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Dear reader

This year's last newsletter gives an account of what could prove to be two landmark rulings from North Rhine-Westphalia on the setting up of large-area retail stores – and of an EU initiative dealing with this topic.

In addition we report on a broad range of topics from the areas of trade, company and labour law.

In the hope that this letter will provide you with new insights, I remain

Yours sincerely

Dr Johannes Grooterhorst
Attorney at Law

A. Current News

North Rhine-Westphalia's Constitutional Court finds Factory Outlet Centre rule (§ 24a, Section 1, Sentence 4, State Development Programme [LEPro NRW]) to be unconstitutional

I. The North Rhine-Westphalian municipality of Ochtrup has prevailed in its local government statutes-based complaint against the federal state's comprehensive regional planning scheme, which had barred the municipality from planning a Factory Outlet Centre (FOC). During the hearings before the Constitutional Court of the German federal state of North Rhine-Westphalia (NRW) in Munster the municipality was represented by Grooterhorst & Partner Rechtsanwälte.

According to § 24a, Section 1, Sentence 4 of the Development Programme of the Federal State of North Rhine-Westphalia (LEPro NRW) municipalities with a population of fewer than 100,000 were not permitted to plan factory outlet centres with sales areas of more than 5,000 m^2.

In its ruling of 26.08.2009 (Constitutional Court File No. 18/08) the Constitutional Court of the federal state found § 24a, Section 1, Sentence 4 of the federal state's development programme null and void, on the grounds that the regulation amounted to an arbitrary interference with the municipalities' autonomy.

No rationale provided for threshold values

The court noted the absence of a rationale for the population and sales area thresholds of 100,000 and 5,000 m^2 respectively and in addition declared the interference with the right of the municipalities to plan to have been improperly weighed. What was more, the rule in question was also arbitrary because the legislator in devising it had failed to take the special requirements of rural areas into account, the court added.

The decision marks a turning point in judicial decisions on planning law and should lead to enhanced scrutiny of many planning law rules throughout the Federal Republic.

Considerable interference with municipalities' planning autonomy

According to NRW's Constitutional Court these restrictions the regional planning regulations impose on the planning options municipalities have with regard to large-area retail establishments amount to considerable interference with the municipalities' planning autonomy. However, for its part the Federal Administrative Court in Berlin has (in a similar recent case involving the FOC Soltau) deemed the interference the regulations amount to marginal only; the court justified its assessment by claiming that in depriving the municipalities of specific planning options only, the regulations still provided ample scope for substance-related planning.

Having said that, the higher level of interference should in turn lead to a greater need to explain and justify, which for its part is unlikely to leave all existing planning-law rules unscathed. The interference has to be justified by reference to interests of a more than local nature that are, moreover, of greater importance and the justification provided must follow logically from planninglaw rules. The more extensive the interference and the fewer the exceptions the planning-aw rules permit, the higher the standard such a justification must meet.

Constitutionality of the other regulations contained in § 24a LEPro NRW doubtful

As some of the reasons adduced by the Constitutional Court in its ruling can be applied to the other regulations contained in § 24a LEPro NRW the constitutionality above all of what remains of the federal state's rules regarding large-area retail establishments is also very much in doubt.

Niklas Langguth

Appellate Administrative Court NRW: Act on the Establishment of Large-Area Retail Establishments (§ 24a LEPro NRW) as a whole has no binding force.

II. In a parallel case the Appellate Administrative Court (OVG) in Munster has meanwhile also made a statement on § 24a LEPro NRW. In these administrative-law proceedings the planning municipality was likewise represented by Grooterhorst & Partner Rechtsanwälte. In its ruling of 30.09.2009 (File No. 10 A 1676/08) the Appellate Administrative Court in Munster expressed the legal opinion that § 24a Section 1, Sentence 4 LEPro NRW as a whole was unconstitutional. It was not, however, up to the Appellate Administrative Court to come to a final decision on this constitutional issue.

The OVG removed the binding force of the regulation contained in § 24a LEPro NRW altogether. To date this regulation had functioned as the primary means of the federal state for exerting control over where large-area retail establishments are set up. The Appellate Administrative Court found the regulation to have no binding force upon the municipalities. We will report in detail about the ramifications of this far-reaching decision in our next newsletter. Until then for more news on the matter please consult the "current news" section of our website.

Some comprehensive regional planning regulations of North Rhine-Westphalia and other federal states might not comply with European Union law.

Other possible objections to the comprehensive regional planning scheme of the federal state of North Rhine-Westphalia and that of other federal states arise from a possible failure of the regulations in question to comply with European Union law. In a letter of reminder the EU Commission had objected to a number of regulations. However, the Constitutional Court and the Appellate Administrative Court have not (yet) been called upon to look into these European Union law issues.

Niklas Langguth

B. Trade and Company Law

Right to change prices found in some General Standard Terms and Conditions is null and void

I. In many instances General Standard Terms and Conditions relating to long-term continuous obligations contain a rule according to which the user is permitted – in the event of his costs going up – to increase the amounts paid by the customer on a regular basis (the so-called cost element clause).

