

GERMANY: NEGOTIATED RESTRUCTURING

Public discourse on structural change and restructuring

German unification was succeeded by a vast de-industrialisation of the East. Since the mid-nineties, the West has experienced continuous and ubiquitous restructuring as well. Yet, the production sector (manufacturing, construction & mining) still accounts for 30% of total employment. The public discourse is not centred on managing the problem of restructuring but on maintaining the „Standort“ (Germany's global competitiveness as a location for production). The predominant agenda is defined as preserving employment in manufacturing by defending Germany's export position, and this increasingly through cost-cutting.

Importance of redundancies and dismissals

Dismissals are generally less frequent than quits in West Germany, while it is the other way around in the East. In a long-term perspective over several cycles, dismissals in the West seem to be slightly growing in numbers. The relative importance of dismissals for personal or disciplinary as compared to operational reasons has, since the late 70ies, drastically shifted in favour of the latter, which are potentially related to restructuring. In repeated works council surveys, matters related to restructuring are continuously on top of the agenda. In 2003, 590,000 jobs are reported lost due to insolvencies alone.

Work-related regulation and its actors

1. The German system of *labour relations* is highly legalistic, but wide areas of regulation relevant to work and restructuring are left to negotiations between the social partners at the industry and enterprise level. The legal framework prescribes procedures, not outcomes. Public actors are nowhere defined as stakeholders or supervisors in private enterprise restructuring. In most cases, legally defined rights constitute a semi-dispositive minimum. The observance of rights and the enforcement of rules depends entirely on the initiative of individual and collective actors concerned, backed by the possibility of recourse to the labour courts. The predominant practices of managing redundancies are shaped by and compatible with the law, but they are nowhere explicitly described in the legal texts.

2. *Works councils* elected by the workforce and acting on the grounds of legally defined rights are the primary partners of employers in negotiating restructuring. However, in 89% of establishments (predominantly the smaller ones) employing a slight majority of the German workforce there is no works council, either because the establishment does not reach the legal threshold of five or (more important) because the workforce has not chosen to elect one. Without a works council, there is little scope for a collective and pro-active approach to restructuring.
3. *Industrial unions* are organising by sector. After several mergers, only a few remain today. They bargain for wages and working conditions (including, e.g., notice periods), they may initiate the election of works councils, and their counselling and coaching of works councils is crucial when it comes to negotiating restructuring. Trade union representation on works councils has declined less than their membership.
4. *Public actors* (municipalities, *Länder*, the Federal Government) have no formal responsibility or right to intervene in a restructuring process on their own account. Politicians may nevertheless play some role if they are called in by the employer or the works council and trade union. The *Public Employment Service*, in addition to being informed about collective dismissals in accordance with the respective European Directive, offers two closely related instruments for accompanying restructuring which are available on request.

Institutions and procedures

Supervisory boards are mandatory only in corporations with more than 500 employees. They comprise employee representatives in minority positions. Restructuring will usually be the kind of business decision that has to be approved by the supervisory board. However, in MNC's with strategic headquarters abroad, the leverage of trade unions and works councils through supervisory boards tends to be marginal.

'Change of operations' (*Betriebsänderung*) is the pivotal legal concept that comes close to a comprehensive approach to restructuring within the confines of the establishment. 'Change of operations' gives the works council a certain leverage for intervention; but it is not a publicly recognised status of the enterprise 'under restructuring' (like in Belgium). The 'operational' framing of this concept defines the interests that have to be reconciled as the organisational requirements of the management and the social interests of the employees. The employer is not obliged to justify his decision for restructuring in economic terms, nor is the regional impact of restructuring included in the agenda as it is legally defined (like in France).

