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TRANSFER TO ANOTHER POSITION—NOW WITH SOCIAL SELECTION?

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Regular readers of *German Labor & Employment News* know that under German law, termination of employment for operational reasons requires employees to be grouped according to social criteria, such as age, seniority, and number of dependents, so that the employer can identify those most in need of protection from dismissal. However, a new judgment of the German Federal Labor Court (*Bundesarbeitsgericht*; BAG) clarifies that such considerations might be appropriate in the case of transfers within the company as well. The judgment also offers the opportunity to analyze current case law on such transfers in general.

THE NATURE OF TRANSFER

Not every detail pertaining to an employee's work performance can be stipulated in his or her employment contract. For this reason, employers have the right to issue instructions to their employees, pursuant to Section 106 of the German Industrial Code (*Gewerbeordnung*; GewO). This section provides that, subject to other provisions in the employment contract, collective bargaining agreements, or shop agreements, employers may *determine the content, place, and time of the work*

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performance at their reasonable discretion. This also forms the legal basis for employee transfers to new positions or locations. In other words, a transfer may be considered an application of the right to give instructions. A legal definition of "transfer" is provided by Section 95 of the German Works Council Constitution Act (*Betriebsverfassungsgesetz*; BetrVG), which holds it to be the assignment of another work area that is expected to exceed the term of one month or involves a considerable change in the circumstances under which the work is to be performed.

TRANSFER AS PART OF THE EMPLOYMENT

According to the foregoing, transfers may be assigned even if the employment contracts lack provisions pertaining to them. However, such provisions are quite common. For instance, with respect to the *content* of the work to be performed, contracts often stipulate that, in addition to the work originally or mainly agreed upon, "other work corresponding to the knowledge and qualifications of the employee" may be assigned. Provisions regarding the *place* of the work performed are common as well; a contract might state that the work is "also to be performed at another place within Germany." Provisions of this kind are regarded partly as a clarification of the right to issue instructions and partly as a limitation of the employer's scope of discretion in doing so.

Determining what the employer may order within the scope of reasonable discretion is often of considerable practical importance, because anything that is not covered by reasonable discretion must be mutually agreed upon by the employer and employee or, as the case may be, enforced by the employer by means of a "change termination" (*Änderungskündigung*)—a dismissal that offers the employee the option of remaining employed under other conditions. Neither a mutually agreed-upon change nor a change termination will be an application of the employer's right to give instructions. But because the right to issue instructions may not apply in a given case, the change termination, employed as a precautionary measure, is usually more favorable to the employer, unless an agreement can be reached between

the parties. In many cases, the employee accepts the altered employment circumstances offered by the change termination while filing an action against the validity of the changes. If the employee wins, his or her initial employment circumstances are retained; if the employee loses, he or she at least retains employment under the less favorable conditions. If the court finds that mere instruction would have been possible, the legal concept of the "dispensable change termination" will apply, which was last addressed by the BAG in its judgment of July 19, 2012 (2 AZR 25/11). Earlier, the BAG dismissed as unfounded the action taken by an employee against a change in the employment contract (BAG, judgment dated January 16, 2012, 2 AZR 102/11).

In this judgment, the plaintiff's employment contract provided that the employee could be relocated "within Germany." However, the employer effected a change termination in order to relocate the employee. The BAG concluded that the more general the contract terms are that stipulate the employee's work location, the broader the employer's right is to unilaterally assign the employee to a different work site. It held that a change termination was not required in this particular case, since "the contractual conditions allegedly yet to be brought about have already been applicable." The employee's action was therefore unfounded.

In view of transfer clauses, the employer must use reasonable discretion, but there are further limitations to be taken into account. Transfer clauses are regularly to be regarded as clauses constituting *general terms and conditions*. Thus, they are subject to the provisions of Sections 305 *et seq*. of the German Civil Code (*Bürgerliches Gesetzbuch*; BGB). In principle, this allows for an examination for reasonableness (Section 307 Para. 1 Sentence 1 BGB) and an examination for transparency (Section 307 Para. 1 Sentence 2 BGB) by the court. However, stipulating a certain place of work is simply considered a determination of the employee's main duty and is not subject to an examination for reasonableness. The same is true if a place of work is specified and a transfer clause also exists, since the clause provides for nothing more than what would apply under Section 106 GewO anyway regarding the right to issue instructions. In such a case, the employer reserved the right to specify only the contractually agreed content of the work, not a change of the contents of the contract.

