July 22, 2015

MULTINATIONAL EMPLOYMENT MATTERS: SIMILARITIES AND DIFFERENCES BETWEEN THE US AND THE EU

Panelists:
Andrez Carberry, Avon Products, Inc.
Phillip M. Berkowitz, Littler Mendelson P.C.
Dirk Sievert, Noerr LLP
Contents

A. Terminating Employment Contracts in Germany

B. Post-Contractual Prohibition of Competition

C. Transfer of Undertakings
A. Terminating Employment Contracts in Germany

- No employment at will
- Rights of Termination: (i) extra-ordinary termination and (ii) ordinary termination

  (i) **termination for cause with immediate effect** requires an important reason; important reason exists if – in consideration of all circumstances and interests of both parties – the continuation of the employment is unacceptable for the terminating party

  (ii) **ordinary termination** always subject to notice periods

  any ordinary termination has be socially justified pursuant to the Act of Protection Against Unfair Dismissal (“Kündigungsschutzgesetz”, hereinafter “KSchG”); KSchG applies only in business units with more than 10 employees; employment is protected after more than six months of service
A. Terminating Employment Contracts in Germany - continued

(ii) ordinary termination - continued

Sec. 1 KSchG: employment can only be terminated if the dismissal is based on one of the following three grounds:

1. Conduct-related dismissals
2. Person-related dismissals
3. Dismissal based on operational reasons

- **Special form**: Dismissal with option of changed employment conditions
- **Mass layoffs**: notification to the local labour office required
- **Litigation**: employee who has received a notice of termination may file a lawsuit for unfair dismissal within a period of three weeks; if successful, the employee is entitled to return to his former job position
B. Post-Contractual Prohibition of Competition

A good start ...
B. Post-Contractual Prohibition of Competition - continued

- **During term of employment:** Statutory prohibition of competition during term of employment (Sec. 60 German Commercial Code, hereinafter “HGB”)

- **Post contractual:**
  - No statutory post-contractual prohibition of competition → Contractual arrangement of post-contractual non-compete agreement necessary.
  - Sec. 74-75d HGB apply – scope: for all employees, but not for members of company organs (Managing Directors / Service Agreements)
  - **Form requirements!** Written form; signed document must be handed over.
B. Post-Contractual Prohibition of Competition - continued

- **Post contractual** - continued:
  - **Adequate compensation.** At least 50% of the last contractual remuneration (including bonus) must be granted as waiting allowance (Sec. 74 HGB). Insufficient compensation results in invalidity of the non-compete agreement (Sec. 75d HGB).
  - **Contents:**
    - Job-related prohibition of competition; Preferably: Company-related prohibition of competition
    - Territorial scope (Germany? Europe? Worldwide?)
    - Term of prohibition of competition (maximum 2 years)
    - Contractual penalty

- **Misc. regulations:** Sett-off of other earnings (§ 74c HGB); Invalidity of non-compete agreement (§ 75 HGB); Waiver pursuant to § 75 a HGB
B. Post-Contractual Prohibition of Competition - continued

1. Job-related prohibition of competition
   
   Example:
   
   „The Employee undertakes not to negotiate life insurance contracts for a period of two years after termination of employment.“

2. Preferably: Company-related prohibition of competition
   
   Example:
   
   „The Employee undertakes not to work for a competing insurance company / the insurance companies A and B for a period of two years after termination of employment. “
C. Transfer of Undertakings in the European Union (EU)

- statutory basis: **European Directive on Transfer of Undertaking and Protection of Employment (TUPE)**
- TUPE protects people working in businesses that are transferred between owners
- TUPE must be implemented in every EU member state; similar regulations in all EU member states; Germany: Sec. 613a German Civil Code (BGB)
- Fundamental ideas of TUPE:
  - provides for the protection of the employees by leaving the terms and conditions of their employment unchanged; provides for the continued existence of employee representative bodies
C. Transfer of Undertakings - continued

- **Implementation in Germany: Sec. 613a BGB**

  - **When does it apply?** Asset deal, transformations pursuant to the German Company Transformation Act ("Umwandlungsgesetz"): merger, split-up, transfer of assets, change of corporate form

