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The concept of 'establishment' in the context of collective redundancies (AT)

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Summary

In the context of collective redundancies the term 'establishment' (*Betrieb*) must be interpreted in compliance with the Collective Redundancies Directive 98/59/EC (the 'Directive'). The early warning mechanism of Section 45a of the Austrian Labour Market Promotion Act (*Arbeitsmarktförderungsgesetz*, 'AMFG') is only triggered if the number of the planned redundancies reaches a relevant threshold in an establishment. In the present case the stores in question were qualified as separate establishments within the meaning of Section 45a AMFG.

Legal background

In accordance with Section 45a AMFG employers in Austria are obliged to follow a strict procedure as far as collective redundancies are concerned. They need to inform the local employment office at least 30 days prior to giving notice to the first employee in case the number of planned dismissals to be declared within a time frame of 30 days in an establishment (*Betrieb*) exceeds a relevant threshold. These thresholds generally refer to the number of employees in comparison to the number of dismissals and consensual termination agreements initiated by the employer. Furthermore, a particular threshold applies for employees aged 50 and above which does not depend on the size of the workforce. Any collective redundancies that are effected without due notification to the local employment office are null and void.

Facts

The plaintiff was employed as a saleswoman at one of the defendant's four stores. Two out of four of the Austrian stores, including the store where the plaintiff was employed, were shut down and notice was given to the respective employees. The plaintiff challenged the dismissal and argued that due to the number of dismissals in relation to the number of employees in all the four stores together, the defendant would have been obliged to follow the procedures of the early warning mechanism.

Judgment

The Labour and Social Security Court of Vienna (*Arbeits- und Sozialgericht Wien (ASG Wien)*) dismissed the employee's claim. In its decision it referred to the Directive and established ECJ case law.

The case was appealed to the Higher Regional Court of Vienna, which confirmed the decision and dismissed the arguments of the plaintiff. The Court pointed out that according to well-established case law of the ECJ the term 'establishment' must be interpreted autonomously and not by reference to the laws of the Member States.

Referring to the *Rabal Cañas* case (C-392/13) and the *Athinaiki Chartopoiia* case (C-270/05) the Court went on to define an establishment as the unit to which the workers being made redundant are assigned to carry out their duties. It is not essential in order for there to be an 'establishment' that the unit in question be endowed with a management that can independently effect collective redundancies. There is a difference between '*establishment*' and '*undertaking*', given the fact that an establishment is in general part of an undertaking. In the context of an undertaking an 'establishment' may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks.

Therefore, where an 'undertaking' comprises several entities meeting the criteria set out above, it is the entity to which the workers made redundant are assigned to carry out their duties that constitutes the 'establishment'

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for the purposes of the Directive. The number of dismissals effected at that establishment must be taken into consideration separately from those that take place at the other establishments of that same undertaking.
Furthermore, the Court confirmed the first instance court's reference to ECJ case law under which the Directive mainly relates to the social-economic consequences caused by a mass redundancy in the local context and a certain social environment.
As a result, the defendant's stores in Austria were all separate establishments within the meaning of the case law of the ECJ. Even if Vienna and Lower Austria would be considered as one common labour market the relevant threshold would not have been reached.
The Supreme Court of Austria confirmed this decision stressing that the purpose of Section 45a AMFG was to limit the socio-economic consequences of collective redundancies in a particular local and social environment.

Commentary

The national courts correctly pointed out that in order to clarify and interpret the term 'establishment' in Section 45a AMFG, the interpretation has to be based on the Collective Redundancies Directive 98/59/EC and established ECJ case law.
In practice, however, employers might struggle in assessing whether two or more sites of an undertaking constitute separate 'establishments' within the meaning of the collective redundancies legislation. The crucial point is whether the redundancies affect the same labour market being characterised by having the same local and social environment. Unfortunately, the Supreme Court has failed to give an indication whether the area of competence of the labour market authorities would qualify as such environments. As failure to comply with the rules of the early warning system makes the redundancies null and void employers may be well advised to err on the side of caution and notify the local employment office if there is a risk that the threshold is reached under any of the possible calculation methods.