Therefore, what is required is not an examination for reasonableness, but an examination for transparency as to whether the chosen provision is comprehensible. The examination for reasonableness is necessary only if the interpretation of the clause shows that the employer reserved the right to change the contract (BAG, judgment dated January 16, 2012, 2 AZR 102/11). If the result reached in this context holds the transfer clause to be invalid—for instance, if it was far too broad—the court will not reduce it to the reasonable degree, but will leave it out of consideration and apply Section 106 GewO instead. With respect to the place of work originally agreed upon, however, this would specifically mean that a transfer to another place was no longer possible.

SELECTION DECISION IN CASE OF TRANSFERS

The transfer legislation was last amended with regard to the reasonableness decision by the BAG judgment dated July 10, 2013 (10 AZR 915/12; Press Release No. 45/13). The judgment was based on a case in which the plaintiff was initially employed by the German Federal Employment Agency on the basis of a fixed-term contract. Due to a change in the case law, the Federal Employment Agency extended the employment contracts of the plaintiff and other temporary employees for an indefinite period of time (i.e., acknowledged them as contracts of unlimited duration). This, however, resulted in a local surplus of personnel, a situation the agency tried to resolve by transferring some of the formerly temporary employees to other locations. The plaintiff considered the transfer unreasonable "on the basis of her personal circumstances" and also deemed the selection decision to be wrong. She disputed the policy of transferring only persons who had previously had fixed-term contracts, while employees who had been employed from the outset in permanent positions were not included. According to the BAG, this practice was indeed contrary to reasonable discretion, so the transfer of the plaintiff was held to be invalid.

This decision means that employers must use their reasonable discretion to consider not only the employees to be transferred, but also their relation to the other employees. Employers are therefore advised to form selection groups of employees, comprising not just the employees directly affected by the conditions mandating the transfer, but their coworkers as well. This practice of forming "correct" selection groups is strongly reminiscent of the legal mandate to create social-selection groups in the case of dismissals for

operational reasons—admittedly a difficult task, but one that may prevent questions later. It is also a step the Federal Employment Agency failed to take.

In this particular case, the agency certainly could not be accused of arbitrariness, since the surplus of personnel resulted from a change in the case law, and the attempt was made to reduce the surplus where it arose, i.e., among the persons for whom there had actually not been permanent positions. However, according to the BAG decision, the necessity of a transfer should have an impact not just on the persons affected by the pertinent cause, but on their coworkers as well, who presumably do not want to be transferred either. The precise demarcation, however, remains unclear. Therefore, the present decision must definitely be viewed critically. The BAG's approach, which resembles a social selection, will in any event render it even more difficult in the future to make a legally certain prior assessment of an employer's reasonable discretion.

EMPLOYMENT RELATIONSHIP WITH CROSS-BORDER IMPLICATIONS: PARTICULARITIES IN DISMISSAL PROTECTION

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The effects of globalization are increasingly being felt in our professional lives. In employment relationships under German law, dismissals at companies that have foreign subsidiaries may raise specific legal questions in terms of dismissal protection.

This typically applies in the following cases:

- A company with a registered office abroad employs several thousand employees worldwide; in Germany, this company maintains only a small sales office with fewer than 10 employees. Does the German Protection Against Dismissal Act (*Kündigungsschutzgesetz*; KSchG) apply?
- A company resident in Germany relocates its production to a bordering country and maintains an establishment with vacant positions in Germany. The employees in Germany are dismissed for operational reasons because there are no options to employ them in Germany. Is the employer obligated to offer the employees—as a "milder instrument"—continued employment in an establishment abroad or, preferably, to give notice of a change termination (*Änderungskündigung*) with the option of reemployment in such place?

