JOB SAFEGUARDING AS AN OBJECT OF THE RIGHTS OF INFORMATION, CONSULTATION, AND CO-DETERMINATION IN EUROPEAN AND GERMAN LAW

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I. CHANGE OF PARADIGM IN JOB SAFEGUARDING

The right of information, consultation, and co-determination of employees is experiencing a change in paradigm: Facing high unemployment[1] the emphasis changes from the regulation of contents of the employment contract to *job safeguarding* as presently the most important problem of the labor law.

This change of paradigm has effects on businesses as well as on employees. On the one hand, the businesses face a tendency toward a restriction of their autonomy of decision regarding the labor conditions. On the other hand, the employment relevancy of their economical decisions is questioned. The employees are encouraged to make their own contribution for their job safeguarding.

II. INFORMATION, CONSULTATION, AND CO-DETERMINATION REGARDING REDUCTION IN STAFF

Most notably, the preponderance of job safeguarding forms the right of information, consultation, and co-determination of the employees' representation about the reduction in staff. At the European level, this is reflected in the competence of the European works council. According to No. 3 of the annex to guideline 94/45/EG

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1. While in 1993 the unemployment amounted to 7.7% in the German Republic referring to inquiries of Eurostat, it amounted to 9.5% in 2004. According to calculations of the Statistic Federal Office, in September 2005 in Germany 11.2% of the depending civil employees, in new Federal States even 17.6%, were jobless. In the EU, having twenty-five member states the unemployment rate amounted to 9.0%. In some member states it is over 10%, in some even over 17%.

of the September 22, 1994, this competence explicitly includes the occurrence of extraordinary circumstances, which result in relocations, the closing of businesses, or in collective redundancies. In the *Renault* case, the French courts enforced this regulation by sanctioning the closing of a business without former information, consultation, and co-determination of the European works council, with the result that the closing could take place only with a three month delay.[2]

Further, guideline 98/59/EG of July 20, 1998, on the approximation of the laws relating to collective redundancies, has to be mentioned. Its Article 2 obliges an employer who plans to undertake redundancies of higher dimensions to consult the employees' representatives in due time with the intention of avoiding or limiting redundancies or to at least alleviate the effects by social accompanying measures, especially the assistance to find another disposal or a re-education for the released employer. The EuGH decided in 2005 that this consultation has to occur before the articulation of the redundancy and thus put special emphasis on the right of information, consultation, and co-determination.[3] At the same time, the employer's liberty to resign was restricted heavily with this decision.

In addition, guideline 02/14/EG of March 11, 2002, is to be mentioned, establishing a general framework for informing and consulting employees in the European Community. A reference clause in Article 4, paragraph 2, lit. c stretches the right of information, consultation, and co-determination onto collective redundancies, therefore the steps of procedure envisaged by this guideline have to be considered.

In Germany, in cases of staff reduction section 111 Betriebsverfassungsgesetz (BetrVG, Works Council Constitution Act) establishes the right of information, consultation, and co-determination. The violation of section 111 BetrVG is sanctioned by a fine regulated in section 121 BetrVG. The German law clearly exceeds the named European guidelines. First, it arranges a formalized procedure for a balance of interests, which, according to the jurisdiction of the Federal Labor Court, has to be finished before the reduction of staff can be performed.[4] Second, it makes arrangements for a participation right of the works council concerning the severance schemes ("Sozialplan"), by which either measures of

2. Cour d'Appell de Versailles of 7.5.1997, No 2780/90.
3. EuGH vom 27.1.2005 – Rs.C – 188/03 (Junk).
4. BAG vom 20.11.2001, EzA § 113 BetrVG 1972 Nr. 29.

transfer, like re-education or compensation may be enforced. But these rights are limited by the liberty of the employers: in any case, the employer may deviate from agreements about staff reduction for the price of compensations (§ 113, para. 1 BetrVG). Severance schemes cannot be enforced in case they are economically unsustainable for the undertaking, especially if its continuity is in danger (§ 112, para. 5, sentences 1–2, No. 3 BetrVG).

