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Collective dismissals at a glance – an update

The implementation of collective dismissals in Germany is a complex process. First, the employer must inform and consult with one or more employee representatives on different aspects of the proposed dismissals; secondly the employer has to notify the competent employment agency (*Bundesagentur für Arbeit*); and thirdly it must comply with several individual dismissal requirements to justify a dismissal on operational grounds. This briefing highlights the key issues on consultation obligations and the consequences of a recent decision of the Federal Labour Court (*Bundesarbeitsgericht*).

1. Collective dismissals

Dismissals are considered collective if the total number of proposed dismissals:

- exceeds 5 in a business operation regularly employing 21 to 50 employees;
- exceeds 25, or, comprises at least 10 % of the regular workforce in a business operation regularly employing 60 to 499 employees; or
- amounts to at least 30 in a business regularly employing 500 or more employees.

2. Information and consultation

Who?	Economic committee[1] (*Wirtschaftsausschuss*)	Works council[2] (*Betriebsrat*)
When?	In good time before employer takes decision.	In good time before employer takes decision.
On what?	Details (why? when? how?) of envisaged collective dismissals (reasons for the dismissals, number of affected employees, timing of dismissals etc.) including necessary documents (but excluding trade and business secrets).	Details (why? when? how?) of envisaged collective dismissals (reasons for the dismissals, number of affected employees, timing of dismissals etc.) including necessary documents. At least two weeks before notifying the employment agency (see below), the employer must provide in writing: ■ the reasons for the planned dismissals, ■ the number and occupational group of the employees to be dismissed, ■ the number and occupational group of the employees regularly employed, ■ the period of time over which these dismissals are to take place, ■ the proposed dismissal selection criteria, ■ the criteria for calculating any severance payments, and ■ a request that the works council consult on collective dismissals and propose a meeting schedule.

[1] The economic committee is a subcommittee of the works council in companies with more than 100 employees.

[2] The works council is the (local) representative elected by the employees. In companies with two or more works councils, the works council must set up a company works council (*Gesamtbetriebsrat*). In a group with several companies with works councils a group works council (*Konzernbetriebsrat*) needs to be established. Depending on whether the collective dismissals are carried out in one or more business operations, the local works councils and/or the company works council needs to be informed (and consulted with).

3. Consultation

Consultation should start immediately after having informed the economic committee and works council. There is no minimum/maximum period for the consultation, usually it takes 2 to 6 months.

Economic committee	Works council		
Consultation	Reconcilement of interests (*Interessenausgleich*)	Social plan	Discussions on details of collective dismissals (under Section 17 KSchG)
On the proposed collective dismissals and the impact on the employees and on personnel planning (usually one meeting only). The economic committee shall inform the works council on the consultation process.	Describes the restructuring measures (whether, when and how dismissals shall be carried out). Usually, there are at least three external meetings. Agreement on written reconcilement of interests? Yes / No Agreement at conciliation committee or no agreement Implementation of restructuring measures (i.e. collective dismissals)	Determines compensation (i.e. severance payment) for the affected employees. The consultation on the social plan and reconcilement of interests is usually combined in practice. Agreement on written social plan? Yes / No Conciliation committee sets up social plan Social plan finalised	Employer and works council shall, discuss ways in which the dismissals can be prevented or limited and their consequences mitigated. The Federal Labour Court ruled that the consultation process under Section 17 KSchG can be either integrated into the reconcilement of interests or carried out separately. The employer should seek to obtain an opinion of the works council on the discussions mentioned above.

4. Sanctions

Failure to comply with the above information and consultation requirements has the following consequences:

Economic committee	Works council		
Consultation	Reconcilement of interests (*Interessenausgleich*)	Social plan	Discussions on details of collective dismissals (under Section 17 KSchG)
■ Fine of up to EUR 10,000 ■ Information request via arbitration	■ Fine of up to EUR 10,000 / 250,000 ■ Injunction against employer to obtain information ■ Injunction against employer to stop implementation of collective dismissals ■ Damage claims by affected employees (unless compensated by social plan)	■ Consent between employer and works council can be replaced by decision of conciliation committee.	■ All dismissals (including termination agreements) are void. The Federal Labour Court ruled that any failure with respect to the consultation process under Section 17 KSchG will render any dismissals and termination agreements void.