INTERNAL APPLICATION OF THE PROTECTION AGAINST DISMISSAL ACT: OPERATIONS IN GERMANY

According to Section 23 KSchG, the provisions of the general protection against dismissal apply only to companies that regularly employ more than 10 employees. The German Federal Labor Court (*Bundesarbeitsgericht*; BAG) holds that if cross-border implications are involved, only the employees employed in Germany are to be considered. (In this respect, see the BAG judgment dated January 17, 2008, 2 AZR 902/06.) The case in question related to a company located in Belgium that employed 25 employees there and three sales representatives in Germany; for the employees in Germany, the application of German (labor) law had been expressly agreed upon. The company terminated the employment relationships of the three sales reps for operational reasons. The KSchG was not applied, since the threshold value of 10 employees had not been reached, and the employees in Belgium were not to be included. The geographic scope of the KSchG is thus limited to the territory of the Federal Republic of Germany, and the employee's constitutional complaint against the BAG's judgment was not accepted for decision by the German Federal Constitutional Court (*Bundesverfassungsgericht*) (decision dated March 12, 2009, 1 BvR 1250/08).

An exception to the mandate to count only employees within Germany for purposes of Section 23 KSchG arises in the case of employees working outside Germany who had been posted abroad by the German establishment on a temporary basis.

SIX-MONTH WAITING PERIOD IN EMPLOYMENT CONTRACTS ACCORDING TO FOREIGN LAW?

The general protection against dismissal applies only if the employment relationship has existed in the same establishment or company without interruption for more than six months (Section 1 KSchG). If, within that six-month period, several employment relationships were maintained with the employer that followed one another without interruption, an "uninterrupted" employment relationship is then typically to

be assumed. This applies also if the previous contractual relationship was maintained with the same employer abroad and was governed not by German employment contract laws, but by foreign ones. The BAG judgment of July 7, 2011 (2 AZR 12/10) dealt with such a case.

This case involved the P Bank, a member of the P Group (a financial services provider) and one of the major banks in the Baltic countries, with a registered office in the Latvian capital of Riga. The bank opened one branch office in Berlin and one in Munich. At first, the employee in question concluded an employment contract drawn up in Latvia under Latvian law. After a one-month induction in Latvia, he was deployed in Germany, and the parties concluded a new employment contract under German law. When the bank later terminated the employment relationship, the parties disputed whether the employment periods of the two employment relationships should be added up so that the waiting period for the application of the KSchG would be fulfilled. The BAG held that the employment period covered by the employment contract concluded under Latvian law should be considered despite the contractual changes effected in the meantime.

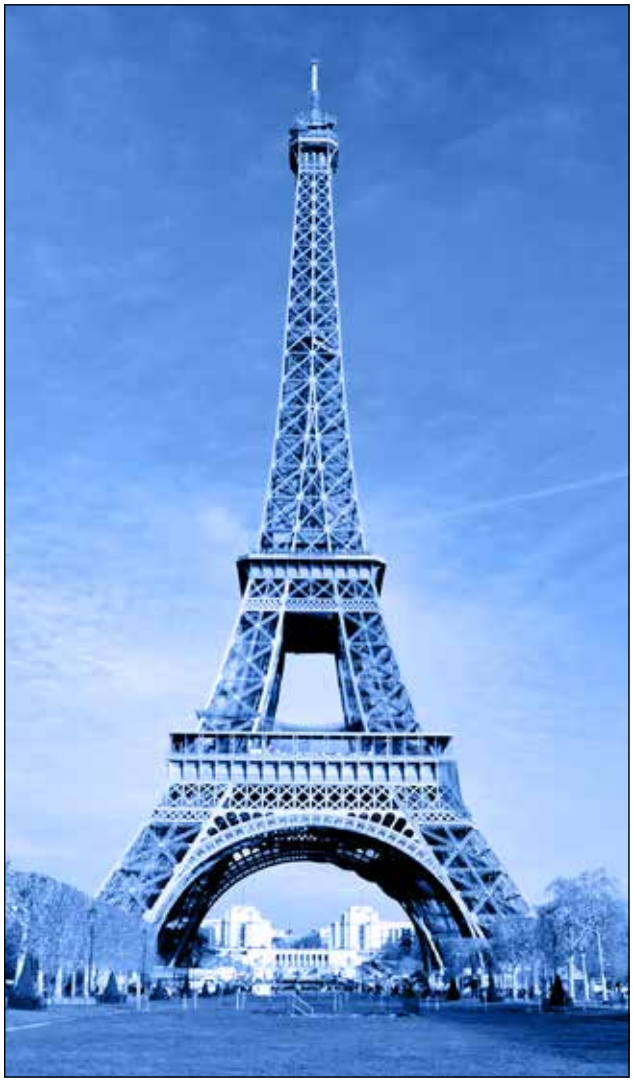
EXAMINATION OF POSSIBLE CONTINUED EMPLOYMENT IN AN ESTABLISHMENT ABROAD

In the event of a termination for operational reasons, the employer is not supposed to be obligated to offer possible continued employment in an establishment abroad or, preferably, to give notice of a change termination with the option of reemployment in such place.

