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COLLECTIVE REDUNDANCIES IN GERMANY AND THE UK

HENGELER MUELLER

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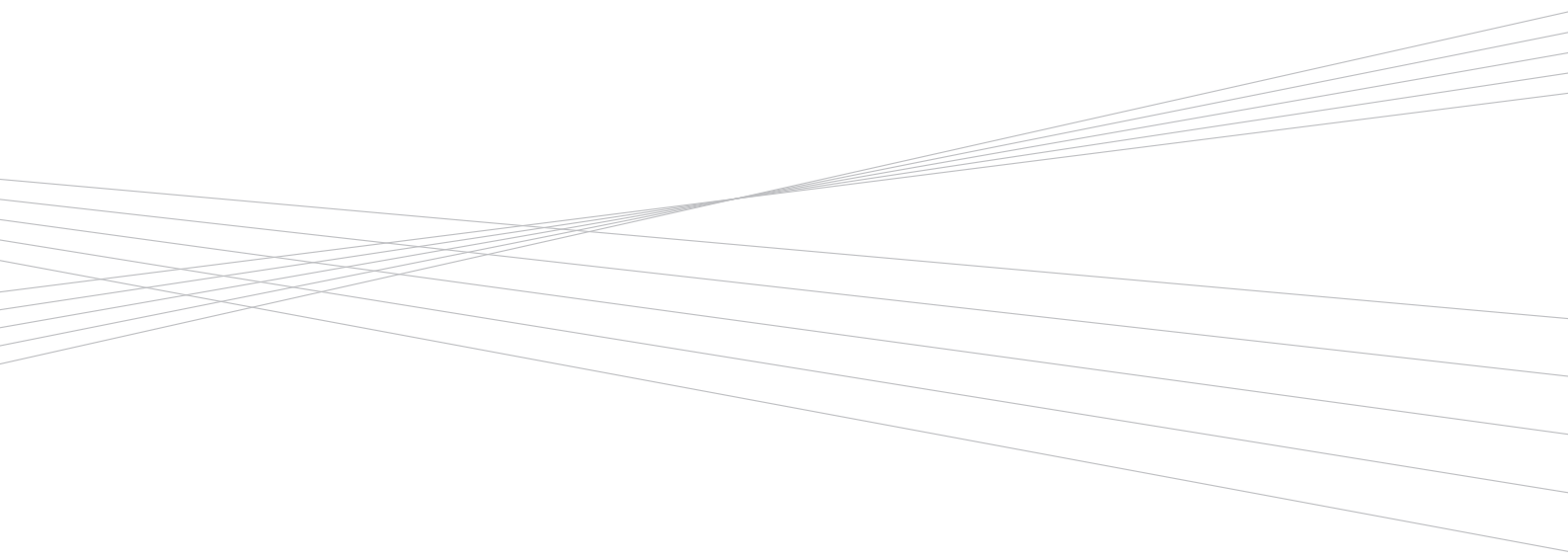

Introduction

Collective redundancies are something which most businesses strive to avoid. They are costly, disruptive, and bad for morale. However, they are also necessary in many circumstances, even more so since the economic downturn took hold across Europe. As a result collective redundancies have increased dramatically. For the period January to September 2012, the number of notified redundancies in the UK was around 440,000. In Germany the figure of planned redundancies made public for the same period is around 750,000, which is more than twice the number in the entire previous year[1].

Alongside the rising need for collective redundancies, the law governing them has grown more and more complex. The collective redundancy regimes in Germany and in the UK are clearly related and yet contrasting in their approach. They differ in many respects, including how redundancy is defined for these purposes, when the regime applies, and the sanctions for non-compliance. The law in both countries is derived from a single source, the Collective Redundancies Directive (98/59/EC) (the "**Directive**"). In the **UK**, the Directive is implemented by the Trade Union and Labour Relations (Consolidation) Act 1992 ("**TULR(C)A**"). In **Germany** it forms part of the German Termination Protection Act (*Kündigungsschutzgesetz* – "**KSchG**"), requiring an administrative procedure before the Federal Labour Agency (*Agentur für Arbeit*; hereinafter also the "**Agency**"). However, under German law, scenarios constituting a collective redundancy within the meaning of section 17 KSchG will also constitute a so-called "**operational change**" (*Betriebsänderung*) under section 111 German Works Constitution Act (*Betriebsverfassungsgesetz* – "**BetrVG**") which triggers additional information, consultation and material negotiation obligations under BetrVG. Furthermore, union activity including strike aimed at conclusion of a collective bargaining social plan in the context of such redundancies cannot be excluded in accordance with recent precedent.

