

Chapter 8

Investor agreements and collective labour law

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1. Introduction*

Board level employee representation (BLER) is considered to be an important tool for helping safeguard employee interests and promoting sustainable companies. However, this mechanism has important limitations. First of all, some countries in the EU and many countries outside of it have no tradition of codetermination and no legal framework for BLER. Secondly, there are limits to what worker representatives can achieve through BLER alone. Therefore it is important to identify instruments that can supplement BLER or that can be used in countries without a tradition of codetermination.

One such instrument is an agreement between trade unions and investors. These investor agreements are especially useful for supporting labour interests in takeover situations, where a controlling ownership stake is transferred from one shareholder (or group of investors) to another. One such example where this relatively new instrument was used is the takeover of the German construction company Hochtief by its Spanish competitor ACS in 2010/11. The German trade union IG BAU was able to negotiate an investment agreement with the new owner regulating investment after the takeover. Based on the case of the German legal framework, the Hochtief-ACS example shows how investor

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1. For an analysis, see C. Seibt and O. Wunsch 'Investorenvereinbarungen bei öffentlichen Übernahmen', *Der Konzern* 2009, pp. 195-213; R. Kiem 'Investorenvereinbarungen im Lichte des Aktien- und Übernahmerechts', *Die Aktiengesellschaft* 2009, pp. 301-312; and J. Reichert and N. Ott 'Investorenvereinbarung mit der Zielgesellschaft – Möglichkeiten und Grenzen der Einflussnahme auf Gesellschaftsorgane', in M. Habersack and P. Hommelhoff (eds) *Festschrift für Wulf Goette*, Munich 2011, pp. 397-412.

agreements can be designed and incorporated into a national context of labour and company law without difficulties.

2. Takeovers and investor agreements

Where an investor buys up the shares of a listed company, this can have serious implications not only for the company's future direction but also for its directors and members of the supervisory board. If these actors do not consent to this development, the transaction is generally referred to as a hostile takeover and, as such, cannot usually be prevented simply by legal means. However, if there are forces within the target company resistant to the takeover, such as minority shareholders holding a veto, it may both be possible and opportune to establish certain limits which will restrain the investor following the takeover. For these purposes, investor agreements have been developed. The target company, represented by its board, and the investor agree on certain terms.¹ For example, it is conceivable that the investor agrees to retain the existing members of the supervisory board for the next three years or, as was the case in the agreement between the Schaeffler group and the tyre and motor vehicle parts manufacturer Continental AG,² not to acquire a holding of more than 49.9% and thus not to become the majority shareholder. It may also commit not to question the future of a particular plant or to retain certain production lines. Analysis from the company law perspective has tended to focus on the extent to which company law permits agreements of this kind. In particular, questions have been raised in light of the rules on the independence of both the management and the supervisory boards.³

Labour law appeared not have become involved in this new anticipatory instrument emerging within the sphere of company law. This all changed at the latest on 21 December 2010 when the German trade union IG BAU reached an accord with the leading Spanish construction company ACS⁴ that was in the process of establishing a controlling stake in the German construction firm Hochtief AG.⁵ This accord provides for Hochtief to re-

2. The investor agreement of 21 August 2008 is available online: www.handelsblatt.com/unternehmen/industrie/investorenvereinbarung [accessed 24 August 2011].

3. On this point, see Reichert and Ott, cited above.

4. Actividades de Construcción y Servicios S.A.

5. The wording of the accord is available online: www.igbau.de/Binaries/Binary83348/Vereinbarung_IGBAU_ACS_Wortlaut.pdf [accessed 27 December 2011].