The legal concept of 'change of operations' comes to bear only where a works council exists, which then has rights of information, consultation and negotiation in *three arenas* simultaneously: (a) Collective negotiations about a 'reconciliation of interests' and a 'social compensation plan' with regard to the restructuring, (b) being heard before each dismissal is actually invoked, with the possibility to formally voice an objection (which, however, has a potential effect only if the employee threatened by dismissal takes individual legal action);

(c) being properly informed in the framework of the European Directive on collective redundancies. Playing all three arenas simultaneously, timely and formally impeccably is the principal problem for employers in the process of restructuring. Like in France, the potential penalty for undue procedure is a strengthening of individual workers' positions if they should contest their dismissal in court.

Individual rights of employees with regard to dismissals are very important and deeply rooted in the German legal culture – quite unlike Sweden where the trade union is the sole caretaker of the individual. In establishments with more than 10 employees (i.e. only in 20% of establishments, but for 80% of the national workforce), they constitute a baseline of protection even in the absence or indolence of a works council. These rights will only be invoked if the individual concerned takes the case to court within three weeks.

Dismissals related to restructuring are legally accepted by virtue of '*urgent operational requirements preventing the continuation of employment*'. Operational necessity, proper selection of the workers to be dismissed with regard to seniority, age, obligations of support and disability, and due involvement of the works council are the grounds on which individuals will challenge their dismissal. If they succeed, their dismissal will be void, and in theory they have to be reinstated. At any stage of the procedure, the employer may bargain himself out of this by offering financial compensation in return for the termination of contract and procedure. There is no universal legal provision for financial compensation, nor is there a legal entitlement of the individual to outplacement services or an obligation of the employer to offer them (like there is in France). All this can only be collectively negotiated in the framework of a social compensation plan if a works council exists.

Labour Courts organised in three instances form a separate and uniform branch of civil jurisdiction with its own organisation, procedures, career patterns, and court buildings. Its first instances are available regionally all over the country. They are responsible for both individual and collective cases (employee vs. employer, works council vs. employer, trade union vs. employer).

Social compensation plans are the principle outcome of negotiating restructuring. They are agreements between works councils and the employer, giving the individual workers concerned non-forfeitable rights enforceable in court. Due to their private law nature, there are no comprehensive statistics on social compensation plans.

Legally they hinge on the abovementioned qualitative definition of 'change of operations' rather than on unilateral dismissal in a technical sense, thus opening the road to 'voluntary' individual solutions under a collectively negotiated umbrella. By negotiating a framework for voluntary redundancies, the employer and the works council may reduce procedural complexity and risk and thus speed up the shortening of payrolls, though at considerable cost for the enterprise and often the unemployment insurance fund.

Social compensation plans have been *innovative* in that provisions for re-training and outplacement services have increasingly complemented redundancy payments. Thus, individual voluntary redundancies ('buying the worker out of the contract') have been reframed as collective pathways into new employment.

Enforcement, encouragement, and outcomes

The observance of individual employment protection can only be enforced by *individual legal action*. Merely between 11% (employee survey) and 16% (labour court survey) of dismissals are contested in a legal procedure. The rest are either not covered by legal employment protection (establishment under ten employees or tenure under six months), or the dismissal appears unquestionably legally acceptable, or the individual does not dare or care to challenge it. Of the legal procedures, 65% ended with a settlement rather than with a sentence, of which again 75% were settled through payments offered by the employer. This creates the impression that employment protection legislation generates compensation payments above anything else. However, the product of above percentages suggests that only around 8% of dismissals are financially compensated as a result of individual legal recourse. Severance payments collectively agreed in the framework of a social compensation plan have to be regarded separately.

In a survey of dismissed employees, only 2% reported that there had been a *works council* who had voiced its objection against their dismissal. However, among the dismissals brought to court, 34% are supported by the works council's objection. It may thus be inferred that the reaction of the works council to the dismissal has a powerful supportive as well as selective function with regard to individual legal action.

Given the existence of a works council in an establishment sized at least 20 employees, and a 'change of operations' with potentially substantial damaging effects for considerable parts of workforce, the works council possesses the legal leverage to negotiate a *social compensation plan* and to force the employer into some sort of agreement through a mandatory arbitration procedure. Yet, only 8% of employees affected by redundancy reported to have benefited from a social compensation plan. These 8% are not the same as the above 8% with individual compensation bargained on the sidelines of the courtroom, though there may be overlap.