This briefing considers the key legal and practical issues affecting employers when conducting collective redundancies in Germany and the UK. It does not cover any aspects of unfair dismissal or termination protection law which, however, in both the UK and Germany, must be complied with alongside the collective redundancy regime.

1 Figures from the Labour Force Survey (UK) and Georg Giersberg, *Mitarbeiter binden und gesund erhalten*, FAZ October 8, 2012, p. 14 (Germany).

What is "redundancy" for these purposes?

The Directive defines collective redundancies as "*dismissals effected by an employer for one or more reasons not related to the individual workers concerned*". This is implemented in the **UK** with similar wording by section 195 TULR(C)A. By contrast, the **German** section 17 para. 1 KSchG, uses the wider definition "*dismissals and other employer-induced ways of bringing an employment relationship to its end*".

In each case, the definition covers more than the 'classic' redundancy scenarios, involving site closures, reducing headcount or relocations. It also includes workplace restructurings and reorganisations, not geared towards a reduction in the amount of work or headcount, but where the employer wishes to revise workforce terms and conditions by terminating existing contracts of employment and offering to re-employ the employees on different terms (in Germany implemented by terminations with the option of altered conditions of employment – *Änderungskündigungen*). In Germany the concept expressly excludes terminations for cause (*aus wichtigem Grund*), cessation of employment due to retirement of the employee (and arguably also in case an employee leaves to become self-employed) or due to a condition subsequent.

If an employee volunteers for redundancy, under both UK and German law he will usually be treated as having been dismissed (and so come within the definition of redundancy set out above). In Germany, employees leaving to become employed by a transitional employment and qualification entity (*Beschäftigungs- und Qualifizierungsgesellschaft/ Transfergesellschaft*) or for employment with a new "regular" employer will count as dismissals unless agreements effecting a seamless transfer have been concluded prior to giving notification under section 17 KSchG.

The Directive does not apply to collective redundancies effected by the expiry of fixed term contracts. It only applies where redundancies take place prior to the expiry of such contracts (*i.e.* within the fixed term). This is also the case under the **German** KSchG. In the **UK**, TULR(C)A excludes collective redundancies on the expiry of fixed term contracts of three months or less, but could apply on the expiry of a longer fixed term contract. That said, a recent case held that the expiry of a fixed-term contract was not a 'redundancy' within the TULR(C)A definition, on the basis that the employee had agreed to a fixed-term contract, accepting that it would come to an end at a particular date.

When does the collective redundancy regime apply?

Under Article 1(1) of the Directive, member states can choose one of two possible conditions. These are where the number of redundancies is:

(a) either, over a period of 30 days:

  (i) at least 10, in establishments normally employing more than 20 and less than 100 workers;

  (ii) at least 10% of the workforce in establishments normally employing at least 100 but less than 300 workers;

  (iii) at least 30, in establishments normally employing 300 workers or more;

(b) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question.

The **UK** has chosen option (b), while **Germany** has broadly adopted option (a), but overall has made its regime stricter. In **Germany**, collective redundancy protection under both KSchG and BetrVG is triggered if an employer makes redundant:

- 6 or more employees of an establishment regularly employing 21-59 employees;
- 10%, or more than 25 employees, of an establishment regularly employing 60-499 employees; or
- 30 or more employees of an establishment regularly employing 500 or more employees.

In addition pursuant to case law by the Federal Labour Court, terminations of at least 5% of the employees of an establishment with 600 or more employees will trigger the requirements of sections 111 *et seq*. BetrVG. In this context, it must be noted that for the purposes of section 17 KSchG, the threshold must be met within 30 days. This is not required for purposes of section 111 BetrVG where the time-period can be much longer. However, under the **German** regime, the termination of certain individuals does not count towards such thresholds, namely managing directors, members of managing boards and certain employees with managerial functions including the power to hire and terminate employees (section 17 para. 5 KSchG) – which is not in accordance with the Directive. No such exclusion for senior employees exists under **UK** law.