This was decided by the BAG in a decision dated August 29, 2013 (2 AZR 809/12—currently available only as a press release) after diverging decisions had been passed by the courts of lower instance (decisions of the Appellate Labor Court of Hamburg dated March 22, 2011, vs. the Appellate Labor Court of Düsseldorf dated July 5, 2012, and the Appellate Labor Court of Berlin dated May 5, 2011).

The plaintiff was employed in a company that operates one establishment in Germany and one in the Czech Republic. The company management made the entrepreneurial decision to close down the German plant and to produce only in the Czech Republic in the future. The employee was given notice of termination for operational reasons; the company did not offer her a position in its Czech plant.

Even the lower-instance court (the Appellate Labor Court of Düsseldorf) held the view that the termination was effective; the employer did not have to offer the employee a vacant position in the Czech Republic. Only an organizational unit or part of a company that is located in Germany can be regarded as an establishment or company within the meaning of the KSchG, under which vacant positions must be offered—a milder instrument than a termination of employment.



The Appellate Labor Court of Hamburg had previously assessed this question differently, deciding that vacant jobs in an establishment abroad exclude the employer's argument that the termination of employment for operational reasons is justified within the meaning of Section 1 KSchG.

The BAG's current decision is of major relevance to the practice, since plants are increasingly operated across borders, and continued employment is no longer restricted to the geographic scope of the KSchG. The continued employment of an employee that ought to be enforced by the employer by way of a change termination would have far-reaching legal consequences, since the employee would leave the scope of application of German law as a result of the change termination. In the case described previously, if the BAG had recognized a need for a change termination, the employee would have continued to work under Czech labor and social law in the future, and the change termination would need to be examined for reasonableness by a German court pursuant to Section 2 KSchG. The affected employee would be obligated after the expiration of the change-termination period to work abroad until a final decision was made regarding the changed working conditions. It would also mean that the employee would be forced, at least temporarily, to leave the German social security system and join the foreign one.

CAPITAL INVESTMENT COMPANIES: NEW DUTIES TO INFORM THE WORKS COUNCIL– IMPLEMENTATION OF THE AIFM DIRECTIVE INTO GERMAN LAW

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Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (the "AIFM Directive") had to be implemented into national law by July 22, 2013. The goal of the directive was to set common requirements for the admission and supervision of alternative investment funds ("AIFs") in order to limit risks for investors and markets within the European Union ("EU"). "Alternative investment fund" is defined as "any collective investment undertaking, including investment compartments thereof, which collects capital from a group of investors in order to invest it according to a determined investment strategy for the benefit of the investors concerned." The group to be controlled comprises alternative investment fund managers ("AIFMs"): legal persons whose task is to manage alternative investment funds.

With the Act on the Implementation of the AIFM Directive, which took effect on July 22, 2013 (*AIFM-Umsetzungsgesetz*), Germany created several new regulations intended to provide small investors with greater protection against risky

investments: all funds are now subject to the supervision of the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*; BaFin), and private investors can no longer acquire shares in hedge funds. In addition, Article 1 of the AIFM Implementation Act established the Investment Code (*Kapitalanlagegesetzbuch*, KAGB), which contains, *inter alia*, special information duties of AIFM.

INFORMATION DUTIES UNDER THE KAGB IN THE CASE OF COMPANY ACQUISITIONS

In Sections 287–292, the KAGB contains special provisions pertaining to company acquisitions by AIFs, i.e., for AIFs that take control of nonlisted companies and issuers. AIFMs are obligated to ensure transparency and to notify the shareholders as well as the employees of the companies of the acquisitions in due time. Corresponding rules apply to the taking of control with respect to issuers.