Besides, there can be socially justified dismissals 'for urgent operational requirement' without triggering negotiations about a social compensation plan as a consequence of 'change of operations', if the number of workers affected by these dismissals or other damages do not amount to an essential part of the workforce.

Job transfer schemes

In order to avoid dismissals, the restrictions of social selection for dismissal, the procedural risks inherent in legal actions against them, and, if so desired, in order to shorten payrolls more quickly than individual notice periods would allow, so-called job transfer schemes have evolved since the massive restructuring that followed German unification.

The employer offers to the worker threatened with dismissal the annulment of the existing open-ended contract in exchange for a fixed-term contract with a third party specifically created for such purposes, a so-called *transfer company*.

In return for giving up legal employment protection, the worker receives a *temporal extension of his employment* plus outplacement services supposed to be delivered by the transfer company. Sanctions against entering unemployment 'voluntarily' in the case of later claiming benefits will be circumvented if the worker trades an open-ended for a fixed-term contract which then ends automatically. If the change-over to the transfer company is effected before the end of the notice period, compensation paid by the employer for wages lost may be kept by the worker even in the case of subsequent unemployment, whereas a direct premature transition into unemployment would result in benefits being withheld until the end of the notice period.

As a rule, transfer schemes are negotiated by works councils in the framework of social compensation plans. Traditional severance payments are supplemented by outplacement services, and the financial component of innovative social compensation plans may be designed to work as an *incentive for labour market transitions*. There may be premiums on opting for the transfer company instead of awaiting dismissal, for taking part in training and other active measures, and for taking up a new job as early as possible. Guarantees for return to the transfer company in case a new job does not work out as expected facilitate transitions, as do supplements to initially lower wages in a new job or provisions for the capitalisation of severance payments plus possibly cheap loans for those who want to set up their own business. These examples are not the rule but only found in advanced transfer schemes.

Transfer companies offer 'employment' on the basis of *short-time 'working' at zero hours*, subsidised by the Public Employment Service by paying short-time compensation of 60% of standardised net earnings for the days lost (67% for those financially responsible for at least one child). The former employer has to pay social security contributions for the whole period and full wages for days he would have had to pay without receiving the services of the employee anyway (holidays and paid leave).

Under the framework of the social compensation plan, short-time working compensation is usually supplemented by the former employer so that income levels between 75% and 90% of former net pay are guaranteed during the transfer period. Overhead costs of the transfer company as well as the cost of outplacement services have to be provided by the former employer. Under certain circumstances, the ESF may be tapped for a contribution to training costs. The maximum period for which short-time compensation is granted is now 12 months (formerly 24).

Outplacement services provided by transfer companies are very much the same as seen in other countries: profiling, job search training and coaching, vocational training, and offers for job placement. Given the special status of participants as 'employees' of the transfer company, failure to actively participate can be sanctioned by dismissal for reasons of conduct.

Likewise because of the employment status, internships or temporary work for other employers with a guaranteed option for return into the transfer company play an important role in preparing more lasting transitions.

Transitions through transfer companies are costly for both the former employer and the unemployment insurance fund. Alternatively, there is the leaner instrument of *'transfer measures'* which subsidises outplacement training for workers selected for redundancy because of restructuring while they are still employed by their old employer. The subsidy is 50% of total cost but at a maximum of 2,500 Euros per participant. The objective of transfer measures is to effect transitions into a new job before the end of individual notice periods. Transfer measures and transfer companies may be used successively but not simultaneously, with the transfer measure first filtering off the more easily to place and the transfer company taking over the harder to place later.

