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SHORT REFLECTION PAPER - LABOUR AND EMPLOYMENT LAW IN GERMANY

1. Background

Ultimately, employment law in Germany comes down to the German constitutional (*Grundgesetz*)[1]. The German *Grundgesetz* sets out main principles which are decisive for German labour and employment law: the right to work, the right to organise as unions, the right to property and entrepreneurial business and the right to equal treatment. Most of German employment law can be traced back to these constitutional rights. Both legislation and case-law (which is very important in labour and employment law) affect the balancing of these constitutional rights, taking into account circumstances in society, economy and the political sphere.

At the same time, European law has had and still has an immense impact on employment law. Many developments, in particular those that set out protections for employees, are based on European law which enjoys primacy over domestic law. In the European legal system, workers are not only part of the single market (Art. 45 TFEU), but also entitled to various social fundamental rights of the EU Charta of Fundamental Rights and specific rights of solidarity in Title IV of the Charta.

The most important European legal acts in employment law include regulations on working conditions such as part-time work, working time restrictions, maternity and parental leave, validity of fixed term and data protection as well as rights of employee representatives.

Therefore, the case-law of the Court of Justice of the European Union (CJEU) has a crucial impact on employment law in Germany. The CJEU increasingly presented itself in recent years as a protector of fundamental rights with an important influence for the protection of workers.

References:

- Art. 45 TFEU: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E045:-en:HTML
- Charter of Fundamental Rights of the European Union https://eur-lex.europa.eu/legal-content-/EN/TXT/?uri=celex%3A12012P%2FTXT

[1] While the *Grundgesetz* was originally intended as an interim regulation for West Germany, it is now recognized generally as the German Constitution.

- European Parliament, The scope of EU labour law, Who is (not) covered by key directives, 2020,https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/658181/IPOL_IDA(2020)-658181_EN.pdf

- Menegatti, Taking EU labour law beyond the employment contract: The role played by the European Court of Justice, 2019, https://journals.sagepub.com/doi/full/10.1177/20319525-19884713

- Oberthür, Aktuelle Tendenzen des EuGH und deren Auswirkungen auf das nationale Recht, RdA 2018, 286, https://beck-online.beck.de/Dokument?vpath=bibdata%2Fzeits%2Frda%-2F2018%2Fcont%2Frda.2018.286.1.htm&pos=1&hlwords=on

A - Protection of employees: private autonomy vs. protection

One of the main issues in employment law is the balancing of the contractual freedom versus the protection of the individual.

Both Germany and the European Union place a strong emphasis on the protection of the employees who are perceived as generally being the weak party. Many statutory laws exist which limit the freedom of employees and employers to agree on working conditions which are seen as disadvantageous. Employees therefore cannot contract out of e.g. working time restrictions, maternity leave provisions, non-compete restrictions, etc.

This goal of protection is clearly visible in the **issues concerning the termination of employment**.

Germany is one of the few countries in Europe that provides for reinstatement if a dismissal is considered invalid. This is not reflected in real life. Most cases where employees challenge the validity of a termination in court will be settled against payment of severance. However, the payment cannot be set by a court and must be negotiated. The court can only rule on reinstatement.

The standards for employers to prove the validity of a termination is high: this is particularly visible where employers view employee's performance to be lacking. Courts request that employees work as best as they can but recognise weak performance as grounds for termination only in very exceptional cases.

B - Collective bargaining law: role of trade unions

Germany recognises unions and awards them constitutional rights (Article 9 *Grundgesetz*) which are safeguarded by the German Constitutional Court as well as the German Federal Labour Court.

Unions may negotiate collective agreements under German law, therefore playing an important role.

However, membership numbers are declining, and the influence of unions is diminishing, especially in the private service sector. We are currently seeing an increase of union activity in the digital industry, however, not always with success.

References:

- Art. 9 German Basic Law, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html-#p0054

- Dribbusch/Birke, Trade Unions in Germany – Challenges in a Time of Transition, 2019, http-://library.fes.de/pdf-files/id/ipa/15399.pdf

C - Codetermination of works councils

In contrast, employee representation is more present through so-called works councils. Within companies, employees are represented by elected representatives from within the business, the works councils. Works councils have been a cornerstone of German labour law for over 100 years. The rights and duties of the works council as the representation of employees' interests in the company were codified for the first time in the Weimar Republic in the Works Council Act of 1920.

They have far reaching rights and need to be involved in most decisions affected employees. The rights range from purely informational rights to actual codetermination where an employer cannot take a unilateral decision but needs to find an agreement with the works council. Codetermination rights exist for example on principles of pay (not the actual amounts but the general pay structures), working time issues and the introduction of any new software.

Also, individual personal measures, such as hiring and firing, require participation of the works council. This is often perceived as burdensome and a significant restriction on companies' freedoms. However, it is also seen as a factor contributing to stability of businesses and the German economy.

The circumstances under which codetermination was introduced in German law changed fundamentally. Originally, codetermination was meant to legitimise employer's decisions and protect workers' rights in a blue-collar industry. Introduced in 1952, and updated in 1972 and 2001, the Works Council Constitution Act (*Betriebsverfassungsgesetz - BetrVG*) remained unchanged since then. In today's economy, a vast private service sector characterized by digitization, works councils face new challenges.

