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Contents

Foreword

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Ladies and Gentlemen,
Dear Clients,

We are pleased to provide you with a new edition of our Forum Juris Newsletter which deals with current court decisions and other legal topics of high practical relevance.

The Federal Supreme Court recently had to decide on the question of whether a subscriber in connection with a capital increase has a right of rescission and/or is entitled to claim damages in the event of the failure of the capital measure. We would like to inform you about the practical implications of this decision as well as about those of a recent decision of the Higher Regional Court of Frankfurt am Main dealing with warranty claims based on an accounts warranty. The case confirmed that both buyer and seller need to be very careful with accounts-related warranties and the specific wording of such warranties. Please see our relevant recommendations.

Furthermore, we will point out what requirements must be met as regards the evidence of the powers of representation of a UK PLC director and refer to a judgement of the Federal Supreme Court regarding the liability of a director of a UK Limited which is subject to insolvency proceedings in Germany.

We hope that we have selected interesting topics for you and that you enjoy reading our newsletter. Should you have any questions as to the individual articles in this edition or suggestions regarding our Forum Juris Newsletter, please do not hesitate to get in touch with your contact persons.

And do not forget to make use of our Deloitte Legal Dbriefs webcast program which is designed to help you stay up to date on legal trends in Germany and abroad. For more information, please visit:

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Kind regards

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Evidence of power of representation of a UK PLC director

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By a court order dated January 26, 2015 (12 W 46/15), the Higher Regional Court of Nuremberg ruled that a certificate of authority of a German notary for the director of a UK PLC based on mere inspection of the UK Companies House register is not sufficient even if all directors participated in the application for registration with the German Commercial Register.

Facts of the Case

In the present case, an application for registration of the amendment of the Articles of Association of a German GmbH was filed with the German Commercial Register. The filed certificate of authority for the only two directors acting on behalf of the shareholder of the GmbH – a UK private limited company (PLC) – was issued by a German notary. The application was rejected by the German Commercial Register since the certificate was deemed not to be sufficient, as it was based on a mere inspection of the Companies House register.

Court Ruling of the Higher Regional Court

In the appeal proceedings the OLG Nuremberg confirmed the decision of the German Commercial Register and its general obligation to verify the power of representation of acting directors, including those of non-German companies, in connection with an application to the German Commercial Register. The mere inspection of a foreign companies register shall only be sufficient in cases, where it has judicial competence that corresponds with that of the German Commercial Register. According to the OLG Nuremberg, the Companies House is not legally comparable to the German Commercial Register since - unlike the German Commercial Register - Companies House does not verify the authority of acting directors when making registrations.

Since the power of representation of a UK director is regulated in more than one law and further UK case law applies, a notary's certificate shall only be sufficient if it contains the confirmation that the notary obtained his or her knowledge by examining the company's corporate documents by explicitly making reference to these documents. This shall even apply if all registered directors participated in the application for registration with the German Commercial Register.

Practical Advice

The OLG Nuremberg confirmed the higher court's rulings insofar as German notary's certificates based on inspection of the UK Companies House register are not sufficient as evidence of power of representation. According to the prevailing opinion – shared by the OLG –, such evidence can be given only by a certificate issued by a UK notary. Unlike other cases, the OLG Nuremberg decided that such notary's certificate is also required if all directors of a PLC or Limited, who are registered with the Companies House, executed the relevant documents to be filed with the German commercial register which is to be assessed critically in terms of European law. A similar decision was made by the OLG Düsseldorf (in its decision dated August 21, 2014, I-3 Wx 190/13) in a case where only one director was appointed for the UK company.

Practice, however, shows that for the avoidance of interim rulings (*Zwischenverfügungen*) close coordination with the German Commercial Register is essential. Generally, for a UK PLC or Limited it is advisable to provide the German Commercial Register with a certificate authority from an English notary, preferably from a Scrivener Notary (having a specific international qualification). The statements of the UK notary should not be of a merely formal nature, but they should make explicit reference to the documents and statements he/she has examined (e.g. Articles of Association, Board resolutions). However, if the foreign entity has a registered branch in Germany, a certificate issued by a German notary based only on inspection of the German commercial register is sufficient.