The implementation of job transfer schemes depends entirely on the autonomous negotiations of the social partners at enterprise level, possibly (and mostly necessarily) with guidance from the social partners at sectoral level, and facilitated by the offer of subsidies from the Public Employment Service. There is only a weak legal link between autonomous negotiations and active labour market policy: The arbitration committee, a body that must be called for mediation between the employer and the works council in case of failure to agree on a social compensation plan, is supposed to take public provisions for job transfer schemes into consideration, which can also be read as a guideline for free negotiations without arbitration. Transfer companies, in particular, appear nowhere in the legal textbooks. They are an innovative construct, born out of the conditions of labour law and the available active labour market policy subsidies.

Critical issues

German labour law is difficult to practice for both sides and makes professional legal advice almost indispensable. Labour judges estimate that about 20% of cases contested in court lacked social justification because of deficient social selection, whereas 40% of works councils' objections against dismissals were legally ineffective because of lack of substantiation. This legal complexity seems awkward and gives rise to constant complaints; without it, however, there would be far less incentive for employers to negotiate voluntary and perhaps innovative solutions in the quest for reduced legal complexity and procedural risk.

Employees in SME's enjoy less legal protection in small establishments (no social compensation plan in establishments under 20 employees, no individual employment protection under 10) and less factual protection in medium establishments (under 100) where there is often no works council. The pivotal role of the works council in negotiating restructuring implies that half of the German workforce is not covered by the legally prescribed procedures. Even where a works council exists, pro-active approaches to restructuring are often prevented by lack of expertise and previous experience, financial resources of the enterprise, and 'critical mass' of the number of workers concerned.

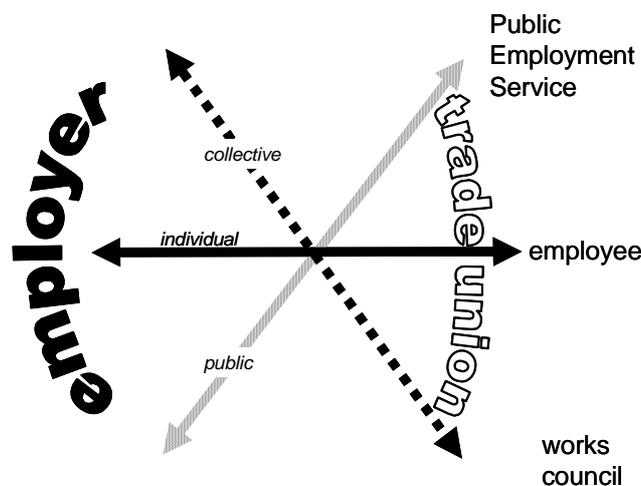
Early retirement used to be the key instrument in managing redundancies, and any pro-active accompaniment was only pursued where early retirement was insufficient to solve the problem. Recent legislative measures to cut down on early retirement have had considerable impact, but the basic preference for it remains. Where transfer companies are used a first stage in a pathway to retirement, they cannot fulfil their functions of re-training and job placement.

Since companies' principal motive for involving a transfer company is the swift and easy severance of the labour contract, they tend to be satisfied with this 'outplacement' in the narrow sense of the word. In many cases, any vigorous advocate of 're-placement' is lacking, with the redundant workers resenting the change, the works council setting priorities for the remaining workforce, the trade union focussing on financial aspects and the PES not really desiring transfer companies to outperform its own placement services.

Prevailing practices are addressing the 'hard factors' of jobs and money; they run the risk to neglect the soft factors that may, however, form barriers against finding a new job: attitudes, self-perception, physical and psychological health. There are only few examples of a comprehensive approach to transfer management taking the whole personality of the clients into consideration.

Pro-active and preventive approaches do not appear to be on the rise as trans-nationalisation tends to shift information and decision-making out of the reach of local actors. Visionary plans for local revitalisation, which were present in the eighties and early nineties, have since been discouraged by employers' resistance against assuming such responsibility, by employers' failure to meet agreed commitments, or by the actual failure of the concepts despite good will and effort.

Three axes of dealing with restructuring



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