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TOPIC 2
LABOUR LAW (IN ITS INDIVIDUAL AND COLLECTIVE ASPECTS) AND PRODUCTIVE DECENTRALIZATION

AUSTRIA

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1.

a.

Trends regarding economic restructuring are disparate.

Starting from a stable development in previous years, mergers and takeovers increased sharply in Austria in 2004, in line with general international trends.

At the same time, the trend towards outsourcing continued.

This was one of the reasons why the number of newly founded enterprises has been increasing in Austria: in 2003, 80% of all newly founded businesses were individual companies, mostly run by one individual.

There is also an increasing tendency to shift production and services – particularly IT services – abroad.

In response to an all-European company survey on the outsourcing of work on the basis of information and communication technologies (Project EMERGENCE) 43% of the respondents replied that they were outsourcing such work, mostly within their own region.

In recent years there has been a particularly strong tendency on the part of (overwhelmingly) public companies such as postal services and railways to restructure and spin off activities.

There has also been a steady increase in the number of leased employees: in 2003 their total was just under 65 000.

b.

It is worth noting that there is a general trend in favour of selective outsourcing. Companies tend to focus on their core competences and outsource other activities, such as safety and security, IT infrastructure or customer services.

c.

Decentralisation of companies may have a variety of effects on individual jobs and their holders, which include the following:

- where employees are made to terminate their work contracts and perform their work for their former employer as self-employed entrepreneurs, this will frequently result in a unilateral dependence of the individual concerned on their former employer who is now their only client; for many individuals the road to inependence is fraught with insecurity and may prove disastrous as they may lack the necessary entrepreneurial skills and experience;
- where employees are transferred to a spun-off enterprise or subsidiary company, this may result in a change or termination of the applicable collective agreement; at the same time, other legal basis for the terms and conditions of work of the individual concerned, such as collective agreements on enterprise level, may no longer be applicable to him or her;
- if productive activities are threatened to be outsourced and the volume of available work to be reduced, the workers remaining in the original company will be under pressure to accept terms and conditions of work inferior to those prevailing formerly in order to avoid the outsourcing.

d.

Decentralisation of companies may also have a variety of effects on collective working relations, including the following:

- labour representatives may come under pressure to accept changes in collectively bargained working conditions (e.g. so-called “employment pacts on enterprise level“), which may – if such changes are made at enterprise level – even undermine

agreements concluded at supra-plant (industry) level, thus resulting in tensions between workers' representatives at enterprise and industry levels;

- the leasing of manpower may result in conflicts between the leased and the regular employees;
- changes in company structure may render collective agreements invalid and require them to be re-negotiated.

2.

As a rule, legally independent enterprises have to be regarded separately even if they are linked with the principal company, which can exercise a dominant influence over it.

With regard to employee representation, a business may exceptionally be seen as a single one even if several enterprises run that business jointly. This would, however, presuppose a high degree of organisational interlinkage. A typical example would be a large-scale building site that is operated over a considerable period by several companies. This perspective does, however, not apply to individual jobs and their holders.

As regards the representation of workers' interests by a works council, the connection of several enterprises forming a group is the relevant criterion (see 7/b below).

3.

a.

The law (§ 3 Arbeitsvertragsrechtsanpassungsgesetz – Employment Contract Law Modification Act) stipulates with respect to the transfer of a company, business or part thereof that the transferee – the enterprise taking over said company, business or part thereof - assumes all rights and duties in respect of the indivudual employment relationships. This principle does not apply in bankruptcy cases.

Whether a spin-off of company activities is considered a business transfer depends on whether an existing economic unit is transferred.

The term "part of a business" means a delimitated economic unit established for a permanent activity and pursuing a specific productive or commercial purpose, be it in the field of production, services or sale.

This means that if the transferee company can achieve certain productive or commercial purposes with the material or immaterial means that have been transferred to it, we can speak of the transfer of the part of a business, which transfer has the above-mentional legal consequences.

According to current jurisprudence the term “transfer” covers all procedures by which the power of decision is transferred to another party. This covers not only such transfer transactions as sale, granting of user rights, lease etc. but any sort of transfer, for instance by legislative action (privatisation).

To the extent that “externalisation“ comprises at least the transfer of a business part as described above, such transactions are governed by the rules pertaining to enterprise and business transfers.

