Downsizing and industrial law

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Meanwhile downsizing is no longer just a synonym for the appreciation of cars due to their reduction in size. In the last few years the automotive industry as a pioneer has applied the downsizing effect also to its affiliated groups and companies and optimized its balances mainly by outsourcing. Also in many other industries the hive-off of companies and departments has become a popular means of downsizing one's own company and thus consolidating one's own balance by cost-cutting. Most commonly services like data processing and transport business, yet increasingly also fields like marketing or cleaning services.
Also for German companies downsizing is of great interest, especially in view of the rating process with the banks' lending policy. However, whereas restructuring, outsourcing or shutdowns of companies or departments world-wide can be accomplished without any real problems German entrepreneurs are faced with a lot of legal problems often right from the outset posing almost insurmountable obstacles due to the strictly regulating and pro-employee German industrial law.

A current example of this is the German transposition of the EC directive 2001/23/EC on company transfer by the amendment to section 613a BGB (Civil Code), which came into force on 1st April 2002. The EC directive provides that an employer who sells a company has to inform their employees of the reason and consequences of the company transfer. The German transposition of this directive, however, is even more far-reaching. Without giving any concrete clues as to the scope and content of the duty to provide information far-reaching consequences are provided for in case the selling employer infringes this duty. For in this case any employee affected can oppose the transfer of their employment relationship with the company to the purchaser for an unlimited period of time (i.e. even after several years). The consequence of this is that the employer, who sold their company possibly some years ago, suddenly has their former employees again under contract.
Despite major doubts from legal experts these regulations have become law and thus another incalculable risk for entrepreneurs willing to sell has been cemented.

A not insignificant risk factor with restructuring, shutdowns, outsourcing or company sales is the existence of a works council. Due to the Employees' Representation Act German members of the works council are provided with an extensive range of co-determination and participation possibilities with operational measures. If a company has a works council it is almost impossible for the corporate management to accomplish operational changes without having reached an agreement on them with the works council before.

For instance, even simple staff cuts from a certain order of magnitude on, which do not imply any further structural changes to the company, are considered a change in plant operations, in which the works council has to have a say. As a basic value in general an order of magnitude of 5% of the staff cuts can be assumed. If the employer plans such staff cuts, they have to reach a balancing of interests in order to compensate the employees for the disadvantages caused. If the employer makes such staff cuts without involving the works council before, this alone implies that the employer has to compensate all employees concerned for the disadvantages caused with money (statutory compensation for detrimental effects in accordance with section 113 BetrVG (Employees' Representation Act)). The statutory

compensation for detrimental effects also applies if the employer deviates from the agreed balancing of interests while making the operational change or staff cuts.

Another current example of a legal obstacle, which can paralyze restructuring and rationalization in the personnel field, is a decision hot off the press of the Federal Court for Social Security (reference: B 11 AL 100/01). The Federal Court for Social Security has decided that employees who enter into a termination contract with their employer concerning their employment of relationship must reckon on a suspension unemployment benefit payment unless they can prove that they would have been effectively made redundant if they hadn't signed the termination contract. Special attention has to be paid to the little word "effectively" for this means that the employee has to legally check already before signing the termination contract whether the possible dismissal would even be valid before an industrial tribunal. Since this is simply impossible the employee will have no choice but to renounce the termination contract, be given notice and than have the validity of the dismissal checked in dismissal protection proceedings – all this just in order not to lose their claim to unemployment benefit. Thus a stop is put to a flexible company organization by personnel changes or adaptations by means of termination contracts; instead lengthy legal proceedings will precede any personnel restructuring in future.

A special constellation will be the case if a not insignificant number of employees opposes a company transfer (e.g. more than 5% of the staff) and these employees thus stay with the old employer, who, however, can no longer offer them any jobs on account of the company transfer. As far as dismissal protection is concerned, as a rule operational dismissals due to loss of jobs will be the consequence. As far as industrial constitution law is concerned, however, first there is the duty to hear the works council in accordance with section 102 BetrVG as well as possibly the duty to reach a balancing of interests. First and foremost the question arises of which works council is to be involved: the one which was transferred with the company and which now exists with the purchaser of the company or a possible central works council of the old employer? It is practically impossible to consider these legal as well as fiscal niceties in the run-up of a company transfer correctly and completely without any legal assistance. However, for that very reason it is absolutely necessary to seek advice from a lawyer already in advance for when the company transfer or the operational change has been completed such mistakes or omissions can hardly be made up for. For the court bases its judgement on how the employer should have acted legally correct at the time of their respective decision.