What is an "establishment" for these purposes? The definition under **UK** law is derived from European case law. An establishment is defined as the unit to which workers are assigned to carry out their duties; it need not have its own management or legal or economic autonomy, but must be in some sense a distinct entity with a degree of permanence and stability, and its own organisational structure and workforce. This means that an establishment may be a branch office, or a department which is spread over a number of geographic locations. **German** precedent on collective redundancy issues traditionally applies a stricter definition of an establishment used under the BetrVG which defines an establishment as an organisational unit in which an employer continuously pursues specific operational objectives by himself or with employees, with technical and/or immaterial means. While legal writers have been calling for application of the definition supplied by the European case law, in precedent of June 2012, the Federal Labour Court has again applied the BetrVG definition.

What if an employer makes a number of different proposals for redundancies within the 30-day (German) or 90-day (UK) reference period, or shortly after its expiry? In the **UK**, this can cause some confusion. For example, if the employer initially proposes 25 redundancies, but then proposes another five redundancies within the same 90-day period, does the collective redundancy regime apply? The answer seems to be that it will only apply to the first tranche of 25, if the two proposals are separate. However, if in reality both proposals are part of the same overall redundancy process, and the employer has attempted to avoid the collective redundancy regime by staggering the redundancies, tribunals are likely to seek to apply the regime.

German law on this issue is more complex. If the threshold number of terminations is reached within the 30-day-period, the collective redundancy regime applies. If several redundancy waves occur over a time-period exceeding 30 days which individually do not entail the requisite number of redundancies to trigger the collective redundancy provisions, but which form part of a uniform plan by the employer to reduce employee numbers in stages over a certain period of time, in the context of operational changes, the Federal Labour Court has held that such waves will constitute a uniform measure and redundancy numbers will be added for the purpose of triggering the thresholds applicable under section 111 BetrVG. However, there seems to be no case law of similar content in the context of section 17 KSchG so far, and legal writers are in disagreement whether such waves should be added or whether the unequivocal 30-day-period prescribed therein indicates that this should not be done. Until this issue is determined by case law, this may result in cases where redundancy waves do not trigger the information, consultation and notification requirements of section 17 KSchG but will actuate the information, consultation and negotiation obligations vis-à-vis the works council under section 111 BetrVG.

What is the trigger point for collective redundancy consultation?

Under the Directive, the trigger point is when an employer is "*contemplating*" collective redundancies. According to the latest European case law, this will occur once the employer has taken a strategic or commercial decision compelling it to contemplate or to plan for collective redundancies. The point at which such a decision is merely contemplated would be too early, and the point at which the employer sets his mind on redundancies would be too late.

In the UK, the trigger point is when an employer "*proposes*" to make collective redundancies. The "*proposes*" test is generally understood to mean when the employer has formed a clear, albeit provisional, intention to make redundancies. He must have done more than merely contemplated the possibility of redundancies, and have formed some specific proposal for redundancies (although he may still be also considering alternative courses of action).

While **German law** does not define such a distinct trigger, in practice the position is similar to that adopted in the UK. An employer has to act under the collective redundancy regime once he is aware that measures that he wants to take will result in a number of terminations triggering a collective redundancy threshold. However, he should also act if measures that he wants to take *may* end up involving such number of terminations.

In relation to group companies, where the decision that will lead to redundancies is taken by the parent company, in both the UK and Germany, the trigger point is when the parent company identifies the subsidiary which will be affected by the redundancies.

What does the information and consultation procedure involve?

Under the Directive, the employer must begin consultations with the workers' representatives in good time with a view to reaching agreement. Consultation must, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences of redundancies. The employer must provide employee representatives with prescribed information during the course of the consultations, such as the reasons for redundancies, the number and category of workers affected, and the procedure to be followed.