If there is no business transfer, the employment relationship is not automatically transferred but continues to exist without modification between the employee and the original employer. If the transfer is followed by the massive termination of jobs, this may under certain circumstances require the drawing up of an enforceable “social plan“ – i.e. a collective agreement on enterprise level designed to mitigate the negative consequences of the transfer for the employees.

b.

When a company, business or part thereof is transferred, the existing employer-employee relationships are transferred to the transferee company along with all the rights and duties arising from the individual contracts of employment. A termination on account of the transfer is inadmissible.

The working conditions existing at the time of the transfer remain in force, with the following exceptions:

- an employee may object to the transfer of his employment relationship if the transferee fails to accept any limitations of the right of termination that may have been provided for in a collective agreement or if he fails to honour existing promises to pay a company pension; in such cases the employee continues in the employ of his original employer;

  if the employee in question cannot object, since his former employer has ceased to exist, the previously agreed limitation of the right of termination under a collective agreement becomes part and parcel of the contract of employment with the transferee;

- if a new collective agreement or new collective agreements on enterprise level as a consequence of a plant transfer result in a significant deterioration of other working conditions, the employee may terminate the employment, with the same consequences as would become operative if the termination were effected by the employer;

- if, after a plant transfer, no new collective agreement binding the transferee is applicable, the former collective agreement continues in force; this principle is enshrined in § 8 (2) Arbeitsverfassungsgesetz (Labor Relations Act), according to which collective agreements also operate in respect of an employer to whom an undertaking of an employer is transferred who has so far been bound by said collective agreement. This continuation, however, relates to the collective agreement in force at the time of transfer, while subsequent modifications of the collective agreement do not affect the transferee company. If the collective agreement ceases to exist, for instance on account of a termination, and if no new one becomes applicable, the former working conditions as stipulated by the collective agreement must be upheld and may not be deteriorated for one year from the date of the plant transfer;
- even in the case of a change into a new collective agreement – a case that will mostly arise as the consequence of a plant transfer, where the transferee is engaged in a different entrepreneurial activity and therefore a member of a different organisation within the Economic Chamber (the contracting party that concludes collective agreements for the employers' side) than the transferor, so that, as the undertaking is transferred, the collective agreement applicable to the transferee company also becomes applicable to the transferred employees – even in such a case the minimum pay stipulated in the former collective agreement, i.e. the general time rate plus extra pay, if any, and special payments (13th and 14th monthly pay), must not be reduced.

c.

Yes. § 108 (2a) Arbeitsverfassungsgesetz (Labour Relations Act) obligates the owner of an enterprise to inform the employee representatives (works council) well in advance of any transfer, spin-off, merger or inclusion of undertakings, businesses or parts thereof and to advise the works council of

- the reason for such measures,
- the resulting consequences for the employees, and
- the measures envisaged with respect to the employees.

Such information has to be provided by the owner of the enterprise of his own accord; if the employee representatives so demand, the owner has to enter into consultations with the employee representatives and provide the latter with all documents it will require to evaluate the situation from the perspective of the employees and present suitable proposals.

Under certain conditions the employee representatives may demand the drawing up of a "social plan" - i.e. a collective agreement on enterprise level designed to mitigate the negative consequences of the transfer for the employees – and enforce compliance with said demand.

If the undertaking in question has no works council, the individual employees affected by the transfer have to be informed accordingly.

d.

If the operations of an enterprise are carried on by the transferee on the transferor's premises, this may suggest that it is a joint operation (see Item 2 above, with the consequences regarding the representation of workers described under that heading).

In every case of a transfer of a plant or parts thereof which entails the transfer of employment, the transferor-transferee relations are governed by the principle that both enterprises are jointly liable for claims arising from employment contracts concluded prior to the transfer.

e.

The transferee company takes over the employment relations that existed at the time of transfer (see Items 2 a and b above) and becomes the employer, i.e. the contracting party of of the employees in question with regard to working relationships and conditions of employment.

4.