III. INFORMATION, CONSULTATION, AND CO-DETERMINATION IN ORDER TO PREVENTATIVELY SAVE JOBS

A. General Job Safeguarding

Accumulatively, the right of information, consultation, and co-determination apply to preventative job safeguarding as well. On the European level, the guideline about the European works council extends the scope of the annual information by the central management on the employment situation and its presumable development (Annex No. 2). The frame guideline for information, consultation, and co-determination of employees considers in its reasoning job safeguarding as a "superior aim" and explicitly mentions in Article 4, paragraph 2, lit. b that subjects of information, consultation, and co-determination are the employment situation, the employment structure, and the presumable employment development, especially in case of a risk for employment.

The German Works Council Constitution Act establishes a right of proposition as a strengthened right of consultation of the works council for the safeguarding and promoting of jobs. According to the new section 92a BetrVG, the works council may, for these purposes, make propositions for a more flexible handling of working time, for the promotion of part time and old age part time work, for new forms of work organization, for changes of the working procedures and workflow, for the qualification of employees, and for alternatives regarding the outsourcing of work or its placment at other businesses as well as for the production and investigation program.

But the works council still does not have a real right of initiative; it can enforce neither its decision about its propositions, nor the closure of corresponding works council agreements. The propositions made by the works council rather have to be debated between employer and works council. Debating thus does not mean that the employer has to explain its whole economical planning to the works council. In fact, he may restrict the debate on the concrete proposition made by the works council.

If the employer denies the propositions of the works council, he has to justify his decision. In businesses with more than 100 employees the justification has to be in writing. But the employer is only concerned with the obligation of justification in case the reason he does not accept the propositions is that he considers them to be "inappropriate." If the employer considers the propositions appropriate, but not necessary, or if he does not want to realize them for other reasons, an obligation of justification does not exist. The employer can fulfill his obligation if he reasons comprehensively why he considers the propositions not suitable to secure jobs or to promote employment in the business. He does not have to disprove the objective eligibility of the measure. If the employer does not fulfill his obligation to justify his denial, the labor court can commit him to a justification upon request of the works council and might, under the given circumstances, expose himself to a sanction according to section 23, paragraph 3 BetrVG.

If the employer and the works council agree upon a measure for job safeguarding, they can conclude a voluntary employer/works council agreement, if the arrangement in question is a social affair in terms of section 88 BetrVG. This is the case, for example, if agreements are made concerning a more flexible handling of the working time, the promotion of part time or old age part time work, or the management of qualification measures. Voluntary employer/works council agreements cannot be taken into consideration as far as economical questions are concerned, e.g., about the outsourcing or placing of working tasks or about a production or investigation program. In either event, the economical measures might be the subject of a balance of interests according to section 112 BetrVG.

B. Job Safeguarding by Qualification

On the European level, job safeguarding by *timely and adequate qualification* of the employees as a specific aim of the rights of information, consultation, and co-determination so far can only be discovered in Article 2, paragraph 2 of the guideline concerning collective redundancies, 98/59/EG. This article explicitly mentions help for another disposition or re-education of the released employees.

These regulations are exceeded as well by the German law. Since the reform in 2001, section 97, paragraph 2 BetrVG provides an enforceable right of co-determination in case the employer plans or

executes measures of the operational education that alter the occupation of the employees affected and thus their occupational knowledge and abilities do not suffice to fulfill their tasks anymore. In case of controversy, the arbitration committee finally decides (§ 97, para. 2, sentences 2–3; § 76, para. 5 BetrVG).

The right of co-determination presumes planning or execution of a measure by the employer, which will or at least in all likelihood may cause a deficit of qualification of the employees. A measure is planned, if the employer has already decided its realization. Only measures of the employer with operational reference are taken into consideration, for example a change of the technical constructions, of the working procedure, or of the workflow or the place of employment.