Under **UK law**, the employer must consult with the appropriate representatives of any of the employees who may be affected by the proposed dismissals or by measures taken in connection with those dismissals. The employer usually starts the process by providing to the appropriate representatives the prescribed information in writing, which broadly follows that required by the Directive. Consultation must be 'meaningful' and thus should be undertaken when the proposal is still at a formative stage, and employee representatives have time to consider it. The employer must consult with the employee representatives with a view to reaching an agreement, but need not necessarily reach an agreement. If agreement has not been reached at the end of the consultation period, the employer is able to proceed unilaterally to implement the redundancy programme, although individual consultation with the at-risk employees will still be required as a matter of unfair dismissal law.

Under TULR(C)A, the consultation must begin "in good time" and in any event:

(a) at least 30 days before the first dismissal takes effect, where between 20 and 99 redundancies are proposed; and

(b) at least 90 days before the first dismissal takes effect, where 100 or more redundancies are proposed.

The employer cannot implement dismissals during this period of consultation.

As indicated, under **German law**, collective redundancies have to comply with two regimes in parallel, namely the one applicable under KSchG and the one under BetrVG. The requirements under KSchG are less burdensome to comply with and mainly require information and consultation with the works council of the affected establishment, and notification to the Federal Labour Agency. The BetrVG-regime on the other hand establishes information, consultation and material negotiation obligations vis-à-vis the works council of the affected establishment.

Pursuant to KSchG, the employee representative bodies of affected employees[2] must be informed by the employer in writing on the intended notification to the Federal Labour Agency including information on the planned terminations, stating the reasons

2 Depending on the individual case, these may be one or several local works council/s (*Betriebsräte*), a company works council and/or group works council as well as executive committees (*Sprecherausschüsse*) as representative bodies of the executive employees of a company. For easier reference, these will be referred to jointly as "works council" in the remainder of this briefing.

A common problem faced by German employers contemplating collective redundancies is to determine which employee representative bodies need to be involved in the process. Depending on the affected establishment/s, this may be local bodies only or bodies at company or group level. The relevant case law is inconsistent. *E.g.*, some lower labour courts will require that a company or a group works council be given power of attorney by local works councils in order to be able to act in collective redundancy proceedings even if more than one establishment or if an entire group of companies is affected by the redundancies.

for the redundancies, number and occupation of the employees regularly employed and of those to be dismissed, criteria applied to determine individuals to be dismissed and of severances payable to these, as well as the time-frame for implementation of the intended dismissals. In a next step, works council and employer have to consult on the intended terminations with a view to avoidance or reduction thereof. No agreement needs to be reached and no specific intensity or duration of consultations is required. If the works council does not participate in consultations, the employer may proceed unilaterally and notify the Agency, but has to prove that the works council was informed in writing two weeks earlier.

However, under section 111 BetrVG, it is required that (1) the employer inform and consult with the economic committee of the company (*Wirtschaftsausschuss*) and (2) the employer also inform and consult with the works council, and that works council and employer find a solution with regard to the intended measure which is acceptable to both. Such solution is laid down in a compromise of interests (setting out the plan of action – *Interessenausgleich*), which is often accompanied by a social plan (defining measures to mitigate any negative effects of the plan of action on employees, for example compensation payments or cooling-off periods – *Sozialplan*). If negotiations of the compromise of interests fail, a conciliation procedure must be conducted to reach a mediated agreement. This commonly involves a so-called conciliation board (*Einigungsstelle*), staffed with a labour judge as neutral chairman and representatives of the employer and the employees. The conciliation board may take resolutions suggesting a compromise of interests and ordering a social plan with binding effect on the parties. Only after such board has voted on a compromise of interests, can the employer proceed with the measure unilaterally. If done earlier, some labour courts will grant temporary injunctions stopping the premature implementation of the measure. The time-frame of the above process customarily takes up to three months, but – if a conciliation board is involved or in case of dilatory tactics of the works council – it can also easily exceed six months. Therefore, employers should allow themselves a confidential consideration phase (prior to informing the economic committee) to plan and structure the intended measure and its consequences soundly, and decide on a strategy in negotiations with the works council. Legal and HR advice should be obtained at this stage. This will facilitate a smoother and faster process in going forward. Also, it may help prevent the unions active in the affected establishment from becoming involved parallel to the works council negotiations with the aim to negotiate a collective bargaining social plan. Union social plans commonly entail much higher cost than works council social plans as unions may employ collective bargaining tools such as strikes to strengthen their negotiating power. The Federal Labour Court has

confirmed that union activity on redundancies, including strike, cannot be excluded by the statutory procedure prescribed under KSchG and BetrVG.