The working relationship and the rights and duties resulting from it are defined as the relationship between the parties to a contract of employment, i.e. in concrete terms the employees and the affiliated or dependent enterprises. Employees have no claims on the principal company, with one exception:

An enterprise that transfers part of a commission to another enterprise (e.g. an enterprise which has accepted a commission to service a company's EDP installations passes the hardware maintenance on to another enterprise) is - secondarily - liable for the collectively bargained wage claims of employees of that subordinate company, but only if the transfer of the hardware maintenance comnmission was inadmissible or ran counter to the terms of the contract.

Where building contracts are passed on, the general contractor's liability for wage claims under collective agreements on the part of employees of the subordinated company do not depend on whether the transfer off the cotract was lawful or contractually admissible, but

whether the employee has unsuccessfuly asserted his claims on his employer (the subordinated company) before a court of law within six months.

These liability principles have, however, not gained any significance in practice.

b.

No.

c.

No such decisions have come to our notice.

5.

a.

i.

The law governing the lease of workers in principle applies to all forms of lease, i.e. the employment of an employee passed on to a third party for the purpose of performing work. The resulting working relationship is one between the company that leases the employee to another company and the employee (see ii and iii below).

The law governing the lease of workers contains general protective clauses and stipulations binding the enterprise employing said workers. These clauses and stipulations operate in addition to, and side by side with, the obligations incumbent on the company, that leases the employee to another company, as their employer. In addition, there are special rules governing temporary work agencies (see b below).

The general protective clauses include the following provisions:

[a] every such lease is subject to the express assent of the employee concerned;

[b] the duties arising from the contract of employment for the employer, i.e. the company that leases the employee to another company, are in no way restricted by the lease;

[c] for the duration of the lease the company for which the leased employee performs his work will be seen as his employer with regard to the employee's right to safety and health at work, which means that this company is under the enforceable obligation to comply with the relevant protection requirements;

[d] for the duration of the lease the company for which the leased employee performs his work shares with his original employer the duty to safeguard the employee's wellbeing, i.e. to ensure working conditions that safeguard the employee's life, health and other interests and his personality rights;

[e] the transferring company is under the obligation to terminate the period of lease if it is aware, or can be aware, that the company for which the leased employee performs his work fails to comply with its protection duties in spite of having been warned to do so;

[f] the provisions under which an employee has only limited liability, under certain conditions, for any damage he causes in the course of performing his work also govern his relations with the enterprise for which he is working in the course of the lease.

In this context, the law lists exceptions that operate in the case of leasing of employees effected within the scope of joint ventures. Exceptions also pertain to the leasing of employees in connection with the installation, servicing and maintenance of and repair work on technical plant, or the training of employees of the transferee enterprise by the seller of said plant if such training is necessary in the context of such installation etc. Further exceptions obtain for leasing ob employees within a group of enterprises. All these exceptions, however, have in common that they do not relate to the requirement of the assent of the employee (see [a] above) and that the principles outlined in [b] to [d] above apply in any case since they form part of the generally applicable provisions of labour and social legislation.

Transfers within a group of enterprises that are not only temporary in nature are furthermore subject to the wage and working hour regulations governing the transfer of employees by temporary work agencies (see b/vii below).

ii. + iii.

The working relationship is one between the leased employee and the transferring company, and the employee has the duty to perform his work for the third party – the transferee company. This does not give rise to any legal relationship between the transferee enterprise and the employee. Therefore it is the transferring enterprise that lays down working conditions and decides on the termination of the working relationship.

The transferee enterprise has the right to give instructions to the leased employee regarding the concrete work to be executed and his role within the company organisation. Legally, such instructions are, however, within the province of the employer.

b.

i. + ii.

Generally, the leasing of employees to enterprises affected by strikes or lockouts is prohibited.

Otherwise, there are no restricions with regard to specific branches of business.

Limitations of the admissibility of the leasing of employees may, however, be due to provisions governing the exercise of specific professions (physicians, dispensing chemists etc.).

Special rules obtain for the leasing of registered nurses to hospitals or other health institutions: transfers are only admissible to the extent that the number of leased employees does not exceed 15% of the total health-care staff and that the quality and continuity of care is safeguarded.

iii.

Yes. The commercial lease of employees by temporary work agencies is subject to licensing.