Comments from other jurisdictions

Germany (Othmar K. Traber, Ahlers & Vogel): The Federal Labour Court also had to decide on the scope of the term 'establishment' (judgment of 13 February 2020 - 6 AZR 146/19). In this context, the Federal Labour Court declared the termination of an employee to be invalid because the employer had not made a correct mass dismissal notification as it had misunderstood the concept of establishment.
The core issue was whether flight personnel were also attributable to the 'home base' of Düsseldorf, i.e. the station at which the crew regularly assembled, departed and arrived, even though the head of flight operations was based in Berlin. The head of flight operations was responsible for enforcing and complying with cockpit work instructions and operating regulations, for personnel planning and the rehiring of all flying personnel, as well as for the entire duty and deployment planning of crews and the movement of crews between the individual departure stations. Duty and rotation planning was carried out for all flight operations from the Berlin headquarters.
At the Düsseldorf station, however, a 'regional manager' was appointed to ensure smooth operations and coordination between flight crews and higher management levels.
The Federal Labour Court stated that the concept of establishment in relation to collective redundancies is to be interpreted autonomously and uniformly under European Union law. While this previous case law and the literature assumed a link to a consideration to the Works Council Act (*Betriebsverfassungsgesetz*), the Sixth Senate of the Federal Labour Court rejected such a reference.
Although within the framework of the Dismissal Protection Act the establishment for companies in the shipping and aviation industries (Section 24 of the Act) are legally defined, this concept of establishment also does not apply since the notification requirement for mass dismissal is based on the Collective Redundancies Directive 98/59/EC (the 'Directive').
The Federal Labour Court stated that the term 'establishment' within the meaning of the Directive is to be interpreted very broadly in accordance with the ECJ. The ECJ does not place high organizational requirements on the necessary organizational structure. Accordingly, an establishment is a distinguishable unit of a certain permanence and stability, which is intended to carry out one or more specific tasks and has a group of employees as well as technical means and an organizational structure for the performance of these tasks.
In this respect, the Federal Labour Court stated that the 'Düsseldorf station' was not temporary but permanent and that the specific task of this unit was to enable flight operations from that airport.
The Court then went into detail as to whether flight personnel also belong to the 'totality of employees'. Ultimately, it was sufficient for the Court that the crew members would fly to and from the home base. This was sufficient, as it established a central point of reference and connection between flight and labour law regulations.
Regarding the organizational structure, the Federal Labour Court stated that a stable organizational structure is sufficient without any further requirements being placed on the degree of independence. For this purpose, a management which can guarantee a smooth operational process on site is sufficient. In particular, it is irrelevant whether the local service has disciplinary rights of instruction or other independent powers with

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regard to personnel measures without the involvement of higher-level management personnel.
Accordingly, it is sufficient as a basic organizational structure if a first contact person on site oversees the coordination between employees and higher management levels, even if this person does not have management authority. In the opinion of the Court, this was the regional manager.
The flight personnel were thus not assigned to the Berlin unit, from which they received their direct instructions and duty rosters, but to the establishment 'Düsseldorf home base'.
A comparison of the two judgments shows that even the smallest management structures within a unit that can be delimited in terms of personnel are sufficient to fulfil the requirement of a basic organizational structure as required by the Court of Justice for the notion of an establishment within the meaning of the Directive.

United Kingdom (Richard Lister, Lewis Silkin LLP): The concept of 'establishment' is also of crucial importance in UK law on collective redundancy consultation. An employer must be proposing to dismiss at least 20 employees 'at one establishment' before collective consultation is required. Accordingly, if an employer is proposing to implement more than 20 redundancies across several workplaces, but less than 20 at any single location, it must consider whether the workplaces should be treated as a single establishment so as to trigger the duty to consult.
In line with the ECJ case law interpreting the Collective Redundancies Directive, UK tribunals and courts generally interpret 'establishment' as the unit or workplace to which employees are assigned. It must be relatively permanent and stable but does not need to have independent management who can decide to dismiss staff or be economically or administratively separate. This will depend on factors such as whether the unit performs specific tasks and it has facilities, such as a workforce and an organizational structure, to enable it to perform those tasks.
A particularly influential authority on this issue in the UK in recent times has been the ECJ's 2015 ruling in *USDAW and another – v – WW Realisation 1 Ltd (in liquidation), Ethel Austin Ltd and another* (C-80/14) – generally known as 'the Woolworths case'. This was a reference to the ECJ by the UK Court of Appeal. Essentially, the ECJ ruled that the word 'establishment' in the Directive denoted the local employment unit to which the workers made redundant were assigned to carry out their duties. The upshot on the facts was that each store within two large retail chains constituted a separate establishment, carrying out their activities from stores in different locations throughout the UK (and employing in most cases fewer than 20 employees).
In light of the welcome clarification provided by the ECJ in the Woolworths case, I would expect a UK court or tribunal to reach the same conclusion as the Austrian courts in the case reported above – namely, that the defendant employer's stores were separate establishments. Nonetheless, it is important to remember that the identification of the unit to which workers are assigned to carry out their duties remains a question of fact that depends on the specific circumstances. While the answer may be clear when the employer is a large retail chain, this will not always be the case. For example, the Advocate General in the Woolworths case gave the example of an employer operating several stores within one shopping centre, commenting that it would not be inconceivable for all those stores to be treated as forming a single local employment unit. The ECJ did not comment on this example in its judgment, which means there is still a degree of uncertainty in this area.

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