In both the **UK** and **Germany** there is an obligation to notify a public authority of collective redundancies. In the UK, section 193 TULR(C)A requires the employer to give formal advance notice to the Department for Business, Innovation and Skill ("**BIS**"). The notice must be sent at least 90 days before the first dismissal (where 100 or more employees are to be dismissed) and at least 30 days before the first dismissal (where between 20 and 99 employees are to be dismissed). In **Germany** section 17 KSchG requires that notification be given to the Federal Labour Agency. The notification (*Massenentlassungsanzeige*) must be made in writing, and, similarly to the information given to the works council, state the reasons for the redundancies, number and occupation of the employees regularly employed and of those to be dismissed, criteria applied to determine individuals to be dismissed and of severances payable to these, as well as the time-frame for implementation of the intended dismissals, and has to include a copy of the information provided to the works council. The employer must also provide a statement by the works council regarding the intended terminations, or a compromise of interests negotiated between works council and employer with regard to the measure. If neither of these documents is yet available, the employer may demonstrate that it has informed the works council in writing at least two weeks prior to the written notification to the Agency, and inform the Agency on the status of their consultations.

The Agency will review the collective redundancy notification and decide on its effectiveness and on the term of an ensuing termination ban (*Entlassungssperre*). As a rule, the length is one month from receipt of the collective redundancy notification by the Agency, however, the time-period can be extended to up to two months (for example if a large number of employees are affected) or shortened by the Agency (for example if the notice periods of a large portion of the affected employees are shorter than the one month ban). If notice periods expire during the ban, the end of employment is postponed until expiry of the ban, except where the Agency has consented to the taking effect of individual terminations.

Once the notification process is complete, the employer has 90 days from the end of the termination ban in which to issue notices of termination to the affected employees. Terminations delivered at a later time will be ineffective if collective redundancy requirements are triggered and no new notification of a collective redundancy has been made. This limitation must be kept in mind in structuring the entire collective

redundancy process. If notification to the Federal Labour Agency is given early on in the process, the employer may end up being barred from giving any notices of termination during the 90-day period if the works council negotiations and conciliation procedure required under section 111 BetrVG cannot be completed in time.

Exceptions

Under **UK law**, if there are "special circumstances which render it not reasonably practicable for the employer to comply" with its collective redundancy obligations, he is to a limited extent excused from those obligations. However, he must still take all such steps as are reasonably practicable in the circumstances to comply with those obligations. Scenarios falling within this definition are limited, but include:

- insolvency, where this is caused by a sudden unexpected event with serious and immediate financial implications;
- the withdrawal of a takeover offer, where this leads to the employer's sudden and serious financial deterioration; and
- (to a certain extent) the need to cease trading as soon as possible, to limit losses and maximise value for creditors.

The **German** collective redundancy regime has no similar exceptions. However, in scenarios comparable to the UK exceptions, the Agency may likely shorten the termination ban and/or allow short-time work to be conducted in order to decrease the economic burden on the employer. The conciliation procedure which forms part of the negotiation process with the works council under section 111 BetrVG is subject to more generous thresholds and is not applicable at all to companies undergoing collective redundancies within the first four years from their foundation. However this requires that the relevant operational change consists solely of redundancies, cf. section 112a BetrVG.

Remedies

In the **UK**, if the obligations to inform and consult are not properly complied with before redundancies are initiated, there is no bar to the redundancies going ahead. However, an employment tribunal may make a financial award of up to 90 days pay for each affected employee in these circumstances. In addition, if the employer does not follow a fair procedure carrying out the redundancies, the employees may be able to bring a claim for unfair dismissal.

If the employer fails make the required notification to BIS, then he will commit an offence and be liable on conviction to a fine.