IN DETAIL

If an AIF (solely or jointly with another AIF) takes control of a nonlisted company, the AIFM must inform the company, the shareholders, and the BaFin about the acquisition of control and must ask the board of the company to inform the employee representatives (i.e., the works council) or, if there are no employee representatives, the employees themselves, using its best efforts to ensure that this information is provided (Section 289 KAGB).

Section 290 KAGB determines the content of what is to be disclosed when taking control. According to this section, the AIFM is obligated to provide the following information:

- The identity of the AIFM;
- The principles established for the avoidance and management of conflicts of interest, particularly among the AIFM, the AIF, and the company, including information on safety measures which have been taken to ensure that agreements between the AIFM/AIF and the company are concluded as between business partners which are independent from each other;
- The principles for external and internal communication with respect to the company, particularly with the employees;
- The intentions of the AIF regarding future business development; and
- The expected impact on employment, including material changes in working conditions.

Section 291 KAGB contains special provisions regarding the information in annual financial statements and the management report in the case of a change in control. The AIFM is obligated to use its best efforts to ensure that the annual financial statements are prepared and provided to the employee representatives within the statutory period. The report has to contain the following information:

- Events of special relevance that have occurred after the end of the business year;
- Expected developments in relation to the company; and
- Information on the acquisition of the company's own shares.

SANCTIONS

An administrative offense is committed by: (i) any person who, in breach of Section 289 KAGB, does not effect, or does not correctly, completely, or in due time effect, a notification, provision of information, or communication pertaining to such an acquisition; or (ii) any person who, in breach of Section 290 KAGB, does not present, or does not correctly, completely, or in due time present, any information or detail pertaining to the acquisition. The offense may be punished by a fine of up to €100,000.

"UNLIMITED" IS NOT "TEMPORARY"

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Since the German Act on Temporary Employment (*Arbeitnehmerüberlassungsgesetz*; AÜG) was revised at the end of 2011, employers may deploy leased employees on a "temporary" basis only. However, the legislation did not clarify what this specifically means. Now, the German Federal Labor Court (*Bundesarbeitsgericht*; BAG) has held that the term covers more than just a declared goal without any consequences for companies that fail to observe it. Nevertheless, companies will find other ways to avoid offering permanent employment: for instance, by means of outsourcing and by issuing contracts for work and services.

The BAG did not decide how long "temporary" actually is. However, the judges pointed out that more than just a basic

meaning is attached to the temporary character of employee leasing under the AÜG. The case dealt with the hiring of leased employees pursuant to Section 1 Para. 1 Sentence 2 AÜG, which itself may be only "temporary," since a revised version of the law has been applicable since December 1, 2011, and explicitly provided for the requirement of a temporary character.

On July 10, 2013, the BAG decided that the deployment of leased employees without any time limitation is inadmissible. Therefore, if the employer declares the planned employment to be permanent, the works council is entitled to withhold its consent to the hiring of a temporary worker pursuant to Section 99 of the German Works Council Constitution Act (*Betriebsverfassungsgesetz*; BetrVG) (judgment dated July 10, 2013, 7 ABR 91/11).

The judgment will probably inconvenience many employers that intended to draw on a personnel reserve of temporary employees in response to uncertain staffing needs.

"TEMPORARY" MEANS "LIMITED IN TIME"

The definition of the term "temporary" introduced by the legislation at the end of 2011 was controversial. Some people considered it just a declared goal, since legal consequences for failing to comply with the recommendations for leased employees had deliberately been omitted. Others considered the criterion to be satisfied only if a factual reason for a time limitation approved by the German Act on Part-Time Work and Fixed-Term Employment could be affirmed.

In the present case, the employer had expressly stated that it intended to deploy the temporary employee without any time limit instead of a permanent employee. This allowed the BAG to take the easy way out: declaring the hiring to be invalid on the basis that an employment relationship unlimited in time cannot be "temporary." According to the BAG, the criterion serves to protect temporary workers and is intended to prevent the hirer's staff from being divided into permanent and leased employees.

In practice, however, there is still no indication as to how long "temporary" can be. It is clear only that there must be a limitation in time.