5. Notifying employment agency

When?	Upon completion of the consultation with the works council in order to prevent or mitigate dismissals and their consequences (in any event no earlier than 14 days after providing the works council with the information on the collective dismissals and initiating consultations with it).
On what?	The notification must include the employers' name, ■ its seat and the nature of the affected establishment, the reasons for the planned dismissals, ■ the number and occupational group of the employees to be dismissed, ■ the number and occupational group of employees to be dismissed and of those regularly employed, ■ the period of time over which these dismissals are to take place, ■ the proposed dismissal selection criteria, ■ the gender, age, occupation and nationality of the employees to be dismissed, and ■ either (i) the works council's opinion regarding the dismissals or (ii) proof that the employer informed the works council at least two weeks prior to submitting the notification including a description of the status of the discussions with the works council.
In which form?	The notification must be in writing (i.e. signed under hand by the legal representatives of the employer). Use of the official form provided by the employment agency for this purpose is recommended. (http://www.arbeitsagentur.de, form: *Anzeige von Entlassungen*).
Sanctions	Any failure in relation to the above requirements will render any dismissal and termination agreement void. This applies even if the employment agency considered the notification to be sufficient.

6. Consultation of the works council on each individual dismissal

When?	At least eight calendar days before the employer gives notice of termination to the individual employee; written format is recommended (e.g. e-mail).
What?	Details of the operational reasons for the dismissal, e.g. closure of a business or a part thereof), age of employee, years of service with the employer, number of family members to support, severe disability, special protection against termination, entrepreneurial decision and of the social selection resulting in a position becoming redundant (e.g. comparable employees for employee who is to be dismissed, considering age, length of service, number of family members to support and any disability when selecting the employee who is to be dismissed), applicable notice period for the employee. Termination agreements are not subject to consultation.
Sanctions	Any failure to comply with this consultation requirement will render the individual dismissal void.

7. Dismissal

Dismissal	The dismissal must be given to the employee in writing (i.e. signed under hand by the legal representative(s) of the employer) and received by the employee. Failure of written form and receipt renders the dismissal void. The dismissal letter does not always include the reasons for the dismissal, but set out the applicable notice period and/or the last day of employment. The applicable notice period (statutory, contractual or notice period under applicable collective bargaining agreement) usually varies between two weeks and seven months depending on the years of service with the employer. Due to the statutory blocking period the minimum notice period is no earlier than one month after the employer has properly notified the employment agency of the details of the collective dismissals. The employer must demonstrate that operational reasons exist resulting in the individual employee becoming redundant. Employees to be dismissed must be chosen via the social selection process. Dismissed employees are entitled to receive their regular remuneration during the notice period. Employees with special protection against termination (e.g. employees on maternity or parental leave, members of the works council) may not be terminated before the competent public authority/works council has given its consent.
Severance payments	As a rule, employees who are dismissed on operational grounds do not have a statutory entitlement to any severance payments. If, however, the dismissal is deemed unfair by the labour court, the employee may apply for a payment of severance in lieu of reemployment (which rarely happens in practice). The amount of severance payments under a social plan (or agreed between employer and employee on an individual basis to avoid or end an unfair dismissal dispute) is usually equivalent to 0.5 to 1.5 month's remuneration per year of service. If employer and works council cannot agree on a social plan, the conciliation committee can determine the amount of severance payable to dismissed employees.
Unfair dismissal claims	Must be filed with a competent labour court within three weeks of receiving the dismissal notice, otherwise the dismissal is deemed valid. Since the burden of proof for demonstrating the fairness of the dismissal is on the employer, the employee prevails in the majority of unfair dismissal claims (unless there is a complete closure of the business).
Sanctions	If a dismissal is not justified or for any other reasons void (see 4 to 6 above), the employer must reemploy the employee in the previous position.

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