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The "energy price brake" from an employment law perspective: Overview and comments

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The legislature has adopted the Natural Gas Heating Price Brake Act (EWPBG) and the Electricity Price Brake Act (StromPBG) as a reaction to the recent sharp increases in energy costs. Both Acts came into force in December 2022 to provide an "energy price brake".

Their aim is to provide tangible relief to both private households and companies in light of increased energy costs. The legislature intends to safeguard the stability of companies and locations and, as a consequence, jobs in Germany and Europe.

To summarise, relief is provided through the "energy price brake" primarily by gradually **reducing unit prices** related to certain energy quotas. The particulars of the assessment are regulated in detail in the Acts (section 3 ff EWPBG / section 4 ff StromPBG). Companies may claim relief on the basis of the EWPBG and the StromPBG amounting to up to **EUR 150 million** under certain conditions.

Granting relief, however, leads to partly severe employment law restrictions/requires corresponding concessions from companies at certain threshold values. This article gives an overview of the content of the Acts and the most important questions in this context.

A. Content of the EWPBG and the StromPBG from an employment law perspective

If the total relief received by a company on the basis of the EWPBG and StromPBG exceeds **EUR 2 million**, the Acts mandate the following obligations under employment law:

I. Obligation to retain jobs

Companies are initially subject to an **obligation to retain jobs** until at least **30 April 2025** (section 29 (1) EWPBG / section 37 (1) StromPBG). Companies may fulfil this obligation in various ways:

1. Collective Agreement or Works Agreement

The **primary** variant envisages that a company adopts a **collective agreement** or **works agreement** to commit to maintaining the jobs. The applicable provisions do not provide any explicit requirements regarding the type, content and scope of such an employment protection agreement, apart from the minimum duration until 30 April 2025. It appears questionable whether the instruments stated in section 92a German Works Constitution Act (BetrVG) are

sufficient for safeguarding employment, in particular with regard to the section name used in the EWPBG and StromPBG, "Obligation to retain jobs" ("Arbeitsplatzerhaltungspflicht").

2. Voluntary commitment

Alternatively, a company may, instead of entering into an employment protection agreement, issue a **unilateral declaration of voluntary commitment**.

The company must submit an undertaking to the responsible audit authority to employ a workforce of at least **90% of the full-time equivalent jobs** in the company **on 1 January 2023** (section 29 (1) sentence 2 EWPBG / section 37 (1) sentence 2 StromPBG) until at least 30 April 2025.

If this obligation to retain jobs is to be fulfilled by issuing a declaration of voluntary commitment, **additional notification obligations** arise in relation to the responsible audit authority:

- On the one hand, the company must issue a **written declaration** with any available comments from those affected by the negotiations (in particular trade unions, employee associations, works councils) as to **why** a **collective agreement** or a **works agreement was not entered into** in order to safeguard employment. The explanatory memorandum makes it clear, however, that such comments **are not mandatory**. No pressure should be imposed to participate in or to conclude corresponding collective bargaining (Bundestag document 20/4685, pg 111).
- On the other hand, the company must present an **audited (!) final report on job development** by **31 December 2025**. This report must explain any redundancies that have been implemented and provide details of compensating investments (more about this shortly). According to the explanatory memorandum, the final report may also be submitted in 2026 in exceptional cases, in particular if some investments were first made in 2026 (Bundestag document 20/4685, pg 112).

3. Deadline for providing evidence

Companies must provide evidence of the measures they have taken to fulfil the job retention obligation to the responsible audit authority **by 15 July 2023**. This means, in particular, that the corresponding collective agreement or works agreement must be already bindingly agreed by this point.

4. Consequences of breaches/missing deadlines and possible compensation

If a company does not provide the evidence by 15 July 2023, the audit authority may **recover** the relief granted, provided it exceeds EUR 2 million.