NEW WAYS: TIME LIMITS, OUTSOURCING, CONTRACTS FOR WORK AND SERVICES

After this judgment, employers will presumably no longer make the mistake of referring to the leased position to be filled as a "permanent" job. It is simply not allowed to deploy a leased employee for an unlimited period in a certain job.

Sometimes companies get by with the hiring of temporary workers on a quarterly basis or by extending their contracts. If the works council refuses its consent, employers may apply to the labor court for a decision in lieu of the works council's consent pursuant to Sections 99 and 100 BetrVG. Employers substantiate these applications by stating that the employment is "urgently required for factual reasons," e.g., due to a temporary boom in orders. As soon as the application has been filed with the court, temporary workers can be hired, i.e., even prior to the court decision. Depending on the court's workload, the quarter may end before the court hears the case, enabling the employer to withdraw the application for a decision in lieu of consent before the court makes the decision. Time is therefore on the employer's side in this context. While it is possible that the works councils and labor courts will attempt to prevent this practice, a clear tendency to apply the provisions of the AÜG restrictively may be identified among the courts.

Given the strict employment protection in Germany, companies will presumably look for alternatives to employment assignments unlimited in duration. Among the possibilities

are fixed-term employment assignments, which are allowed for up to two years without requiring factual reasons; the outsourcing of entire production steps; or the much-disputed "service contracts," which differ from employment agreements in that they are aimed at defined achievements rather than just work.

REFUSAL OF THE COMPANY PENSION ADJUSTMENT—REQUIREMENTS AND CONSEQUENCES

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Pursuant to Section 16 of the German Company Pension Act (*Gesetz zur Verbesserung der betrieblichen Altersversorgung*; BetrAVG), employers must examine the possibility of adjusting the benefits provided by the company pension scheme every three years and must then decide on an adjustment at their reasonable discretion. Within the scope of the examination, the interests of the pension recipient and the financial situation of the employer are among the most important factors to take into account. However, few paragraphs of the BetrAVG have imposed more imponderable financial burdens on employers and have led to more legal uncertainty than this one, as the legislation, having provided only abstract wording, did not establish specific criteria for the examination of the employer's financial situation. The provision of details and the establishment of principles guiding the employers' responsibilities have been left to the case law.

The following article discusses the conditions under which an employer may refuse to grant an adjustment of company pensions in whole or in part.

REFUSAL TO ADJUST BENEFITS (NONADJUSTMENT) DUE TO THE EMPLOYER'S FINANCIAL SITUATION

First of all, the employer must examine whether an adjustment is required. If so, the employer is legally justified in refusing to adjust benefits only if it can prove and document that the company's financial situation is at risk.

The risk that the company could collapse is not the only legal justification for refusing an adjustment. An adjustment obligation may not be imposed in the expectation that the company will be able to use its assets to cover the anticipated

additional costs; a company obligated to pay pension benefits should not be weakened for the long term in such a manner that it will be exhausted or that jobs will be put at risk due to the adjustment burden. A pension adjustment should be provided only if it is possible to finance the costs thereof with the proceeds of the company and its increase in value.

The German Federal Labor Court (*Bundesarbeitsgericht*; BAG) has always viewed an adjustment of company pension obligations as the rule, permitting nonadjustments only in exceptional cases. If an employer invokes a nonadjustment due to the company's financial situation, it must base its arguments primarily on the need to maintain company operations and jobs. Because the company must have a sound financial base, the employer is required to increase company pensions only if the adjustment is secured for the long term with future proceeds and an increase in the value of the company.

The basis for this is a reasonable interest on equity capital, which is assumed by the BAG if the interest on equity capital corresponds, at a minimum, to the interest rate for long-term yield on public-sector bonds plus a risk markup of 2 percent. If the equity is exhausted or if this minimum equity return is not generated, an adjustment does not have to be made. However, it is not sufficient to simply refer to insufficient interest on equity capital. Instead, a retrospective assessment for the past three years and a forecast for the next three must be made. The BAG does not deem a shorter assessment period to be representative of the company's financial situation.