Subscriber's rescission in the event of a failed share capital increase

If a company expressly undertakes to execute an increase in its share capital, it is obliged to facilitate a speedy implementation of this capital measure. If the capital increase fails, the subscriber is entitled to withdraw from the transfer agreement and can request the repayment of his or her capital contribution.

Case

The Federal Supreme Court (*Bundesgerichtshof – BGH*) had to decide on the question whether a subscriber in connection with a capital increase has a right of rescission and/or is entitled to claim damages in the event of the failure of the capital measure.

The plaintiff had been a silent partner in the defendant limited liability company (*Gesellschaft mit beschränkter Haftung – GmbH*). In the course of an increase of the share capital of the defendant GmbH, he made a contribution in kind to the company in form of his share silent partnership interest. The underlying agreement stipulated the GmbH's obligation to facilitate the execution of the share capital increase. Subsequently, as some disagreements arose between the company's shareholders, the execution of the share capital increase was not pursued further. Finally, the competent commercial register (Handelsregister) declined the registration of the capital increase.

The Court's ruling

In abrogation of its former case law, the BGH pointed out that in the case in point there was a contractual obligation on the part of the company to facilitate a speedy execution of the share capital increase, i.e., by facilitating its registration with the Commercial Register, which, if infringed, can result in claims for damages.

In similar cases, the BGH had denied a subscriber's claim for the execution of a shareholder resolution on the increase of the company's share capital as well as a claim in damages for non-performance. Moreover, in its earlier rulings, the BGH had left the question of whether the company is obliged to indemnify a subscriber to a failed capital increase for any reliance damages open. In this context, the present ruling has brought some light into this matter: the court held that there is no general claim for performance for the subscriber in respect of the actual execution of an increase in the share capital and no claim in damages for non-performance that with respect to a corresponding claim in damages would result in the company's obligation to comply. Its shareholders are and shall remain in principle free to suspend a former resolution regarding an increase in the share capital.

However, if the company explicitly undertakes an obligation towards the subscriber to facilitate the execution of the share capital increase, in particular by pursuing the mandatorily required registration with the Commercial Register, this obligation can, in the event of the failure of the capital measure, lead to a subscriber's contractual claim for reliance damages, in addition to a right of rescission (and a form of repayment claim).

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Comment

The present ruling by the BGH is to be welcomed from a practical point of view.

The BGH still does not hold a company generally obliged to facilitate the speedy execution of a resolved increase in the share capital. However, the ruling points out a way for the contractual handling of the risk of a failed share capital increase. Through the inclusion of an explicit obligation of the company to facilitate the execution of a capital increase by pursuing its registration with the Commercial Register in the transfer agreement, the subscriber concerned can be entitled to a contractual compensation claim for his or her potential reliance damages, in addition to his or her right of rescission. Since these contractual claims cannot be countered with a plea of impoverishment (*Einrede der Entreicherung*) in contrast to statutory claims for unjust enrichment, this approach is beneficial for the subscriber of a failed share capital increase.

Avoidance of the corporate regulatory fine by voluntary disclosure

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If executives of an entity commit tax evasion or recklessly understate tax in their official capacity, this can result both in the personal conviction of the executive in question and in a regulatory fine on the enterprise. These risks can be minimized by a coordinated voluntary disclosure.

Duty of late registration of tax if errors are found

If it is discovered in an enterprise that tax returns have not been submitted in the past, or have not been submitted accurately, and this has meant that tax may have been understated, the executives of the enterprise, i.e. normally the managing directors or management board members, have a duty to inform the revenue authority without undue delay. An intentional breach of this duty constitutes a tax offense.

Risk of investigations under tax law

In this situation, however, it is often a concern that the managing directors or management board members may be at risk of being subject to investigation for tax crimes on account of an error subsequently discovered. This is particularly the case if, for instance, comparable errors have already occurred in the past, but did not at the time cause problems under tax criminal law. Also conceivable, though, are situations in which the revenue authority, unlike the enterprise, assumes intent.

