be regarded as “organisational business entity”. Later on, influenced by the European Court of Justice (ECJ) and its interpretation of the EC Directives 77/187 and 2001/23/EC as basis for German Law, the interpretation of “business transfer” developed further. The European Court of Justice refused to accept an interpretation of the “business transfer”-term in accordance with the definition by the German Work Constitution Act, since the term is seen as an autonomous European legal term to be interpreted independently. Therefore decisions of the ECJ were made on a pure evaluation basis of various criteria which decides in a case to case basis, whether a transaction has to be regarded as a “business transfer”. The term “economic entity” of the ECJ, nowadays to be observed by the national courts, is much broader than the German term “Betrieb” within the meaning of the Works Constitution Act. It contains, next to the transfer of business or separable part of business, also transfers of any economic entity in the sense of an “organizational aggregation of resources to be necessary to achieve an economic function, which preserves its economic identity”. The

differentiation in the past between operational organization and the economic entity became obsolete.

Nonetheless, German courts stated after ECJ decisions in the past that a preservation of the “economic identity” after its transfer requires at least, that such economic entity remains – despite of the transfer – a functional, operational and procedural as well as an organizational entity.

Nonetheless, it was for a quite long time unclear to which extent such transferred entity has to be identical with the unit before transfer, i.e. if the transferred entity causes a transfer of employment, or if a complete integration of the entity in the existing business of the purchaser (implying the dissolution of the transferred unit) would exclude a “business transfer” with the consequence, that no employment relationships are transferred. It was argued about the meaning of “preserving the identity”, i.e. if that shall mean that the identity after purchase shall be kept within the business of the purchaser. German courts argued that the “economic identity” have to continue after the purchase. A purchaser who just uses the purchased equipment and resources by integrating in a present organization of his current existing business would dissolve the “economic identity” of the transferred unit. No business transfer and no employment transfer by law thus would take place if the purchaser integrates the purchased assets in its own business or organization of business.

In its recent ruling the ECJ was – in favour of employees – less strict, which most likely will lead to changes in German practice. In its decision adopted on 12 February 2009 (ECJ, decision C-466/07), a case submitted by the second instance court LAG Düsseldorf, it clarified that is not necessary that the organizational entity continues to exist as whole entity after an acquisition. In fact, it is sufficient that a “functional link” of the assets by “interdependence and the mutual supplementation” remains in principle unchanged. The continuation of the “functional link” of the transferred assets – even if integrated in the purchasers existing organization – makes it possible for the purchaser to proceed with the same or similar business activities. Contrary to the German Labour Courts, there will be no need that the organizational structure itself remains unaffected after a purchase as long as a “functional link” between the transferred assets can be shown even after the acquisition. With this decision, the ECJ thus clearly strengthened the rights of employees and expanded the scope of application of the Directive 2001/23/EC and national law provisions. Of course, such decision will be a challenge for labour lawyers within future asset deals.

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The European Works Council – A blunt instrument?

Caused by the significant increase in multinational businesses over recent years and in times of Europe-wide uncertainty as to security of employment, the establishment of a European Works Council (“EWC”) and its rights in this context seem to gain relevance amongst employees and their representation bodies within the EU.

However, until today only few businesses within the EU – qualifying for establishment of an EWC – have actually established an EWC (app. 36%). It is said that in total about 820 EWCs exist with about 19,000 members. This may explain, why the institution “EWC” as such does not yet appear to play a major role in transnational businesses and is commonly regarded as a merely “blunt instrument”.

This impression may however prove to have been misleading, when companies are actually confronted with the demand to establish an EWC. Supported by respective judgements of the European Court of Justice (“ECJ”), such companies are subject to comprehensive information and cooperation obligations and a shortly forthcoming change in legislation may extend and put the spotlight on the role and competencies of EWC arrangements.

GENERAL

The right to and details of establishment of an EWC have first been stipulated in Directive 94/45/EC on “establishing an European Works Council or a procedure in Community-scale companies or Community-scale groups of undertakings for informing and consulting employees” (*“the Directive”*).