Such licensing is subject to compliance with the following requirements:

- in the case of natural persons, residence in and nationality of an EEA country; in the case of legal persons, residence and headquarters in an EEA country; in addition – if the transfer of employees is not secondary to other business activities – the management organs must also be resident in and nationals of an EEA country.
- Reliability: this requirement is not deemed to have been met if the conduct of the temporary work agency in question suggests that the protection of the employees and their rights is not safeguarded. This is the case if the agency fails to comply with the legal provisions governing the transfer of employees or has grossly violated provisions of labour and social legislation.

If (or as soon as) these conditions are not (no longer) satisfied, the licensing authority has to withdraw the licence. Applications for the withdrawal of a licence may also be made by certain workers' and employers' organisations.

iv.

The general principles governing the leasing of employees (see a/i above) also apply to commercial transfers (i.e. transfers by temporary work agencies).

The working relationship is one between the temporay work agency and the employee and continues to exist during the time that said employee is working for an enterprise.

§ 8 of the law governing the lease of employees forbids agreements between temporary work agencies and transferee companies that aim at circumventing provisions protecting the employee. Such agreements are punishable by an administrative fine (money fine of up to 3600 €, in case of repetition up to 7260 €).

v.

The law envisages no time limit but assumes that such transfers typically constitute the employment of employees by temporary work agencies for the purpose of supplying third parties temporarily with the labour they may require.

If a particular case departs from this type of transfer – for instance where employees are transferred to one and the same enterprise for years – it may be justified, amongst other things in order to avoid circumvention of provisions of labour law, to approximate the claims of the leased employee to those of the regular employees of the transferee enterprise (see c below).

vi.

Some important provisions of the employment contract have to be agreed expressly and in binding form and laid down in the written information regarding working conditions to be handed to the employee. If the employer refuses to supply this information or if it is at variance with the agreed conditions, the employee need not comply with the transfer order. In addition, transfers effected without the necessary information given to the employee are punishable by a money fine.

These important provisions of the employment contract include:

- the amount of pay and times of payment,
- the right to holidays ,
- if appropriate, agreement on a specific amount of work (part-time work) or time limits – in the latter case with an indication of the reasons for such limitation,
- periods of notice
- foreseeable kind of work
- geographic area of employment (within or outside of Austria) in which the transferred employee is to work.

The law forbids, and declares null and void, a number of provisions in such contracts, including

- provisions by which the claim to pay is limited to the duration of work for another company;
- provisions that set the number of hours to be worked at a significantly lower level than is actually expected, or which stipulate a lower number of working hours for those times during which no transfer is made;

- provisions empowering the employer to require regularly additional work from an employee in part-time employment;
- provisions that limit the duration of the employment without due justification.

All these prohibitions aim at preventing the entrepreneurial risk from being passed on to the employee.

The employer – i.e. the temporary work company – is also under the obligation to inform the employee prior to each individual transfer (in writing), of the essential circumstances of said transfer, in particular of the transferee company, foreseeable working hours in that enterprise and the pay receivable for the time of transfer.

vii.

The minimum pay to which leased employees are entitled are determined by two collective agreements, one for white-collar and one for blue-collar workers. It should be noted that these collective agreements are concluded, on the employers' side, by the statutory interest group of which the temporary work agencies are members, so that they are binding on all such agencies. Since Austrian law furthermore provides that if an employer is bound by a collective agreement the latter applies to all his employees irrespective of whether they are members of the trade union which is party to the collective agreement, it is to be assumed that a collective agreement which stipulates essential working conditions such as minimum pay will cover 100% of the working relations of leased employees. Individual employment contracts may stipulate higher rates than the minimum pay laid down by the collective agreement.

During the time of transfer the employee has a legal claim to adequate pay, which is to be seen in relation to the collectively bargained pay level for comparable work in the transferee company. As compared with the collective agreements for temporary work agencies mentioned above, this means that the collective agreements for temporary work agencies are relevant for those times during which no transfer is effected; for times during which the employee is leased, they have to be referred to if the collectively bargained pay level in the transferee company is lower. If it is higher, the transferred employee is entitled to be paid at the higher level.

During the time of transfer the applicable provisions regarding working hours are those of the collective agreement applicable to comparable regular employees of the transferee company. This provision may be important if the weekly number of working hours stipulated in the collective agreement of the transferee company is lower than the number of working

hours in the collective agreements governing transferee employees, viz. 40 hours for white-collar workers and 38.5 hous for blue-collar workers.

viii.