Late registration that meets the requirements for voluntary disclosure if need be

In such a situation the executives of the enterprise may be able to protect themselves by submitting the necessary late registration in a form that, if need be, e.g., if the revenue authority is not persuaded otherwise, meets the requirements set out by the German Fiscal Code (AO) for a voluntary disclosure giving exemption from punishment for tax evasion (sec. 371 AO) or reckless understatement of tax (sec. 378 (3) AO). The late registration need not contain the words "voluntary disclosure". The (stricter) requirements of sec. 371 AO provide in particular for:

- Full late registration of all tax crimes for one type of tax that have not become time-barred, but at least in the last ten calendar years (there may be exceptions for payroll tax and VAT returns).
- No reasons for "blocking", e.g. the announcement or conduct of an external tax audit or knowledge by the revenue authority.
- No tax amounts exceeding EUR 25,000.00; should this be the case, however, exemption from punishment can be achieved by the payment of conscience money pursuant to sec. 398a AO.
- Payment of taxes and interest at the request of the revenue authority.

Risk of corporate regulatory fines

Should the revenue authority consider the above late registration

of bases of assessment to be a voluntary disclosure, this would mean not only that the executives of the enterprise were protected, but also, under certain circumstances, the enterprise itself. In the case of crimes or regulatory offenses by executives of an enterprise, the enterprise may be subject to regulatory fines under sec. 30 of the German Regulatory Offenses Act (OWiG) that could amount to several million euros.

Preclusion clause for successful voluntary disclosures

However, the preclusion clause of sec. 30 (4) sentence 3 OWiG states that the independent assessment of a regulatory fine is precluded if the crime or regulatory offense of the executive cannot be prosecuted. Such a bar to prosecution is given in the case of a successful voluntary disclosure. This requires, however, that all executives concerned submit successful voluntary disclosures.

Simultaneous protection of the natural person and the enterprise

Successful voluntary disclosures under criminal tax law thus offer not only protection against prosecution for managing directors and management board members, but also protection of the enterprise against the assessment of regulatory fines under the Regulatory Offenses Act.

Liability of a Director of a UK Limited for payments resulting in a reduction of insolvency assets pursuant to German law

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A foreign legal form does not protect the legal representatives from being held personally liable under German Insolvency law

In a judgement dated March 15, 2016, the German Federal Supreme Court (*BGH*) ruled that even a director of a UK Limited that is subject to insolvency proceedings in Germany can be held liable for payments made after insolvency under sec. 64 German Limited Liability Companies Act.

Factual Circumstances

The debtor company was incorporated in the UK, under UK law as a private company limited by shares (Limited), however, it operated mainly in Germany via its German-registered branch. After the opening of insolvency proceedings in the assets of the company in Germany, the insolvency administrator sought reimbursement from the director of the Limited for payments made after the debtor company became insolvent. The BGH suspended the legal proceedings and requested the ECJ first to decide on the question of whether legal action seeking reimbursement for payments made after insolvency pursuant to sec. 64 German Limited Liabilities Company Act (*GmbHG*) is governed by insolvency law or by company law. This question is of major relevance as affairs of foreign EU/EEA companies are generally governed by the company law of the State of incorporation whereas insolvency proceedings and their effects are subject to the applicable laws of the Member State in which the insolvency proceedings are opened. Thus in the first case the director of the UK company would not run the risk of being held liable under German corporate law, such as the GmbHG, whilst in the latter case he could be affected regardless of where the company was established.

Decision by the BGH

Based on the ECJ ruling dated December 10, 2015, according to which legal action for reimbursement of prohibited payments after insolvency under sec. 64 GmbHG falls within the scope of insolvency law, the BGH found (II ZR 119/14, March 15, 2016) that sec. 64 GmbHG also applies to a director of a UK Limited. In the Court's view, the purpose of this provision is to avoid payments resulting in a loss or reduction of assets before the opening of insolvency proceedings. In the event that the director fails to comply with his or her obligation to secure the company assets, it is necessary to restore the company assets to ensure equal payment to all insolvency creditors. Losses of future insolvency creditors shall be covered but not losses of the company. This rationale to both types of companies as their shareholders in general cannot be held personally liable with their assets for any company liabilities. Both types of companies are managed by a responsible person not necessarily being the shareholder of the company. Since there is a risk in both cases that the director might make payments to the detriment of the insolvency creditors and thereby reduce the insolvency assets, it is justified that both the director of the German GmbH and the director of the UK Limited are treated equally with regard to the liability for such prohibited payments.