A deficit of qualification in terms of section 97, paragraph 2 BetrVG occurs if there is a serious concern that the *changes planned by the employer* cause a lack of occupational knowledge and abilities that may result in redundancies. A lack of qualification, which is not caused by the measure of the employer but by the employee himself, does not activate the right of co-determination according to section 97, paragraph 2 BetrVG. Even in cases of personal measure that, for the employer concerned, may entail a deficit of qualification, the works council cannot request a measure for his further education.[5]

A co-determination of the works council in the sense of section 97, paragraph 2 BetrVG is only requested in case of an *introduction of measures concerning the operational education*. Thus, the right of co-determination is restricted to the question of which measures of vocational training shall be made internally. Regarding the construction and equipment of educational measures and the participation on external measures of vocational training, the works council is restricted to its right of council in accordance with section 97, paragraph 1 BetrVG.

The job safeguarding in this manner is sanctioned indirectly by dismissal protection proceedings:[6] The behavior of employer and employee regarding such measures affects the requirements that are made under the angle of the ultima ratio concerning the validity of the redundancy personally caused. If the employer is in default with the measures of qualification, which were planned by co-determination with the works council, the requirements increase regarding his efforts

5. *Löwisch/Kaiser*, Betriebsgegerfassungsgesetz 5.Aufl. 2002, § 97 Rn.6; a.A. *Fitting*, Betriebsgegerfassungsgesetz, 22. Aufl. 2004, § 97 Rn.16.

6. Vgl. *Löwisch/Spinner,* Kiendigüngsschutzgesetz, 9. Aufl. 2004, Rn.191 i.V.m. 296.

to avoid redundancies. Alternatively, the requirements decline if an employee does not make use of a qualification offered.

IV. INFORMATION, CONSULTATION, AND CO-DETERMINATION ABOUT BUSINESS POLICY

Concerning the business policy, the guidelines about the European works council in No. 2 of the annex, as well as the general guideline about the information, consultation, and co-determination of employees in its Article 4, paragraph 2, envisage comprehensive information, consultation, and co-determination. This applies for the German law as well: according to section 106 BetrVG the economic matters committee has to be informed about all economic matters up to the presentation of the annual accounts (§ 108, para. 5 BetrVG).

In the European as well as in the German law, these comprehensive rights of information, consultation, and co-determination are limited by the *protection of trade and business secrets*: Article 8 of the guideline about the European works council and Article 6 of the general guideline about the information, consultation, and co-determination of employees enjoin the representatives of the employees from passing such information, which was given explicitly as confidential. In special situations or under certain circumstances, which are constituted in the single national laws, the guidelines additionally provide the right of the management, respectively that is the employer, to neglect information, consultation, and co-determination of the employees, in case it would interfere with or damage the activity of the business. Members of the works council or other office bearers according to the works constitution are obliged by section 79 BetrVG not to disclose or use trade and business secrets, which the employer explicitly called to be kept secret. According to section 106, paragraph 2 BetrVG, the employer does not have to inform the economic matters committee in cases of endangering of trade and business secrets.

A special conflict in this area is the relation between the obligation to inform and consult and the European guideline 2003/6/EG of January 28, 2003, about insider dealing and market manipulation. That is, the German law implementing this guideline about the improvement of the protection of investors from October 28, 2004: The question is whether information, consultation, and co-determination have to take place before an intended publication or if it should be held back with the intention of avoiding insider dealing. I consider the following.