In a number of rulings – relating to the General Standard Terms and Conditions of a pay-TV channel and those of German savings banks (BHG ruling of 15.11.2007 – File No. III ZR 247/06; BHG ruling of 21.04.2009 – File No. XI ZR 78/98) the Federal Supreme Court (BGH) has found cost element clauses to be null and void. At least in those instances in which such clauses allowed the user to increase the originally agreed upon price in an unlimited fashion beyond the passing on of concrete costs, thereby not only preventing a reduction in profits but instead boosting the same, the court declared. Costelement clauses were thus only permissible if the user's right to raise the price was made dependent on genuine price increases and the various cost elements and their weighting with regard to the calculation of the overall price were made explicit prior to the signing of the contract, the court added. What was more, if the regulation failed to specify an unambiguous duty on the part of the user to reduce the amounts paid in the event of falling costs, a one-sided right to change the price was unreasonable, the BHG noted.

The fact that in the event of the price being raised the customer was regularly given the right to terminate the contract did not render the clause reasonable, the court stated. The right of a customer to terminate such a contract did not in all cases lead to an adequate reconciliation of interests. In the final analysis a user might even benefit from the termination of such a contract: a user might avail himself of an unreasonable price increase and the subsequent termination to rid himself of an economically disadvantageous contract, the BGH observed.

Ralf-Thomas Wittmann

D&O insurance: new legislation generally continues to excludes third-party direct claims against the insurance company

II. Unlike what most people assume, the party having suffered the damage or loss does not have a third-party direct claim for damages against the third-party insurance company of the party having caused the damage or loss. This popular misconception results from a special case in insurance law and one that arguably gives rise to the greatest number – in absolute terms – of third-party insurance cases: in the case of automobile third-party insurance a third-party direct claim by the party having suffered the damage or loss exists in German law against the third-party insurance company of the party having caused the damage or loss.

The Insurance Contract Act (VVG) of 01.01.2009

The new Insurance Contract Act (VVG) still adheres to this principle, while at the same time specifying a number of exceptional cases in which such a third-party direct claim nonetheless exists.

According to § 115 Section 1 of the new VVG a third-party direct claim for damages by the party having suffered the damage or loss exists if:

Cases in which a third-party direct claim exists

– The party signed the third-party liability insurance contract to comply with the regulations of the Compulsory Insurance Act (as in the case of automobile third-party insurance).
– Insolvency proceedings have been opened with regard to the contracting party's assets, the opening of such proceedings has been rejected for lack of assets or a temporary receiver has been appointed.
– The whereabouts of the contracting party are unknown.

However, these special cases are often not much help in dealing with the usually complicated business of settling claims – in the D&O insurance realm in particular. Thus in D&O insurance cases the "separation principle" continues to apply: the first step remains the filing of an action for liability against the executive organ.

Issues arising from the three-cornered relationship: policyholder – insurance company – person insured.

Moreover with D&O insurance a special set of circumstances prevails: a distinction is made between the policyholder – the company – and the person insured – the organ. There is thus a three-cornered relationship between insurer, policyholder and insured organ member; with the policyholder owing the insurance premium and the insurer owing protection to the insured organ.

What makes this arrangement problematic is above all the fact that in this instance the "third" party having suffered damage or loss is not, as in other liability cases, an outsider, but the policyholder itself. In the event of the policyholder – the company – filing a claim for damages against an organ member, the successful prosecution of such a claim is in many cases made exceedingly difficult by the fact that the D&O insurer supports the organ and therefore as a result acts against the interests of the company.

As a matter of principle the insurer is naturally keen in the event of loss or damage to pay – if at all – as little and as late as possible. The policyholder's – i.e. the company's – interests are the mirror image of the insurer's: it wants to receive damages as quickly as possible. This collision of interests frequently leads to prolonged legal disputes.

A quicker way to settle claims?

Incorporating more extensive third-party direct claims in D&O insurance into law could lead, besides reducing the workload of the courts, to claims being settled much faster, as the liability of the organ and the insurer's liability would then be decided within a single process. Objections arising from the insurance contract could moreover also be decided within the framework of such a single process.

Johanna Noßke

C. Labour Law

In the absence of an agreement on targets an employee has a claim for damages

To enhance the motivation of employees, employers frequently put a target bonus system in place. In such a case the employer will in general promise to pay the employee a variable wage, provided he or she meets the mutually agreed upon annual targets. Until recently labour-law rulings had not conclusively answered the question of how such variable wage components are to be treated in the absence of an agreement on annual targets.

In a ruling dated 10.12.2008 (File No. 10 AZR 889/07) the Federal Labour Court (BAG) has now decided that an employee has a fundamental claim for damages against his or her employer, if the employer has culpably prevented an agreement on annual targets from being reached. This can for instance be the case if the employer despite appropriate requests made by the employee refuses to talk about annual targets or if the employer makes an agreement on such targets conditional upon the employer's agreeing to other hitherto nonexistent demands (such as for example agreeing to changes to other points of the employment contract).

The employer's claim for damages normally corresponds to the variable wage that would have resulted from an agreement on annual targets that would have come about in the normal course of events. In addition it is assumed that, unless the employer is able to adduce and prove special circumstances undermining the assumption, the employee would have met the targets associated with this "fictitious" agreement on targets.

Tobias Törnig

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