Conclusion

This landmark decision opens the way for liability claims of German insolvency administrators against directors of companies established outside Germany but having a German branch and/or mainly operating in Germany in case of insolvency proceedings over the assets in Germany. Moreover, it can be assumed that other legal instruments such as the liability for delaying insolvency proceedings or for causing insolvency and the liability for repayments of shareholder loans will also be subject to insolvency law. As a result, the directors of foreign companies can also be held liable on the basis of these provisions.

Risk of liability: Account warranties in German M&A deals

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It rarely happens that German courts deal with M&A litigation. The parties commonly prefer to refer their dispute to (confidential) arbitration. On one of these rare occasions, the Higher Regional Court of Frankfurt am Main had to decide on a warranty claim based on an accounts warranty. The case confirmed that both buyer and seller need to be very careful with the accounts warranty and its particular wording.

Accounts warranty serves as "catch-all" warranty

A warranty on the accuracy of certain annual accounts of the target company granted by the seller is usually a key warranty for the buyer, as the annual accounts commonly serve as a basis for the purchase price calculation. In the case at hand, the buyer brought a claim for breach of the accounts warranty against the seller on the basis of several issues that in total led to a substantial overstatement of profits. The court was convinced that the buyer had based its purchase price calculation on the annual accounts presented to him by the seller and which turned out to be incorrect. In the court ruling the buyer was awarded damages in connection with customer guarantee claims, IT-maintenance costs, attorney expenses, personnel costs, insufficient deferred tax and VAT provisions and other reasons. It is unlikely that the seller had granted specific warranties dealing directly with these topics and yet the buyer was able to successfully establish its claims in court, effectively using the accounts warranty as a "catch-all" warranty.

Warranty held to cover both known and unknown liabilities

The parties had agreed on an objective accounts warranty, i.e., the warranty was not limited by the seller's knowledge. The court made clear that such an objective accounts warranty can be triggered even if the seller has acted with all due care when preparing the accounts and although the seller was absolutely unaware of the risk prior to signing. It has to be noted that the wording of the clause did not refer to unknown liabilities in any way. Even though the specific clause largely resembled the German equivalent of the "true and fair view" principle set out in the German Commercial Code, the court did not give much weight to the question of how careful the seller has to be when providing for risks under the applicable accounting standards. The court emphasized that the parties had agreed on an objective standard. The seller was thus denied a defense based on the seller's knowledge or standard of care at the time the accounts were prepared.

Conclusions for M&A practice

Several legal practitioners criticized the decision, in particular for the strict approach taken on the objectiveness of the account warranty. However, the decision cannot be appealed and will remain part of the very limited case law on accounts warranties under German law. From a practitioner's perspective, it is therefore crucial – in particular for sellers – to fully understand the impact of the accounts warranty. If such warranty is drafted without necessary care, the seller may face extensive liability even if the annual accounts

were prepared in accordance with all applicable accounting standards and the underlying facts were unknown to the seller. An accounts warranty may be interpreted in a way that it effectively constitutes a "catch-all" warranty, exposing the seller to extensive liability for matters (which are reflected in the annual accounts), for which the seller denied to grant a specific warranty.

Crucial facts are often revealed for the first time when preparing the first annual accounts under buyer's control

In the case discussed here, the buyer gathered all the facts needed to establish the case during the preparation of the first annual accounts after closing. This again shows the need for the buyer to ensure while negotiating that the agreed time limitation allows the buyer to (i) prepare annual accounts of all target companies under its own control, (ii) have these accounts audited and (iii) prepare a claim based on any findings resulting from this exercise.

