

SUMMARY

2012/11: European works council cannot stop plant closure (GE)

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Summary

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Facts

The defendant in this case was a globally active supplier of spare parts in the automotive industry. On 22/23 June 2011 the parent company's management informed the European works council (the "EWC") that one of the company's factories in Germany would be closing down. It issued a press release to that effect, started negotiations with the trade unions and informed the factory's staff about a possible social plan aimed at alleviating the impact of the closure on redundant employees. The published judgment does not reveal whether the company's own works council, if there was one, was involved.

The EWC demanded written documentation with respect to the rationale for the decision, including whether there were alternatives to closing down the factory, and so forth. Management responded by holding a presentation on 12 July in which it provided detailed information about the group's finances and the need to close down the factory in question. The EWC was not satisfied. It demanded full compliance with the German Act on European Works Councils (the "EBRG"), which provides that, where management intends to make certain decisions, such as closing a factory, it must (i) inform and (ii) consult with the EWC

before making the final decision. “Informing” means exchanging information in order to give the EWC an opportunity to verify and understand the rationale for the decision¹. “Consulting” means having a genuine dialogue². The EWC asked management to reverse its decision and cease the process of closing down the factory until the correct information had been given and the consultation process completed. Management refused to give in to this demand, whereupon the EWC applied to the local labour court for injunctive relief. The EWC asked the court to order management to cease all measures aimed at executing the decision to close down the factory until it was in full compliance with the information and consultation rules.

The court turned down the EWC’s request. The EWC appealed to the Landesarbeitsgericht.

Judgment

The Landesarbeitsgericht found that management had breached the EBRG on two counts: (i) it should have provided the information that it gave on 12 July before making its decision, not afterwards and (ii) it made its decision without consulting with the EWC. However, the EBRG contains no sanction for non-compliance other than a fine. It is silent as to whether a EWC can apply for injunctive relief. It lacks a provision, such as that contained in the German domestic Works Councils Act, allowing a court to intervene in management’s decision-making. The court saw no possibility of applying that provision by analogy.

Commentary

In my view this decision is in line with German law. The rights and obligations of a European Works Council are incomparably less far-reaching than those of a domestic German works council. Each institution is governed by different laws and one difference relates to the option to apply for injunctive relief.

Most large and medium-sized organisations in Germany have a works council. In the event management wishes to close down the organisation in whole or in part, it must consult with the works council with a view to concluding (i) a “compromise of interests” (*Interessenausgleich*, a document evidencing that closing down is the only viable alternative) and (ii) a social plan. In the “compromise of interests” document management must set out in detail why the closure is necessary. The social plan must specify, *inter alia*, the compensation offered to the redundant workers. In the event management and the works council fail to agree on a social plan, either of them can apply to an arbitrator. The arbitrator will then assess the company’s financial situation and the anticipated financial impact on the staff. Having done that, the arbitrator will come up with a proposal for a social plan and, if the parties do not accept the proposal, it will make a binding decision.

What if management closes down an organisation (factory, plant, office, department, etc.) without informing the works council and without having concluded a social plan? Can the works council apply for and obtain injunctive relief, for example, in the form of a court order to stop the closure and, where appropriate, undo measures that have been taken in preparation for or execution of the closure? The majority of Labour Courts of Appeal would answer this question affirmatively, basing their position on Article 23 of the Corporate Constitution Act (*Betriebsverfassungsgesetz* or *BetrVG*), which gives works councils the right to ask the courts to order management to refrain from implementing decisions that are prohibited and hence void. However, there is a significant minority of Labour Courts of Appeal that deny works councils the right to injunctive relief. The Supreme Labour Court (*BAG*) has yet to decide on this issue.

Given that it is uncertain whether a domestic works council can obtain injunctive relief, it does not come as a surprise that the court in the case reported here denied that right to a EWC, a body that basically has no more than information rights. There is no obligation on management even to attempt to reach agreement with a EWC. All management needs to do is hear what the EWC has to say.

Comments from other jurisdictions

Austria (Martin Risak): Austrian law is not very clear on the consequences of the employer not informing or not properly informing the works council about a transfer of an undertaking except to say that the employer is not subject to fines. There are no published lower court cases and the Supreme Court has not passed any decision on this question as yet. A recent and often discussed article (Kodek, *Einstweilige Verfügungen zur Sicherung des Informationsanspruchs nach §§ 108, 109 ArbVG bei beabsichtigten Betriebsänderungen*, *Das Recht der Arbeit* 2011, 517) argues that the works council should have the right to injunctive relief based on the obligation of Member States to enact, laws, when transposing EU Directives, that provide dissuasive, effective and proportionate sanctions for breaches. It is likely that works councils will bring claims based on this reasoning in the near future and that the question will need to be decided by the Austrian courts.

Subject: Information and consultation

Parties: unknown

Court: Landesarbeitsgericht Köln (Labour Court of Appeal, Cologne)

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