To determine whether a company has met the aforementioned criteria, the BAG requires a complete, uninterrupted history of the company's financial situation, provided by commercial annual financial statements such as balance sheets, income statements, and management reports; isolated statements on the development of the company's order situation, profitability, investment requirements, or commercial profit and/or tax balance-sheet profit are not sufficient. Moreover, the employer has the full burden of proving the company's financial situation. (However, because court hearings are generally public in Germany, the court might exclude the public from such a hearing if there is a chance the proceedings will expose the company's proprietary secrets to competitors.) Thus, the company has comprehensive explanation and disclosure obligations which affirm the basic opinion of the BAG that the refusal to adjust pension benefits is supposed to be an exception.

SPECIAL CASE: LIABILITY WITHIN THE COMPANY GROUP

If the company's financial situation is bad, the pension recipient might attempt to point out the more favorable situation of a wealthy parent company. In such cases, a new question arises: Within the scope of an adjustment decision, to what extent may the pension recipient resort to the parent company?

A. Principle: The Financial Situation of the Individual Group Company Is Decisive

At first, the principle applies that the adjustment obligation is generally incumbent on the company that made the pension commitment or acquired it by way of legal succession. The employer's integration into a group does not allow for deviation from this principle, since the employer is regularly the company with which the employee concluded an employment contract, not the parent company. The group relation does not change anything about the independence of the legal persons involved or the separation of their respective assets. Accordingly, reference cannot be made to the group in general, although in rare cases, the financial situation of the parent company may be taken into consideration.

B. Exception: Recourse to the Parent Company

Recourse to the parent company when assessing the financial situation (*Berechnungsdurchgriff*) of the pension debtor requires a synchronism of attribution, on the one hand, and internal liability, on the other, in the sense of an obligation to meet the claims/liability of the other group company vis-à-vis the pension debtor. If the claim for an adjustment of company pensions is asserted against the pension debtor because the parent company's favorable financial situation is attributed to it, it must be legally possible for the pension debtor to transfer this burden to the parent company, i.e., refinance itself at the parent company.

Such a close financial relation between the parent company and the pension debtor regularly exists if a *control agreement was concluded between the companies. The BAG has not yet decided whether this also applies with respect to a profit-and-loss transfer agreement.* Under older case law, the *close financial relation* was also deemed to exist if de facto consolidated companies (*qualifiziert faktischer*

Konzern) were concerned. This was assumed if the controlling company had permanently and comprehensively managed the business of the controlled company. However, a *close financial relation* alone is not reason enough to resort to the capacity of the parent company. A company's financial capacity can be significantly determined by developments of the group to which it belongs; if a pension debtor lacks financial capacity because its parent company exercised its managing power without due regard for the pension debtor's interests, it is possible, according to the BAG, for the pension debtor to have recourse to the parent company so that the financial situation of the parent company is decisive.

NOTIFICATION OF EMPLOYEES IN THE EVENT OF A NONADJUSTMENT

To the extent that, according to the foregoing, an employer is justified in its decision not to provide an adjustment in pension benefits, the employer must, comprehensively and truthfully, describe the financial situation of the company to the pension recipient in a notification letter.

If the employer presented the financial situation in writing to the pension recipient in such manner and also pointed out the possibility of an objection to the nonadjustment, as well as the consequences of a delayed objection, and if the pension recipient consequently failed to object in writing within three calendar months of his or her receipt of the notification, the adjustment is deemed to have been justifiably not effected (Section 16 Para. 4 Sentence 2 BetrAVG). The pension debtor is thereby released from the "subsequent adjustment" previously affirmed by the BAG; i.e., the pension debtor will not have to catch up with an adjustment even if the financial situation improves at a later date. If the pension recipient exercises his or her right to raise an objection, the court will determine whether the nonadjustment was justified. Therefore, employers are advised to carefully document the adjustment examination and its results (providing an appropriate expert opinion, if necessary) in order to be able to provide the court with proof of the company's bad financial situation.

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JONES DAY GLOBAL LOCATIONS

ALKHOBAR	COLUMBUS	IRVINE	MOSCOW	SÃO PAULO
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ATLANTA	DUBAI	LONDON	NEW YORK	SILICON VALLEY
BEIJING	DÜSSELDORF	LOS ANGELES	PARIS	SINGAPORE
BOSTON	FRANKFURT	MADRID	PITTSBURGH	SYDNEY
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CLEVELAND	INDIA	MILAN	SAN FRANCISCO	WASHINGTON