Under § 14 of the law governing the lease of employees, the transferee company is liable as a guarantor for all pay claims the leased employee may have on account of his employment as well as for the employee's share in social insurance contributions. If the transferee company can prove that it has honoured all its obligations vis-à-vis the temporary work agency, its liability in respect of the claims mentioned above is limited to that of a deficiency guarantor, i.e. it will be only liable if the employee has first vainly sought to assert his claim against the temporary work agency before a court of law.

ix.

Like other enterprises, temporary work agencies are also governed by the provisions of the Labour Relations Act regarding the form of collective in-company labour-management relations. This means in particular the requirement for every enterprise with a minimum of five employees to have employee representatives - works councils - elected, who enjoy a number of graduated participation rights (information, consultation and co-decision rights) on matters affecting employees' interests.

An employee leased for more than just a short period has, however, to be integrated into the overall organisation of the enterprise and is therefore to be regarded as part of its workforce. In practice, this situation will have to be assumed to exist from a transfer period of some six months upward.

The leased employee thus becomes a member of the workforce of the transferee company – but only with regard to the representation of employees' interests, not in respect of his individual contract of employment. Accordingly, he will be represented, like his fellow employees, by the elected employee representatives. If works council elections are held during the time of transfer, the leased employee will be entitled to vote.

This legal construct results in a kind of "double representation" by both the works council of the temporary work agency and by that of the transferee company. The latter will, however, only relate to such aspects of the working relationship as result from his concrete work and integration into the company organisation. One example would be a "No Smoking" company agreement between the transferee company and its works council, by which the transferred employee would also be bound. Aspects of the working relationship in the narrower sense of the term – such as notice of termination – and participation rights related thereto will remain within the competence of the works council of the temporary work agency.

x.

The transfer of employees without license is punishable by an administrative fine of up to 3600 €.

c.

In its decision of 3 December 2003, 9 Ob A 113/03, the Supreme Court of Austria, while not assuming a direct contractual relationship between the leased employee and the transferee company, does reinforce the claims of leased employees in special cases:

The case in point was the working relationship of a female employee with a temporary work agency which had extended over nine years, during which said employee was exclusively transferred to one enterprise. The Court held such transfer to be “atypical”, since transfers were typically of short duration. The more atypical a case, the more justification can be assumed to exist for approximating the employee’s legal standing to that of the regular employees of the company in question. In the case in hand, the Court therefore supported the employee’s claim for severance pay in accordance with the more favourable provisions of the collective agreement applicable in the transferee company, but pointed out at the same time that normally such claims would have to be denied, since the collective agreement obtaining in the transferee company is only relevant with regard to current salaries or wages, but not to other claims (see b/vii above).

6.

a.

A “franchise agreement“ is a continuous obligation by which the franchisor authorises the franchisee against a consideration to distribute certain commodities and/or services, whereby the franchisee uses the franchisor’s name and brand name etc. and complies with the standards of the franchisor’s system of organisation and marketing. Typically, the franchisor advises, supports and supervises the business activities of the franchisee. This makes for a relatively rigid organisation, while the franchisee remains an independent entrepreneur who acts in his own name and on his own account.

The franchise agreement is composed of elements derived from different kinds of contract (contracts for the transfer of use and enjoyment, purchase contracts, service contracts etc.) and has to be evaluated on the merits of the predominant type of contract.

b.

Some forms of franchising can limit the entrepreneurial freedom of action of the franchisee, who is normally to be seen as a self-employed individual, to such an extent that his position approximates that of an individual in dependent employment. This is in particular the case if

the franchisee has to work exclusively for his franchisor and has no other sources of income, if the franchisor determines the purchase and selling prices etc.

In its decision of 10 April 1991, 9 Ob A 8/91, the Supreme Court of Austria stipulated that a franchisee who is closely integrated into the operative organisation of his franchisor so that he is dependent on, and subject to the control of, his franchisor in regard to virtually all entrepreneurial decisions performs the task of a commercial agent and is therefore suject to the special rules pertaining to commercial agents.