The audit authority may likewise recover some or all of the relief granted that exceeds EUR 2 million if the company breaches its voluntary commitment to retain jobs. The statute does not make it clear whether breaching the obligation to safeguard employment agreed upon in a collective agreement or works agreement, for instance through a staff reduction in agreement with the works council or trade union, would also lead to recovery at the audit authority's discretion. Conversely, it could be argued that this method of implementation is normatively privileged to a great extent, which is also explicitly expressed in the explanatory memorandum (Bundestag document 20/4685, pg 111). It is doubtful whether the privilege is supposed to be this far reaching, however, in regard to the aim of the Acts, i.e. the protection of jobs.

Those discretionary decisions made by the audit authorities regarding the recovery of funds should, in particular, be made in accordance with the following guidelines:

- The **amount recovered** should be based on the amount of the reduction in the agreed or assured number of employees, however at least 20%.
- In the event of **(partial) transfers of undertakings** or measures in accordance with the **Transformation Act** (Umwandlungsgesetz), the number of FTE retained by the **legal successor** up until 30 April 2025 is decisive.
- Companies may compensate for a reduction in retained FTE of up to 50% by making certain **investments** amounting to 50% of the amount of relief and support received on the basis of the EWPBG, the StromPBG and the energy costs containment programme. The Acts give further specifications on the type and scope of the investments (section 29 (4) sentence 2 no. 3 EWPBG / section 37 (4) sentence 2 no. 3 StromPBG). Briefly, this consists of investments in the areas of **transformation, climate and environmental protection,** and **energy security** (Bundestag document 20/4685, pg 112).

II. Requirements for bonuses and dividends

Section 29a EWPBG / section 37a StromPBG include restrictions on the amount paid to management for (variable) remuneration and the distribution of dividends.

The type and scope of the restrictions also depend on the amount of relief received by the company. Here, in contrast to the obligation to retain jobs, contributions the company has received on **other legal bases** are taken into account (such as in accordance with section 36a German Social Code, Volume IX (SGB IX) or section 26f Hospital Funding Act (Krankenhausfinanzierungsgesetz); see section 29a (7) EWPBG / section 37a (7) StromPBG).

1. Relief totalling between EUR 25 million and EUR 50 million

If companies receive relief between EUR 25 million and EUR 50 million, the following applies:

- Companies may not grant bonuses, other comparable components of variable remuneration or increases in the corresponding components of remuneration that were **agreed or resolved from 1 December 2022** to members of management or supervisory bodies under company law until 31 December 2023.
- No remuneration may be granted to any of the same group of persons until 31 December 2023 which exceeds their base remuneration as at the effective date of 1 December 2022. The only increase permitted is inflation adjustments. New members of management must be hired at salary comparable with those at the same level of responsibility. It is also not permissible to grant optional remuneration and severance payments that are "*not legally required*".
- From 31 December 2023 onwards companies must also neutralise the relief received when determining the amount of variable remuneration which is calculated in accordance with the EBITDA of the company, i.e. not take the relief received into account when calculating the EBITA.

2. Relief over EUR 50 million

The following restrictions take effect if more than EUR 50 million relief is received:

- Members of management and supervisory bodies may not receive **any bonuses** and other comparable (variable) components of remuneration that exceed their fixed salary until 31 December 2023.
- In addition, companies are **prohibited** from paying **dividends** or other (non-contractual or subject to statutory obligations) profit distribution in 2023.

3. Waiver option

Companies have the option of informing the responsible audit authority by **31 March 2023** that they are foregoing any relief that exceeds EUR 25 million. This will **release** the company from the aforementioned obligations and restrictions

regarding (variable) remunerateion for members of management and supervisory bodies as well as the distribution of dividends (section 29a (6) EWPBG / section 37a (6) StromPBG).

4. Unclear consequences of breaches

In the Acts it is futile to search for provisions which should link legal consequences to potential breaches of section 29a EWPBG / section 37a StromPBG. No recovery is ordered for made payments by the audit authority regarding the obligation to retain jobs and administrative offences are not relevant (cf. section 38 EWPBG and section 43 StromPBG).