In **Germany**, there are no clear legal consequences for failure to properly inform and consult with the works council under **KSchG**. These are discussed controversially among legal writers. Propagated consequences are anything from ineffectiveness of the declared terminations via damage claims to none at all. Recent precedent by the Federal Labour Court has declared that a collective redundancy notification lacking the required timely written information or lacking the required statement by the works council is void. It remains to be seen whether a similar stance will be taken where the statement is provided but has been attained by improper means.

If the employer fails to notify the Agency, or provides the notification too late, without the obligatory information or without copy of the written works council information, the terminations will be ineffective (cf. section 17 para. 3 phrase 5 KSchG). The employer would have to issue new notices of termination once he becomes aware of the failure. Such terminations, if duly performed, would nevertheless terminate the employment relationships if not challenged by the affected employees in termination protection proceedings (which will usually happen though). If the number of redundancies stated in a notification is lower than those occurring in fact, this will only make ineffective the terminations that are not counted in these numbers – provided that (1) all other requirements of the notification have been complied with and (2) it is possible to identify the individual terminations that are included in the notification.

While earlier precedent by the Federal Labour Court had stated that once the Federal Labour Agency had consented to a termination, the employer could rely on the underlying collective redundancy notification for purposes of such termination even if it had flaws, a new decision by the Court of June 2012 declared that this could not be

upheld in light of case law by the ECJ. Given this, it also seems unlikely that the former ruling by the Federal Labour Court would be upheld in which the Court decided that once an employer had been informed by the Federal Labour Agency that in the given circumstances, no collective redundancy notification was needed, the employer could rely thereon.

Under **BetrVG**, the conduct and completion of the prescribed information and negotiation obligations vis-à-vis the works council can be enforced by temporary injunction barring the employer from implementing the intended measure.

Proposals for reform

The positions as outlined above reflect the current state of the law. In **Germany**, legal writers have been asking for the amendment of sections 17 and 18 KSchG with regard to the definition of termination since the 2005 ECJ-decision defining it as the act of declaring notice of termination. Such definition having since been incorporated in German law by precedent, it seems rather unlikely that this will be acted upon by the legislature, except maybe in the context of the need for other reforms of the statute.

However, at European and UK level, there are a number of live proposals for reform. The **European Parliament** has published proposals to require employers to measure the 'psychosocial health' of their employees who are affected by redundancy or restructuring processes – and where the results are adverse, to offer retraining, interview coaching and other assistance with finding a new job. Employers would also be required to involve interested third parties (such as other local and/or dependent businesses) in the redundancy process, and give more consideration to alternatives to redundancies.

In **the UK**, the Government is consulting on proposals to scrap the 90-day minimum consultation period where 100 or more redundancies are proposed. The Government proposes to replace this with either a 45-day minimum consultation period, or a blanket 30-day consultation period for all collective redundancies.

Conclusion

Although the UK and Germany have chosen different ways to implement the Directive, the key factors for employers in either jurisdiction contemplating lay-offs of larger numbers of employees are the same. Such measures should be given thorough analysis prior to the taking of any action, to determine whether collective redundancy requirements must be followed. Premature terminations may result in costly damage claims (**UK**) or in their being ineffective which may delay the entire process (**Germany**).

Employers must plan for the time and resources required for compliance with the applicable collective redundancy regimes (including time periods required for meaningful consultation with employee representative bodies). As this briefing demonstrates, the somewhat complicated procedures involve a number of pitfalls, which often make the involvement of legal counsel advisable.

Further information

If you would like to find out more about any of the issues raised in this briefing, or require advice in relation to a specific matter, please contact:

HENGELER MUELLER

Dr Hans-Joachim Liebers (Partner, Frankfurt)
Email: joachim.liebers@hengeler.com
Tel: +49 69 17095 154

Dr Christian Hoefs (Partner, Frankfurt)
Email: christian.hoefs@hengeler.com
Tel: +49 69 17095 643

SLAUGHTER AND MAY

Roland Doughty (Partner, London)
Email: roland.doughty@slaughterandmay.com
Tel: + 44 207 090 5422

Charles Cameron (Partner, London)
Email: charles.cameron@slaughterandmay.com
Tel: + 44 207 090 5086