  - **What happens exactly?** Transfer of the employments from the seller to the buyer if a business unit or a division of a business unit passes over to a new proprietor by virtue of a legal transaction

  - **Business unit:** organized totality of persons and things for the purpose of carrying out an economic activity with its own objectives – interpretation on case-by-case basis taking into account case law
C. Transfer of Undertakings - continued

- **Implementation in Germany: Sec. 613a BGB - continued**
  
  - **Notification requirement!** Employees have to be informed about the transfer in advance. Detailed, complete and correct information required to trigger the one-month preclusive period during which the employees may object to the transfer (e.g. date, the legal and economic background, the legal, economic and social consequences for the employees, intended measures to be taken with respect to the employees).

  - **Employee objection?** If an employee exercises his/her right to object, his/her employment will remain with the seller. If it is not possible for the seller to retain the employees, it can dismiss the objecting employee based on operational grounds.
Thank you!
Dirk is a German attorney by training. He counsels clients in Germany and North America on all aspects of German corporate law, M&A, Private Equity and Venture Capital. He regularly advises on labor and employment law topics in the context of corporate transactions.

Dirk received his German law degree from the University of Greifswald and his LL.M. degree from NYU School of Law. Dirk is admitted to the Berlin Chamber of Lawyers. He frequently publishes articles and speaks on panels.

References:
- Rocket Internet SE and its portfolio companies in numerous financing rounds and exit transactions.
- Advising a Germany-based telecommunication company on setting up a worldwide network of subsidiaries and conducting a respective legal compliance review as lead counsel, managing local counsel in 30+ jurisdictions.
- Advising Fresenius Group in connection with product liability litigation in the US.
- Advising Boehringer Ingelheim Group in connection with mass tort litigation in the US.
- Advising on the restructuring of Pfleiderer AG, especially the 150 million USD sale of the Pergo Group to Mohawk Industries Inc.

Dirk Sievert, LL.M. (NYU)

Rechtsanwalt,
Deputy Head of the Representative Office
Noerr LLP, New York

E dirk.sievert@noerr.com
T +1 212 4331396
F +1 212 3100133
885 Third Ave, Ste. 2610
New York, New York 10022, USA
## Employment & Pensions

Our experienced team of around 40 advisors is one of Germany’s leading employment law practices. Complex employment-law advice is still the mainstay for our group of experts, dovetailed with effective support from other specialist departments.

### Our services

- Restructuring and reorganisation of companies
- Transactions, mergers and acquisitions
- Internationalisation
- Ensuring flexible conditions of employment
- Organisation of working conditions
- Company pension schemes
- Matters concerning management boards and directors
- Compliance relating to employment law
- Litigation

### Your benefits

- Close to courts and clients: employment-law teams at five German and six Central and Eastern European locations
- Comprehensive advice on all legally relevant aspects all under one roof – tailored to fit your and your company’s needs
- Understanding the specific advisory needs of the sector thanks to the specific industry knowledge of many of our experienced advisors
- Cost-efficiency, speed and cross-locational know-how as well as solutions provided by specialised groups of experts such as restructuring or company pension schemes
## Employment & Pensions

### References

<table>
<thead>
<tr>
<th>ARAG</th>
<th>DAX 30 company</th>
<th>Deutsche Telekom</th>
<th>ERGO Insurance Group</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conversion into a European stock corporation (Societas Europaea – SE), including the establishment of a European worker’s representation</td>
<td>Outsourcing of its facility management business to a joint venture with an M-DAX company; approx. 3,000 employees affected</td>
<td>Takeover of GTS Central Europe Group, one of the leading providers of telecommunication services in Central and Eastern Europe, for € 546 million</td>
<td>Implementation of restructuring of sales of the entire ERGO Insurance Group</td>
</tr>
<tr>
<td>Glunz/Sonae Group</td>
<td>INEOS Enterprises</td>
<td>Private equity investor</td>
<td>Talanx</td>
</tr>
<tr>
<td>Restructuring (closure of plants; conclusion of social plans and works collective bargaining agreements)</td>
<td>Acquisition and restructuring of the European solvents business of Sasol</td>
<td>Planned acquisition of the Kaufhof Group from Metro for more than € 2 billion; advice on collective law in the course of the transaction; advice in connection with the takeover of service agreements</td>
<td>Comprehensive collective employment-law advice on the integration of the Gerling Group into the Talanx Group</td>
</tr>
</tbody>
</table>
Employment & Pensions
What others say about us

“One of the leading practices in employment law with a wide range of advice. A continuously growing base of high-class long-term clients including well-known DAX companies and a traditionally strong network among medium-sized companies ensure a constant flow of cases.”