B. Comments

1. Generally company-level approach

The aforementioned provisions only apply to **companies**, both the rights (such as the amount of relief provided) and the obligations (such as the obligation to retain jobs). The same applies to affiliate companies where according to the explanatory memorandum the respective legal entity is likewise entitled and obligated. Therefore, the group is not regarded as a whole (Bundestag document 20/4685, pg 111).

All companies in a group are only taken into account when calculating relief in the amount of the **absolute maximum** of EUR 150 million (see section 18 EWPBG / section 9 StromPBG).

2. Precise scope of the obligation to retain jobs

The statutory provisions regarding the job retention obligation are vague. Undoubtedly, it is about the status on the effective date of 1 January 2023. The explanatory memorandum states that it is not about retaining individual jobs, but the "*entire workforce*" in terms of the existing FTE. This consideration means that **part-time staff** are only proportionally taken into account. Whereas **temporary workers** that are regularly hired should also be taken into consideration (Bundestag document 20/4685, pg 111). The same must consequently apply for seasonal workers.

Considering the wording of the Acts (for example section 29 (1) sentence 2, (3) EWPBG), there is a strong argument that in any case, in the event of a voluntary commitment the minimum number of employees may not fall below a threshold value of 90% **during the entire period** until 30 April 2025. It is therefore not sufficient for this value to only be achieved on the effective date of 30 April 2025. On the other hand, it can be concluded from the **privileged treatment of works agreements and collective agreements** by the legislature that exceptions are possible in these agreements (Bundestag document 20/4685, pg 111).

3. Selecting a suitable implementation method

Entering into a collective agreement or works agreement is recommended for companies who already have a constructive partnership in place. This has multiple advantages compared to issuing a declaration of voluntary commitment:

- There are only explicit provisions regarding safeguarding employment in terms of timings in the Acts and there is nothing about the type and scope of implementation. There is therefore a good reason to say that it is also sufficient with the corresponding agreement of the works and social partner to ensure a (potentially significantly) lower number of employees or agree other mechanisms to "safeguard employment".
- Companies have fewer notification obligations to the audit authority, in particular with regard to retaining jobs and any investments made.

- It could be argued that breaches of the employment protection agreement are not subject to an obligation to return the relief, but "only" employment law related legal consequences, i.e. in cases of doubt the invalidity of a dismissal or a special right of termination for the trade union or works council. This view is, however, not compelling due to the partially inconsistent wording of the provisions. Rather there are also good arguments in favour of the audit authority being able to recover the relief. Completely excluding the possibility of recovering the relief would satisfy the intent and purpose of the energy price brake.

It is likewise possible to negotiate on the basis of **existing works agreements** and **collective agreements** and potentially increase the duration of the agreed methods to safeguard employment. In any case it should be carefully verified that the **responsible body** on the employee side is involved, even with regard to both works council constitution law and collective agreements law.

Following on from this, issuing a declaration of voluntary commitment should be the only option if there is no negotiation partner available on the employee side to conclude a works agreement or collective agreement with.

C. Conclusion and next steps

The "energy price brake" potentially offers companies the opportunity to receive extensive relief. However, this is coupled with various formalities and procedure.

In the first step, companies have to promptly review whether and to what extent they can (or must or want to) benefit from relief through the "energy price brake" in an amount that exceeds EUR 2 million. There are, above all, questions related to energy law where the audit authority can and must be directly involved to some extent.

If it is possible for a large amount of relief to be granted dependent on energy usage, it must be subsequently evaluated whether and to what extent the statutory requirements could be potentially fulfilled. It is also key to consider to what extent the relief is outweighed by the (significant) restrictions, especially regarding the distribution of dividends.

We expect you to have many complex questions on this subject so please contact our multi-discipline team at GÖRG.

Note
This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Dr. Alberto Povedano Peramato on +49 221 33660-508 or by email to apovedano@goerg.de. For further information about the author visit our website www.goerg.com.

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