(The case discussed was decided by the Higher Regional Court (*OLG*) Frankfurt a.M. on May 7, 2015, 26 U 35/12.)

Denial of the notarization of the incorporation of a German GmbH by a Swiss notary

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The notarization of the incorporation of a German GmbH by a Swiss notary (Canton of Bern) does not meet the formal requirements of German law, as the notarization process is completely different from German principles and thus equivalence of notarization procedures is not given.

Facts of the case

The Local Court of Charlottenburg (*AG Charlottenburg*) (99 AR 9466/15) had to decide whether a German GmbH can be lawfully incorporated by means of the notarization of the formation deed by a Swiss notary in Switzerland.

Rationale

The AG came to the conclusion that the execution of the formation deed did not lead to the lawful incorporation of the GmbH. Consequently, it denied the registration of the GmbH in the Commercial Register, arguing that the notarization of the incorporation of a GmbH by a Swiss notary, particularly in the Canton of Bern, cannot be considered as sufficient to meet the legal requirements with regard to the German notarial form.

So far, the German Federal Supreme Court (*BGH*) has not ruled on the question of whether a foreign, especially a Swiss notary, can effectively notarize the incorporation of a German GmbH. In support of its decision, the AG critically and elaborately reviews cases involving foreign notarizations already decided by the Supreme Court, predominantly related to the notarization of (other) German corporate law procedures in Switzerland.

A Supreme Court ruling issued in 1981 involved notarization of a change in the Articles of Association of a GmbH by a notary in the Canton of Zurich. Another Supreme Court ruling handed down in 1989 dealt with the notarization of the transfer of shares of a German GmbH in Switzerland. A more recent decision in 2013 was primarily about the filing of a new shareholders' list of a GmbH with the German Commercial Register by a notary located in Basel, Switzerland, who had also executed the underlying share transfer deed. The subject of the most recent ruling in 2014 was the legitimacy of a shareholders' meeting of a German Stock Corporation held and recorded in a foreign country.

In all these decisions, the Supreme Court confirmed the validity of the notarization outside Germany, with the underlying criterion of all Supreme Court decisions being adherence to the principle of equivalence. Following the Supreme Court, foreign notarial deeds can be considered lawful and valid if they are equivalent to German notarial deeds. According to the BGH, this shall be the case where both the foreign notary has a position comparable to that of a German notary and the foreign notarization procedure complies with the principles of the German Code of Authentication.

The AG argued that the notarization procedure in the Canton of Bern is not equivalent to the German procedure, as the rules applicable in Bern do not provide for an obligation to have the entire notarial deed read out aloud. Under German law, a violation of the requirement to have the full notarial deed read out aloud results in the invalidity of

the notarial deed. Furthermore, the AG came to the conclusion that it is not possible to generally waive the notarial instruction and control obligations by choosing a foreign notary public. According to the AG, the relevant explanations and instructions by a German notary can only be dispensed with if special conditions are met, for example if the parties are not in need of protection.

In denying the legitimacy of the formation of a GmbH by a foreign notarial deed, the AG also resorts to recent BGH rulings in which the BGH had stated that the purpose of the notarial form requirements for changes to the Articles of Association of a GmbH consists in ensuring material correctness of the deed, which cannot be secured by a foreign notary unfamiliar with German corporate law. Unlike the case of a notarial certification, in the case of a notarization not only the identity of the parties shall be clearly established, but the notary shall rather comment objectively on the content of the declarations to be notarized.

Practical Considerations

In the absence of a Federal Supreme Court decision with respect to the formation of a German GmbH outside of Germany, and with an eye to the general uncertainty related to the acceptance of non-German notarial deeds, companies should be careful in taking decisions to go for execution by foreign notaries public. This applies especially for status-related measures that must be notarized (incorporation or a change in the Articles of Association) as well as structural measures, such as mergers and de-mergers under the German Reorganization Act (*Umwandlungsgesetz*) or the approvals required for the lawful conclusion of a profit and loss pooling agreement. Although for some cases there are court rulings of the Federal Supreme Court affirming the equivalency of deeds issued by notaries in the Netherlands, Austria and Switzerland, this should not be seen as a general free pass for notarizations abroad. There is still no absolute certainty for the acceptance of foreign notarizations. In particular, the cases involving Swiss notaries recognized as effective by the Federal Supreme Court cannot be generalized for the whole of Switzerland, since the notarization procedure is regulated differently in each canton.