In its decision of 12 November 1979, 4 Ob 68/79, the Supreme Court of Austria ruled that a franchisee is to be seen as similar to an employee if the franchise agreement contains provisions that limit his independence to such an extent that he can no longer be regarded as an independent entrepreneur. In the case in point the franchisee was not only under the obligation to buy a certain amount of goods exclusively from the franchisor but also to follow all instructions regarding marketing and “suggestions” concerning business organisation, and to give the franchisor access to his business records at any time. The consequences of this similarity with an employee are on the one hand the jurisdiction of the labour courts in any disputes that may arise from the legal relationship, and on the other hand the applicability of a number of protective provisions of labour law, including the limitation of liability vis-à-vis the other party for any damage caused in performing the contract.

c.

The franchisee’s employees have no legal relationship with the franchisor but exclusively with the franchisee. In some cases consideration might, however, be given to the question whether the use of employees by the franchisee might in reality constitute a transfer (lease) of employees to the franchisor, in which case the rules governing the transfer of employees would be applicable.

7.

a.

Productive decentralisation measures frequently linked with increased pressure on the workers and a reduction of jobs are regarded fairly sceptically by the trade unions. If, however, these measures serve to preserve jobs, the trade unions regard it in their interest to take a share in planning and executing them.

The scepticism is not least due to the fact that it is mostly easier and more efficient to recruit employees of large organisations for union membership, while decentralisation measures may give rise to conflicting interests (e.g. between leased employees vs. regular staff) that it may be difficult to reduce to a common denominator. Sourcing-out to legally independent

enterprises, which as a rule entails a change in the applicable collective agreement (mostly to a “cheaper“ one), may also erode collective agreements, particularly in industry.

b.

Yes. At the level of the group, the (central) works councils) in the individual, legally independent enterprises may join to form a “group works council“, i.e. represent all employees at group level.

The law endows this “group council“ above all with the right to be informed and consulted on matters affecting the employees of more than one enterprise of the group, and also gives it the right to delegate employee representatives to the Supervisory Board of the principal company. This means that the workers’ representatives in the Supervisory Board represent not only the employees of the principal company but those of the entire group.

Where no group works council has been formed, the employee representatives in the Supervisory Board of the principal company are delegated jointly by the (central) works councils of the enterprises forming part of the group (i.e. the principal company and all enterprises affiliated with it).

As regards the relationship between the representation by the works council, central works council and group works council on enterprise level on the one hand and the representation of interests by the trade unions on the other, the following should be noted:

It is the task of the representatives on enterprise level to ensure the exercise of the legally granted participation rights at the plant, company and group levels.

Working conditions (pay, periods of notice etc.) are settled by collective agreements negotiated by the workers’ organisations (trade unions) and employer organisations. Under Austrian law there are no plant-level collective agreements on these working conditions.

As a consequence there is no competition between the employees’ representatives on enterprise level and the trade union but a well functioning division of labour. In addition, there are personal linkages between the two, in that trade union positions are as a rule filled with representatives of works councils

c.

The trade unions subsumed under the Austrian Federation of Trade Unions are organised at branch of industry level according to the industrial union principle, with the Union of Private White Collar Workers forming the only exception in that it represents the white-collar workers in all branches of business. This structure implies that all unions are organised at a higher-than-company level so that even in the case of decentralisation the employees of the

affected or spun-off enterprises continue to be represented by the original trade union on condition that these enterprises belong to the same branch of business.

d.

Collective agreements apply as a rule to individual branches of business and thus cover all the enterprises of the particular branch of activity.

In exceptional cases collective agreements may be limited to one or more enterprises (see the example of air transport companies below).

In the context of decentralisation measures negotiations are usually engaged in at company level. In these negotiations the competent employee representatives are mostly assisted by the relevant trade union. Such negotiations may result in agreements at company level, for instance on concrete personnel planning measures for the next few years (employment pact on enterprise level).

e.

Generally speaking, Austria witnesses a very low number of instances of industrial action. In the last few years there have been two strikes that may be said to have been directed against decentralisation measures:

In connection with the reorganisation of the Austrian Federal Railways (ÖBB), which envisaged inter alia the splitting of the company into several enterprises, there was a strike that aimed, amongst other things, at ensuring the continuation of previous working conditions for all ÖBB employees.

In 2004, the in-flight personnel of a major airline company went on strike. One of the objectives was to achieve new collectively bargained conditions for the employees of a subsidiary, or in other words to enforce working conditions for the entire group by means of a collective agreement.