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Editorial

DEAR READER,
We like to present you our second edition of the Focus on German Employment Law. As you may have heard German labour market is developing well and has come out of the crisis better than many other employment markets in the European Union. Some of these facts are described herein.

For labour law perspective it is always interesting – when employing people – in which way the employer can protect himself against competition after employment has been discontinued. Legal requirements on such post-contractual non compete obligations are high and can nearly not be defined without legal assistance. In this aspect German employment law is – according to our impression – for many non-German actors very different from their own home jurisdiction in which legal practice looks much more generous on such restrictions. Requirements in German law on post-contractual non compete obligations are described in one of our articles.

Always a certain surprise are for foreign enterprises doing business in Germany when it comes to the institute of the German “Betriebsrat”/ works council. Costs of the works council have to be borned by the employer. The article “The expensive works council” demonstrates impressively to which disputes this may lead.

We hope you find the information contained in our FOCUS interesting and we are of course available for any questions you may have.

BEST REGARDS,
DR. CHRISTIAN BLOTH

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Recent Development of German Labour Market

Germany seems – internationally widely recognized – to have come out of the crisis with a significantly lower unemployment rate as expected. Optimism is generally increasing, some economists already see an increase of the national gross product for 2010 by 3%. German economy is doing well in particular due to increased exports, e.g. in car industry.

Unemployment however increased to 3.192.000 million in July, as usual in this time of the year, due to the summer break. However, in seasonally adjusted terms there is a trend of decrease to be seen in the close distance. In July Frank-J. Weise, Chairman of the Executive Board of the Federal Employment Agency (Bundesagentur für Arbeit "BA") said, "The German economy is recovering, the situation on the labour market further improved."

The Unemployment figure rose by 39.000 to 3.192.000 but compared to the figure last year it is quite a step forward with minus 271.000. The total percentage rose by 0.1 percentage points to 7.6 percent.

Federal Minister of Labour and Social Affairs Ursula von der Leyen commented that short-time work again has been a help here, playing a smaller but still important role.

It is also remarkable that especially the number of long-term unemployed has declined. As the effects of the crisis slowly cease and Germany emerges from the crisis the chances for all unemployed will improve. This can also be seen due to the fact that overall underemployment (without short-time work), which comprises the overall disburdening through labour market policies, is below the level of the previous year.

Gainful employment and employment covered by social insurances also increased due to the continuing growth in part time employment (+180.000 compared to the previous year). Whereas the number of self-employed persons increased, the number of employees in employment opportunities ("job programs") involving additional government expenses and persons in minor employment decreased.

According to BA data the market for professional education is affected by a decrease in applicants for demographic reasons and a stable number of offers. The number of reported applicants still surpasses the number of vacancies reported up to now. Though the numbers of the training market might seem pleasing it is still too early to give an estimation of the further development.

Even if seems like a couraging sign, however, there is no reason for euphoria. Figures from the US job market and the US industry and also still problems in Southern Europe are reasons to be careful for a country that is as dependent of exports as Germany is. Because it was the very export industry that helped Germany to recover quicker than other countries from the crisis. Then again the car industry in Europe felt a great impact this month due to government help last year and other various reasons. Then there are still almost 600.000 employees in short-time work.

Like Ursula von der Leyen commented, it is also important to turn the attention to the great, long term challenge of qualifying people better for the labour market; bringing more single parents, migrants and older people into qualified work and keeping them there. One needs to foresee changes in the world of work and planning for these.

Another issue in Germany in connection with the above stated still is the need for qualified workers. German population is declining and aging. Immigrants already here and young people in Germany are often not qualified enough for the needs of the economy. Most of them, although good at school, do not graduate from university due to various reasons. Maybe one of them might be the installment of fees for universities.

So overall Germany seems to be on a good way and there is in fact grounds for hope, but there are still issues to be faced in the years to come.

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The Expensive Works Council

The works council (in German: "Betriebsrat" – not to be confused with "the union"), elected by the employees of the relevant business unit, is an organ of the works constitution and represents the interests of the employees within a local establishment of the company. The employees have the right to set up a works council if the local establishment has at least five employees who are eligible to vote. Its members are then elected for a four year term. The size of the works council depends on the number of employees in the establishment who are eligible to vote. The works council has rights of participation in certain decisions of the company, i.e. information, consultation and co-determination rights. It is empowered to conclude works agreements for the establishment and is authorized to institute legal actions if its rights are disregarded. In larger companies with several establishments with local works councils, a joint works council must be set up and within a group of companies a group works council can be set up if the joint work councils of the group so wish.