*JUVE Handbook 2012*

“Independent German firm handling transactional and standalone employment law issues for a range of DAX-listed and mid-market clients, with a strong focus on the media and aviation sectors. At its most visible advising on restructuring projects, company pensions and post-merger integration. (...) Strengths: ‘The broad spread of services Noerr offers is really important to us.’ (Client)”

*Chambers Europe 2014*
## Awarded Legal Advice

<table>
<thead>
<tr>
<th>Category</th>
<th>Awards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany Law Firm of the Year</td>
<td>Chambers Europe Awards 2015</td>
</tr>
<tr>
<td>Law Firm of the Year: Germany</td>
<td>The Lawyer European Awards 2015</td>
</tr>
<tr>
<td>Law Firm of the Year for M&amp;A</td>
<td>JUVÉ Awards 2014</td>
</tr>
<tr>
<td>International Firm of the Year 2014</td>
<td>Legal Business Awards 2014</td>
</tr>
<tr>
<td>Law Firm of the Year for Information Technology</td>
<td>JUVÉ Awards 2013</td>
</tr>
<tr>
<td>European Law Firm of the Year</td>
<td>The Lawyer European Awards 2012</td>
</tr>
<tr>
<td>Client Service Law Firm of the Year</td>
<td>Chambers Europe Awards 2012 – 2010</td>
</tr>
</tbody>
</table>
Offices

Alicante
Noerr Alicante IP, S.L.
Avenida México 20
03008 Alicante
Spain
T +34 965 980480

Bucharest
S.P.R.L. Menzer & Bachmann - Noerr
Str. General Constantin
Budişteanu nr. 28 C, sector 1
010775 Bucharest
Romania
T +40 21 3125888

Frankfurt am Main
Noerr LLP
Börsenstraße 1
60313 Frankfurt am Main
Germany
T +49 69 9714770

Munich
Noerr LLP
Brienner Straße 28
80333 Munich
Germany
T +49 89 286280

Berlin
Noerr LLP
Charlottenstraße 57
10117 Berlin
Germany
T +49 30 20942000

Budapest
Noerr & Partners Law Office
Fő utca 14-18
1011 Budapest
Hungary
T +36 1 2240900

Kiev
Cooperation Partner:
TOV Nobles
Vul. Khreschatyk, 7/11
01001 Kiev
Ukraine
T +380 44 4953080

New York
Representative Office
885 Third Avenue, Suite 2610
New York, NY 10022
USA
T +1 212 4331396

Bratislava
Noerr s.r.o.
AC Diplomat
Palisády 29/A
81106 Bratislava
Slovakia
T +421 2 59101010

Dresden
Noerr LLP
Paul-Schwarze-Straße 2
01097 Dresden
Germany
T +49 351 816600

London
Noerr LLP
Tower 42
25 Old Broad Street
London EC2N 1HQ
United Kingdom
T +44 20 75624330

Prague
Noerr s.r.o.
Na Poříčí 1079/3a
110 00 Prague 1
Czech Republic
T +420 233 112111

Brussels
Noerr LLP
Boulevard du Régent 47-48
1000 Brussels
Belgium
T +32 2 2745570

Düsseldorf
Noerr LLP
Speditionstraße 1
40221 Düsseldorf
Germany
T +49 211 499860

Moscow
Noerr OOO
1-ya Brestskaya ul. 29
P.O.B. 247
125047 Moscow
Russian Federation
T +7 495 799 56 96

Warsaw
Noerr
Sp. z o.o. Spiering Sp. k.
Al. Armii Ludowej 26
00-609 Warsaw
Poland
T +48 22 5793060