The prohibition of unauthorized transfer of insider information before publication according to section 14, paragraph 2, No. 1 Wertpapierhandelsgesetz (WpHG, Securities Trade Act) only applies as far as a legal duty to pass information does not exist. In such a situation the transfer of information is authorized. As the rights of information, consultation and co-determination according to section 106, paragraph 2 and section 111 BetrVG are limited by the protection of trade and business secrets, the application of the prohibition of transfer mainly depends on the question of whether or not the trade and business secrets might be endangered by information, consultation, and co-determination of the works council, that is, the economic matters committee. So far, the prohibition of section 14, paragraph 1, No. 2 WpHG does not restrict the right of information, consultation, and co-determination of the works council and the economic matters committee any further than the principles for ensuring the trade and business secrets.

As a general rule, insider information is a trade or business secret indeed. But insofar as it is imperative that an endangering may only be exceptionally considered. Such an endangering occurs in case of an objective factual interest to maintain absolute nondisclosure as otherwise the continuance or development of the business would be threatened. Additionally, a precise apprehension that information is passed from members of the works council or of the economic matters committee notwithstanding despite their obligation to maintain secrecy has to exist.[7] To which extent these premises are given is a question of the single case. Also in connection with insider information it cannot generally be assumed that the trade and business secrets are endangered.

Likewise, it cannot be stated that the information of the works council or the economic matters committee avoids the protection of insider dealing. The nondisclosure of the members of the works council and the economic matters committee is a basic principle on which the works constitution is built. Without a precise indication for the circulation of trade or business secrets, an endangering of unauthorized insider dealing by third parties does not exist. Additionally, the members of the works council and the economic matters committee become insiders by the given information themselves, and therefore are themselves concerned by the prohibition of insider dealing. In cases of violations of the prohibition, the members of the works council and the economic

7. BAG vom 11.7.2000, BB 2001, 598 (600)

matters committee are, according to section 38, paragraph 1, No. 1 WpHG, threatened with an imprisonment up to five years with a fine. The law considers the criminal sanction to be a sufficient warranty to avoid insider dealing by so-called primary insiders.

Furthermore, a restriction on the right of information, consultation, and co-determination cannot be found in the fact that the members of the works council and the economic matters committee become insiders by the given information themselves.[8] The members of the works council and the economic matters committee indeed have to consider by themselves whether or not information has to be treated like insider information and, in cases of the passing of such information, they are threatened with considerable civil and criminal sanctions. But this is not unusual. The members of the works council and the economic matters committee steadily have to decide what information underlies the obligation to maintain confidentiality and thereby consistently faces the criminal sanctions of section 120 BetrVG. In principle, the Securities Trade Act does not make any higher demands. It might increase the risk that insider information shall neither be passed nor used irrespective of the description by the employer as confidential. But a member of the works council or of the economic matters committee, who cannot estimate whether the given information is insider information or not, may avoid the risk by awaiting the publication. If contrary to duty, insider information is not publicized immediately, the works council and the economic matters committee can urge the employer or business to publication. In case of need, the federal agency for financial services can be called (compare § 39, para. 2, No. 5; § 40 WpHG).

As far as a supervisory board is assigned with representatives of employees, as it would correspond to the German standard, this does also guarantee information, consultation, and co-determination. Indeed, information, consultation, and co-determination find their limits in the obligation to maintain confidentiality, which also applies to the representatives of the employees as well as to every other member of the supervisory board. This obligation shall prevent the transfer of information toward other representatives of the employees or toward the employees themselves. As far as the passing of insider information toward supervisory board members is concerned, further limitations do not exist compared to the restrictions concerning the

8. So said by Gerhard Röder & Frank Merten, *Ad–hoc Publizitätpflicht bei arbeitsrechtlich relevanten Maßnahmen*, NZA 2005, 268 (272).

information of the members of the works council and the economic matters committee. A nondisclosure of insider information is justified only in cases of precise endangerment by insider dealing by the members of the supervisory board. This is substantiated by Article 2, paragraph 1 UA 2(a) of guideline 2009/6/EG and section 13, paragraph 1, No. 1 WpHG (old version), which obviously assumes a principle obligation to inform the members of the supervisory board because they clearly enumerate the members of the supervisory board as primary insiders.