

New Draft German Legislation Likely to Modify Termination Rules for Employees in the Banking Sector

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According to various matching media reports, on 20 November 2018, the German Finance Ministry released draft legislation for committee consultation that could significantly modify the rules governing the termination of employees in the banking sector. We expect that a version of this legislation will likely be adopted by the German government, particularly with a view to strengthening Germany's attractiveness for (London-based) financial institutions.

Employees of financial institutions in Germany are presently generally governed by the same (restrictive) termination protection rules that apply to other sectors. These rules can make the restructuring of workforces difficult, even where extremely highly-paid employees are involved and even where these employees are largely compensated with performance-based bonus arrangements. If ultimately adopted, such legislation (or an equivalent version of it) may heighten the attractiveness of Germany as a destination for financial institutions, particularly those in the United Kingdom contemplating relocating to Germany.

INTRODUCTORY COMMENT

Under present German law, many employees in Germany are afforded robust protection against termination under the German Termination Protection Act (TPA), provided that the employees do not hold so-called 'senior executive' (*leitende Angestellte*) positions (§ 14 TPA) and provided that their employer usually employs more than 10 FTEs. Termination protection otherwise applies regardless of the employer's sector or the compensation paid to the employee. In practice, this means that highly-paid professional personnel at financial institutions have the same termination protections as e.g. wage-earners in the (lower-paid) manufacturing or services industries. In the financial sector, however, the high pressure to perform and high compensation levels are far more frequently accompanied by consequences for lower than average results (fluctuation of employees driven by employer terminations). Strict regulations governing terminations limit financial institution flexibility to impose consequences,

since any termination of staff usually requires the employer to prove that a business, personal or behavioural reason provided grounds for the termination. In particular foreign-based banks have difficulty reconciling group-wide performance policies with these German termination requirements.

An employer-based application to have the employment contract dissolved in exchange for a severance payment set by the courts under § 9 and § 10 TPA can help only in exceptional circumstances, namely where there are grounds for the court to assume that it would be unreasonable for the employer and employee to be able to work together in future. In other words, for such an application to be successful, circumstances have to point to a severe breach of trust that renders the continuation of employment untenable. Current legal requirements set a high bar for these tests to be met.

DRAFT LEGISLATION

The new draft legislation produced by the Finance Ministry attempts to address this situation. Under this draft, legal grounds for termination will still need to be proven (by the employer). However, a major financial institution that is intending on terminating a senior employee will be able to file an application to have the employee's employment contract dissolved – without providing reasons substantiating a breach of trust.

The draft legislation amends § 25a of the German Banking Act (KWG) and provides that the new exemption will apply to employees employed by a 'major' financial institution and who themselves meet certain compensation tests. The compensation test is linked to pension fund contribution thresholds – in practice, for 2018, it would apply to employees earning more than EUR 234,000 (in western Germany) or EUR 208,800 (in the former DDR). In 2019, these thresholds will likely amount to EUR 241,200 and EUR 221,400 respectively. 'Major' financial institutions are those (a) with a balance sheet sum of more than EUR 15 billion or (b) that are subject to banking oversight by the European Central Bank.

COMMENTS

If the draft legislation is implemented, the high bar posed for major financial institutions to dismiss highly-paid staff would be considerably lowered. Nonetheless, it would be misleading to refer to this change as a 'loosening' of termination rules, as the media has reported. Any application made by an employer to have an employment contract dissolved will require (under existing law and any new such law) the issuance of due termination notice. That termination notice has to be in violation of so-called social protection laws, i.e. it must lack business, personal or behavioural grounds and it may not be invalid for other reasons (e.g. based on a violation of special termination protection or the like, i.e. for persons who are pregnant, disabled, etc.). In addition, under the draft legislation, severance will be payable to the dismissed employee. This severance may amount to 12 monthly average salary instalments for employees under 50 (up to 15 for employees over that age who have been employed for at least 15 years with the financial institution), in each case taking into account ancillary benefits such as performance-based bonuses and the like. Severance amounts are still conditioned by the circumstances relating to the individual termination, such that little foreseeability is available in the short term.

If a termination notice were issued without any grounds at all and primarily for the purpose of obtaining an order to dissolve the employment contract, it is likely that this

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. Heiko Reiter on +49 69 170000-220 or by email to HReiter@goerg.de. For further information about the author visit our website www.goerg.com.

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would amount to an abuse of law and that the labour courts would assess it accordingly.

RECOMMENDATIONS

If this planned legislation is adopted by Parliament, and assuming it is found to be constitutional, the legislation will assist major financial institutions to arrive at more reasonable termination and severance arrangements with highly-paid staff. These financial institutions, however, are not released from their obligation to review whether termination grounds exist prior to serving termination notice (abuse of law is noted here), nor from their obligation to make payment of (significant) severance where a labour court is prepared to dissolve the employment contract.

Financial institutions that are covered by the new draft legislation should continue to exercise due legal care to avail themselves of this potential new opportunity to dissolve employment contracts and to keep potential severance sums on the lower end of the (likely now modified) scale.