The need for change became particularly significant during the pandemic leading to reforms. In June 2021 the Bundestag promulgated the Works Council Modernisation Act (*Betriebsrätemodernisierungsgesetz*), which simplifies the establishment and election of works councils as well as enables the use of digital tools. This reform also provides clarification on codetermination rights regarding the use of artificial intelligence at the workplace or work from home.

References:

- Federal Ministry of Labour and Social Affairs (BMAS), Co-determination 2019, https://www.-bmas.de/SharedDocs/Downloads/EN/PDF-Publikationen/a741e-co-determination.html

- Thüsing, Schritte zur sozialen Neuordnung: Zeitgemäße und zeitgebundene Betriebsver-fassung, BB 2021, 1460,

- https://online.ruw.de/suche/pdf/bb/bb-24-2021-1460-8b2ace8459a608f870bdda94544985fb-.pdf

- Page, Co-determination in Germany – A Beginner's Guide, Hans-Böckler-Stiftung, 2018, https://www.boeckler.de/de/faust-detail.htm?sync_id=HBS-007045

- Klebe, From a German perspective: Works council 4.0 – Digital and global?, Hans-Böckler-Stiftung 2018, https://www.boeckler.de/fpdf/HBS-006949/p_hsi_wp_13.pdf

2. Recent developments

Labour and employment law is closely intertwined with the economic model and developments in business present challenges. It is a field of law which cannot be seen in isolation and which is undergoing constant changes.

References:

- Federal Ministry of Labour and Social Affairs (BMAS), White Paper Work 4.0, 2017, https://-www.bmas.de/SharedDocs/Downloads/EN/PDF-Publikationen/a883-white-paper.pdf?__blob=publicationFile

2.1 Working time and working place

The European labour market consists of a strong private services sector which makes up more than two thirds of the employees in the EU. Accelerated by the pandemic, the discussion on working conditions has focused much attention on the question of balancing work and personal life.

Companies increasingly enable remote work and work from home awarding employees with an unprecedented flexibility. Especially in industries, where there is a lack of qualified employees, there is a trend that companies offer attractive benefits and working conditions, including remote working and flexible working times.

This trend raises new questions for labour and employment law: Employment law traditionally assumes the office or factory as the workplace where compliance with working conditions and occupational health and safety standards may be ensured by the employer more easily. The main issue being currently discussed is working time: Under the Working Time Act (*Arbeitszeitgesetz*), it is not permissible to work more than 10 hours a day and an uninterrupted rest period of 11 hours between working days is mandatory. This means that checking your email in the evening is a violation of working time law. While this is not actively pursued by public authorities, it is deemed problematic that the law is such that nearly all companies in fact violate its provisions.

Companies as well as legislators everywhere are struggling with the challenge of balancing out the wish for sovereignty over working time and compliance with working time standards.

References:

e.g. Katsabian, It's the End of Working Time as We Know It: New Challenges to the Concept of Working Time in the Digital Reality, McGill Law Journal 2020, 379, https://lawjournal.mcgill.ca/article/its-the-end-of-working-time-as-we-know-it-new-challenges-to-the-concept-of-working-time-in-the-digital-reality/

2.2 Concept of workers

Especially with the digitization of businesses, modern phenomena such as platform work and crowd working, are emerging. The so-called gig economy puts the concept of employee/worker into question.

Germany is strict about recognising independent contractors from a social security point of view. Independent contractors currently do not pay into the social security system in a comparable way to employees. Therefore, there is a pull towards classifying independent contractors as employees. Very recently, the German Federal Labour Court (BAG) ruled that crowd workers can be qualified as employees if they are not free to organize their activities in terms of place, time and content but in a way that is characteristic for employees. As a false classification may even lead to criminal liability, this is a serious issue for companies to address, especially with jobs in which qualified persons reject the offer to become employees.

Reference:

- Bundesarbeitsgericht, 01.12.2020 – 9 AZR 102/20, https://www.bundesarbeitsgericht.de/en/-presse/arbeitnehmereigenschaft-von-crowdworkern/

- Drosdeck, Crowdworking – „Collecting bottles on the Internet", LaborLawMagazine, 2021/1, https://www.deutscheranwaltspiegel.de/laborlaw/labor-law/crowdworking-collecting-bottles-on-the-internet-24634/

3. Internationalization - effects on business and employment

Along with the internationalisation of the economy, employment rights are becoming more difficult to uphold. If we look at the issues that clients turn to us for support, this can be broadly separated into two fields:

- Support in the day-to-day operations, e.g. advising on applicable law, drafting of agreements, negotiating and litigating day-to-day issues

- Supporting with change and transformation.

While the first issue is very much a national one, change and transformation is often more international. It is linked to organisational changes which affect the workforce, leading to dismissals and changes to employment conditions. We support these transformations with respect to the individual employees but also with respect to negotiations with the works council and unions as well as in court procedures.

Many companies outsource not only production, but also areas such as finance, purchasing, HR, to lower-cost countries. The resulting changes to the national workforce impact not only the individual company, but also society.

The current elections with the rise of the SPD, a party traditionally linked to the workers' representation, is an interesting development in this respect. The SPD has already brought significant regulations for employers over the past years (such as the right of employees to an interim part-time period, minimum wage, facilitation of works councils). Its election programme pushes towards an even stronger focus on

employees' rights (restriction of fixed-term contracts, co-determination for site closures, digital access rights for unions, higher minimum wage, quota for women, etc.). The Green party shares many of these, while the Liberal Democrats (the FDP) views many of these issues as too restrictive.

The next years will be interesting for labour and employment lawyers in Germany.