The elected employees fulfill their work council duties during their regular (paid) working time and the employer is obliged by law to pay for the costs incurred by the works council's activities. The works council is not entitled to any contributions or fees to be paid by the employees he represents. Also, the employer must pay necessary expenditures, e.g. for means of information and communication.

The question which costs and in which amount have to be borne are subject of numerous decisions by labour courts which do very much depend on individual circumstances of the case concerned. Such typical questions concern training/education costs for various media, travel costs, secretarial support, etc.

The Federal Labour Court ("Bundesarbeitsgericht") has recently made decisions in two cases regarding such works council costs.

In one case (BAG, 14 July 2010, ref. 7 ABR 80/08) a works council consisting of five members had initiated a lawsuit against the

employer requesting that all individual members, not only the works council as a "group", have to be granted individual access to the internet and given personal e-mail addresses, alternatively that internet access was made available not only for certain members. All employees in the business unit concerned and thus also the members of the works council were provided with computers, but not everyone had internet access and e-mail addresses – of the works council only the chairman and his deputy. The employer had only offered that two freely selected members of the works council were granted internet access and e-mail addresses. It argued that the costs would otherwise be too high and that each further internet access increased the danger of viruses entering into the network. However, according to Federal Labour Courts permanent practice, it is up to the works council to assess which means are "necessary" in order to carry out its work. When making its assessment it also has to consider the interests of the employer, e.g. the costs incurred. In other cases, the Federal Labour Court had already decided that internet access is a proper tool which the works council may deem necessary for its work and it decided likely for the e-mail addresses. In this case, the Ferderal Labour Court also established that the costs do not conflict materially with the interests of the employer, as the employer only has unlock the internet access on the individual computers and set up e- mail addresses.

In another case (BAG 23 June 2010, ref. 7 ABR 103/08), an employer was committed to reimbursing the childcare cost of a "single" mother. As part of her work for the work council, she had been away from home for a total of ten days attending two meetings of the joint works council and an assembly of works councils. During this time she had hired a nanny for her minor children (11 and 12 years of age), as her adult full-time working daughter who also lived in the household had refused to take care of her siblings. The costs for the nanny amounted to € 600 (€ 30 per day and child). The employer argued that these costs were personal costs and not to be borne by it. However, the Federal Labor Court found that the cost rule must be interpreted in light of the constitution. In the present case, the member of the works council was in a conflict between fulfilling her work constitution duty and her parental duties protected by the German Constitution. She may not be burdened with cost when having to fulfill both duties at the same time. Also, the amount spent was deemed adequate.

It is quite difficult to give advice on what kind of costs and to which extent they are „reasonable" since they are very much depending on the individual case. Example: Participation in a training seminar on works council's work is certainly "necessary" for a newly elected member of a works council, but perhaps not if the training takes place far away from home and if in the same time a corresponding seminar is available close to the member's home. Then travel and hotel costs may not be deemed "reasonable". However, in many cases only minor costs are at stake and it should be considered whether it is appropriate to enter in a compromise with the works council before such a question becomes a long lasting court matter – also in light of general cooperation with a legally powerful organ of the business unit.

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Post Contractual Non-Compete Obligations under German Law

Educating employees and training them to the point where they successfully acquire and retain new customers and clients with their specific know how and skills is one of the cornerstones of a successful business enterprise. But when it comes down to conflict between the well trained and networked employee these aspects can easily become quite intimidating and risky for the business. So countermeasures need to be taken in order to limit negative impacts of a departing person. It might seem an easy and convenient way to do this by including a post-contractual non compete obligation into the employment contract of one's employee or managing director. As easy as this sounds though, there are quite a few traps in which one could step if one does not pay careful attention to the requirements stated by German law. Law and legal practice have to provide for rules balancing diverging interests of employer and employee: the reasonable employer´s interest in protecting its business against competitors activities by using the support of an employer´s former employee on the one hand and the reasonable interests of the employee in exercising his professional freedom and using his know how. Due to the strict view by courts on such clauses, there is always a potential risk of invalidity or non-binding character of such clauses.