In Germany the Directive has been implemented in the Act on European Works Councils (*“Europäisches Betriebsrätegesetz, EBRG”*).

The Directive, respectively the relevant national Acts apply to companies with 1,000 or more employees, including at least 150 in two or more Member States. Such companies are entitled to erect an EWC or establish procedures regarding information and consultation of the employees. The EWC is to be erected at the location of the “central management” of the Group. There is no obligation for companies to establish an EWC or transnational information and consultation procedure unless either company management takes the initiative to do so, or employees (or their representatives) trigger the request procedure laid down in the Directive. A valid written request from employees, or their representatives, must represent a minimum of 100 employees situated in two or more EU Member States.

INFORMATION UNDERTAKING

After the Directive had been effected, one issue often in dispute, was the question, if and to what extent a respectively addressed group-company is obligated provide information on corporate structure, employee numbers and representation arrangements across the group to a requesting representational body, prior to seeking negotiations about establishing an EWC.

According to Article 4 and Article 11 of the Directive, respectively Section 5 EBRG, the “central management” shall be responsible for creating the conditions and means necessary for the setting up of a European Works Council or an information and consultation procedure and is obligated to provide all necessary information therfor to the requesting employees representation. ▶

National Courts addressed the European Court of Justice for interpretation of the respective Directive stipulations. In three judgments (“*bofrost*”, “*Kühne & Nagel*” and “*ADS Anker*”) – all originating in Germany – the ECJ ruled that employees must be guaranteed access to all information necessary to enable them to determine whether they have the right to demand the opening of negotiations about the establishment of an EWC. The addressed central management must provide the requested information, even if it itself has no direct knowledge about respective details and has to address other Group Companies with a respective information request.

If the central management of a company is not located in a Member State, the responsibility to provide the information essential to opening negotiations over the establishment of an EWC falls on the management of the group establishment or undertaking which employs the largest number of employees in any single Member State (the so-called “deemed central management”).

In detail the ECJ established that the information obligation of addressed central or deemed central management includes in particular information on

- the businesses belonging to the company respectively the group,
- the average amount of employees engaged in the company and their allocation within the Member States,
- their legal form an representational structure, the seat and competent register court and supervising bodies of the company as well as the respective appointment procedure.

Further the names and addresses of employees’ representations in the respective businesses are to be provided ,in so far as that information is essential for the opening of the negotiations’.

EFFECT ON NATIONAL JURISDICTION

Existing national legislation on EWCs has to be interpreted in accordance with the ECJ case law. This last happened in a recent

ruling of the Swedish Labour Court, in which a Swedish subsidiary of “Kühne & Nagel” Group was ordered to disclose information on the total average number of employees, names and addresses of employee representatives, etc. to the requesting German company, which had in its turn be ordered by the German Labour Court to provide respective information to the requesting Works Council. Based on the ECJ ruling (“*Kühne & Nagel*”), the Court ordered that the respective information had to be provided.

CHANGE OF LEGISLATION

In order to strengthen the institution EWC as such, to further safeguard the rights of the employees to cross-national information and consultation and to increase the rate of European Works Councils within the EU, the European Commission had on 2 July 2008 provided a proposal on a new EWC Directive.

On 17 December 2008 the European Council of Ministers has agreed on the new directive, however, it has not yet been formally approved.

Instruments for achieving these aims are inter alia a clearer definitions of the terms information, consultation and transnational, the acknowledgement of the role of trade unions and the obligation for Member States to define adequate sanctions for breach of the stipulated undertakings, in particular regarding information. It is, however, clear that the rights of EWC and related trade unions will be strengthened, even if the rights will be limited to information and consultation, but will not – as for instance in Germany – provide for co-determination rights.

The new Directive is currently translated into 22 languages and expected to come into effect in May 2009. It is expected that it must be implemented by the Member States within 2 years after its formal adoption. Details of the new directive and its implementation will of course be made available in a future edition of this newsletter.

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