Given the drastic consequences that can result from the ineffectiveness of notarizations - in particular if it takes years to detect such ineffectiveness - and the effort and cost that may be associated with an attempt of "healing" the invalidity of such deeds, notarizations outside Germany should only be made use of in exceptional cases and only after having carefully considered the pros and cons. The newer German cost regulations, which for example provide for certain cost alleviations for notarizations of intra-group share transfers, should also be considered in the decision-making.

Private home of a co-shareholder as the place of a shareholders' meeting

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The BGH has ruled that resolutions by a shareholders' meeting of a German Limited Liability Company (*GmbH*) are defective and contestable if the shareholders' meeting was held on the premises of a private home of an opposing co-shareholder.

The BGH first pointed out that the shareholders are in principle permitted to hold a shareholders' meeting at places other than the business premises of the company. This might be the case if the business premises are not reachable or suitable in order to hold a shareholders' meeting. Furthermore, the shareholders' meeting may be held elsewhere if the company has a manageable amount of shareholders and the participation of the shareholders will not be impaired from the outset, because they will be able to reach the alternative meeting place more easily than the company's business premises. But if the shareholders' meeting should take place on the premises of the private home of an opposing shareholder, the other shareholders do not have to accept the private home of the opposing co-shareholder as the place of the shareholders' meeting. The same shall apply if the shareholders' meeting is held in the offices of the attorney of the opposing co-shareholder. The BGH argues that in all these situations the shareholder concerned is in an environment in which the (other) opposing co-shareholder, in contrast to them, is able to move and behave under familiar circumstances. Resolutions of the shareholders' meeting which were adopted on the premises of the private home of an opposing co-shareholder are therefore invalid and the other shareholders may file an application with the court for annulment (*Anfechtungsklage*) against the resolutions within a period of one month.

In the present case the BGH furthermore had the opportunity to decide that the legal or statutory defined power of representation of the managing directors is not affected by the opening of insolvency proceedings with regard to the assets of the company. For example, if the directors are entitled to act jointly pursuant to their legal or statutory power of representation, this also applies within insolvency proceedings. In particular, they are only entitled to file the application for the closing of the insolvency proceedings jointly. However, there is one exception from this principle: regardless of how the power of representation is defined by law or in the Articles of Association of the company, each managing director may file the application for the opening of insolvency proceedings alone.

(The case discussed was decided by the German Federal Supreme Court (*BGH*) on March 24, 2016, IX ZB 32/15.)

Extent of claim by the Works Council to communications technology

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An employer does not generally have to provide a Works Council with Internet access which is separate from its network nor does it have to set up a telephone line which is separate from its telephone system.

Works Council Does Not Have a Claim to Separate Internet and Telephone Access

Pursuant to sec. 40 subsection 2 Works Council Constitution Act (*Betriebsverfassungsgesetz – BetrVG*), the employer must provide the Works Council with sufficient information and communication technology, amongst other things. The Works Council can request its own telephone line and, as far as the employer does not have any opposing reasonable interests, Internet access and that the Works Council's own email addresses be set up without the Works Council having to demonstrate that said aspects are necessary in order to perform specific tasks under the works constitution law.

The German Federal Labor Court (*Bundesarbeitsgericht – BAG*) believes that a separate connection to communication technology is not required solely due to the theoretical risk of the employer being able to exploit technical monitoring possibilities in a detrimental manner (decision dated April 20, 2016 – 7 ABR 50/14).

Facts of the Case

In the present case the office of the Works Council had a separate extension number which was connected to the employer's telephone system. The telephone system was set up in such a way that different types of data (including dialed numbers in full) could be saved and evaluated along with personal data.

The Works Council was also provided with a PC and a laptop. The Internet access could be attributed to the works council and was transmitted in the corporate group by the business proxy server where access could be administered and monitored. The Works Council argued that it was also possible "*to record the user and IP addresses and all the URLs accessed with the browser and evaluate these along with personal data*".