How difficult it can be to formulate a restrictive covenant that is valid and will stand up to a judicial test is shown by two recent judgments from the BAG (Federal Labour Court) of 24 March 2010 and 21 April 2010.

GENERAL PRINCIPLES

To understand the difficulties and aspects that the BAG has criticized in these two decisions a first look shall be taken at basic requirements that one has to meet to have a non-compete obligation be valid and enforceable.

A post contractual competition prohibition will be enforceable according if:

- it does not exceed a period of two years
- it is laid down in writing, e.g. as part of the employment contract
- it is "necessary" to safeguard a "justified commercial interest" of the employer
- it does not "unfairly" jeopardize the employee´s further career
- the employer obligates himself to pay compensation for the duration of the restrictive covenant in the amount of at least one-half of all contractual benefits the employee last received

According to § 74 c HGB other earnings are only deducted if they, together with the compensation, exceed 110% of the employee´s previous remuneration. The employer has the right to question the employee and even a right to refuse performance if the employee does not provide the necessary information.

If the non-compete obligation is not in compliance with these rules, they either may be "void" or "non-binding". If the clause is void, the non-compete obligation is not enforceable. If it is non-binding, the employer cannot force the employee to obey the non-compete obligation. On the other hand the employee then has a right to choose to accept the restrictive covenant as valid or to release himself from it.

Also so called conditional non-compete obligations are non-binding. Such kind of clauses are mostly seen shaped in a manner that the employer decides about whether such clause shall be applied or not.

It is also possible to waive – on the employer´s side – the non-compete obligation any time before the employment agreement legally expires. This has to be made in writing. Further the waiver of the non-compete obligation has the consequence that the employee is free as of the expiration of the employment agreement. However the employer has to pay the compensation for one more year continued from the time the waiver is declared (not during the notice period, when the employee is entitled to his ordinary salary).

THE DECISIONS

The recent decisions of BAG show that even if one keeps all of the requirements in mind there can still be some traps in the wording and boundaries of such non-compete obligations.

The first case actually is not about post contractual competition prohibition but it vividly shows the difficulties of such agreements in general.

In a judgment of the 24 March 2010 (BAG Az. 10 AZR 66/09) the Court had to decide about a non-compete obligation clause contained in a collective bargaining agreement between Deutsche Post and the competent union.

The employee worked 15 hours per week for Deutsche Post (distribution of letters etc.) and six hours per week for a competitor that delivered newspapers. Deutsche Post requested the employer to discontinue her other job. BAG stated that the limits of such competition prohibitions have to take into account the importance of the right of free job choice provided by the German constitution.

The court ruled that the other job was not infringing the competition prohibition. It held for the employee that she only worked part time and needed to have a second income. Also it considered the simplicity of the job distribution of letters and newspapers. The simpler the job is the more obvious the infringement has to be the court ruled. The mere fact that the complainant was working for a competitor was not sufficient. Rather a comparison of the two jobs and the details of the actual business had to be taken into account. So in this case the Deutsche Post was not really doing exactly the same as the competitor, as Deutsche Post did not deliver newspapers in an amount that could make both competitors in the sense of competition.

The second judgment of BAG of 21 April 2010 (Az. 10 AZR 288/09) actually is about post contractual prohibitions. In this case the key issue was the boundaries of post contractual competition prohibitions.

A marketing director sued his ex employer, a manufacturer for windows and doors that sold his products only to specialized dealers for compensation for following the non-compete obligation imposed on the employee. After the termination of the employment agreement the employee started working for a dealer that sold windows and doors to end-users. According to the agreement between the employee and the employer, businesses that distributed windows and doors in general counted as competitive businesses included in the non-compete obligation. Therefore the employer argued that he was not obliged to pay the compensation.

BAG held for the employee and ruled that the employer had to pay the compensation. It explained that the prohibition of selling of doors and windows to end-users was not justified by any commercial interest since his activities were direct to dealers as customers, not end-users. So the employee was not infringing any binding obligation and thus was entitled to the compensation.

These decisions give a glance at the difficulties concerning non-compete obligations in Germany. It cannot be stressed enough how important it is to be as precise as possible in the wording and the limits of a non-compete obligations. BAG also made it very clear that competition prohibitions are only justified if there are legally justified commercial interests to be protected.

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