The Works Council was afraid of being monitored by the employer without authorization and applied for a separate telephone line and Internet access. The Works Council did not make any indication that the employer had already carried out any exploitative monitoring.

The previous (judicial) instances had dismissed the legal action.

Decision

The Works Council was not successful either. The Federal judges decided that the Works Council did not have a claim to a separate telephone line and Internet connection, which would thus eliminate any monitoring possibility, based on the mere theoretical risk of the employer (and/or its administrators) being able to monitor unlawfully the communication systems which had been provided to the Works Council. They therefore rejected the all-round technical protection as applied for.

Comment

The BAG decision sends a clear message that everybody working in the company must generally ultimately be able on a daily basis to trust that there is no unlawful conduct. In general we agree with this as it corresponds to the principle of the trusting cooperation and also rests upon the Rule of Law as the basis of living (and also working) together.

It might be possible to come to a different conclusion in an individual case if there is a justified suspicion due to specific and verifiable events that the employer has previously carried out unlawful monitoring (either once or on repeated occasions). The BAG did not need to make a ruling on such circumstances in the specific case.

Dismissal due to excessive private use of Internet

In a judgement dated January 14, 2016 (5 Sa 657/15), the Higher Labor Court of Berlin-Brandenburg ruled that employers might under certain circumstances be allowed to evaluate their employees' browser history in order to substantiate circumstances justifying a dismissal without consent of the employee concerned.

Circumstances of the Case

In the case presented to the Court, the employee had been allowed to use the Internet for private purposes in exceptional cases and during breaks. However, the employer got a hint that there was excessive private use by the employee in practice. Upon finding an enormous data volume, the employer issued a dismissal for cause. Following the dismissal, the employer evaluated the employee's browser history without the employee's consent and found that the employee had used the Internet for private purposes for approx. 40 hours within only 30 working days by opening websites more than 16,000 times.

Position of the Higher Labor Court

Quite unsurprisingly, the Higher Labor Court ruled that the extraordinary termination was legally effective given the extreme violation of the employee's duties. Far more interesting are the Court's explanations with respect to a potential inadmissibility of improperly obtained evidence (*Beweisverwertungsverbot*) as claimed by the employee.

The Court rejected such inadmissibility of evidence. Although the employee did not give their consent for evaluating the browser history as personal data in the meaning of the Federal Data Protection Act (*Bundesdatenschutzgesetz*), the evidence could be used in the case on hand. The Act basically allows the storing and evaluation of browser histories to control any abusive conduct, even without the consent of the employee.

The concrete justification could be found in sec. 32 of the Federal Data Protection Act. According to sec. 32, personal employee data may be collected, processed and used for purposes of the employment relationship, inter alia if this is necessary for the decision to terminate the employment relationship.

Although the employment relationship had already been terminated when the employer evaluated the browser history, this justification applied. It should – according to the Court – also cover collecting, processing and using personal data that the employer needs to fulfill its burden of proof during dismissal protection proceedings.

The present employer's approach was necessary to clarify the employee's abusive private Internet use because there were no equally effective milder means. In the case on hand, the employer had no other option to prove the forbidden extent of private Internet use.

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Practical Advice

The judgement cannot be interpreted to mean that any monitoring of employees' browser histories without the individual employee's consent is permitted. Such monitoring is still allowed only in exceptional cases and within very strict limits. However, the Court clarifies that the employee's consent for controlling his or her private Internet use is not necessary in any case and any proof gained may be used during court proceedings. An appeal is pending at the Federal Labor Court (*Bundesarbeitsgericht*).

In order to ensure legal certainty, it is highly advisable to regulate in written form employees' private use of Internet and its extent. This might not only be regulated in the initial employment contract but also be subject to works agreements.

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Legend for English-speakers:
RA, Rechtsanwalt = male lawyer, attorney under German law
RAin, Rechtsanwältin = female lawyer, attorney under German law
StB, Steuerberater = tax advisor under German law

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