main an independent company subject to the rules on worker participation at board level operative either in its own right or through the activities of subsidiaries. Conversion of the company to a European company (SE) is expressly excluded. The company's administrative headquarters are to remain in the city of Essen. In addition, ACS agrees not to intervene in operational decisions taken by Hochtief's management and indicates that it does not plan to make changes to working conditions or to the arrangements for worker participation at plant and company level. ACS also indicates that the board of Hochtief can count on its support if it decides to offer employees a guarantee of continued employment. Under the accord, IG BAU will remain the sole negotiating partner within the Hochtief group. In addition, ACS agrees that in those companies within the group subject to worker participation at board level candidates will only be proposed as board of directors' member responsible for human resources (Arbeitsdirektor) following negotiations with the trade union representatives on the relevant supervisory board. This degree of worker influence comes close to the regime operating in the coal and steel industries. These provisions will all take effect as soon as ACS acquires a majority shareholding. Until it has acquired the necessary 50% (and provided that its holding does not fall below 30%), ACS agrees to act within the spirit of this accord.

The accord is silent on the law applicable to this agreement. As the obligations (whether legal or moral) all have to be satisfied in Germany, there is manifestly a closer link to that country than to Spanish law and, as a consequence, in light of the principle set out in Article 4(3) of the Rome I Regulation (Regulation (EC) No 593/2008), German law must apply.

The accord raises some unusual questions. Does the law permit a company's conduct to be fixed in advance by means of such an accord? Is the accord governed by the rules of collective labour law? Or, instead, should it be considered nothing more than a regular contract which an investor has agreed not with the target company but with a trade union? What are the limits governing each type of agreement? Is it lawful to take strike action with a view to reaching such an accord? To begin to answer these questions we must first remind ourselves of the legal forms which are generally open to trade unions in German labour law.

3. The legal instruments available

3.1 Collective agreements

The predominant instrument used in structuring a consent reached between trade unions and employers is the collective agreement (*Tarifvertrag*). In the context of this book, a detailed examination of that instrument would be as helpful as carrying coals to Newcastle. Suffice it to say that if an agreement is not reached, workers may strike with a view to persuading employers to conclude an agreement of that kind. This also applies in relation to collective agreements which do not lay down terms and conditions for workers (i.e. do not have a normative or regulatory function) but are simply limited to defining relations between employers and trade unions.⁶ Existing law does not distinguish at any point between elements of a collective agreement for which workers may lawfully strike and elements in respect of which strikes are not permitted. On the contrary, the Collective Agreements Act (*Tarifvertragsgesetz*) treats the contractual part of the collective agreement (governing relations between employers and trade unions) on a par with the normative part. Moreover, there is nothing to suggest that the legislation envisages any difference in the process by which an agreement is reached on each of these parts. In addition, many substantive issues are equally as susceptible to regulation in the normative part of a collective agreement as in its contractual part. Furthermore, at the start of industrial action it is in many cases unclear what legal form will be given to the final outcome of the negotiations. What is clear, however, is that it would be incompatible with Article 9(3) of the Basic Law (*Grundgesetz*) to remove the contractual part of a collective agreement from the range of objectives for which workers may lawfully strike. From the traditional perspective, such a restriction would be tantamount to declaring certain working and economic conditions, more specifically, anything that cannot be expressed in normative provisions, as beyond the purview of a strike and, consequently, would render it impossible to achieve a balance between the two opposing interests. For that reason, the overwhelming majority of legal writers share the view taken by the Federal Labour Court (*Bundesarbe-*

6. To the same effect, see the judgment of the Federal Labour Court of 12 September 1984 in Case 1 AZR 342/83, reported in *Der Betrieb* 1984, p. 2563.

itsgericht),⁷ namely, that it is lawful to strike with a view to obtaining the contractual part of a collective agreement.⁸

3.2 Collective accords

The Federal Labour Court has held consistently⁹ that trade unions and employers are also entitled to conclude collective accords (*sonstiger Kollektivvertrag*), that is, a form of collective agreement to which the Collective Agreements Act does not apply. These accords are commonly used by trade unions when agreeing with companies threatened with a strike a framework for emergency service provision. As a rule, both parties presume that the accord does not constitute a collective agreement within the meaning of the legislation. The parties do not observe the requirements for writing,¹⁰ nor do they follow the involved procedures generally required under their own rules in order to conclude a collective agreement.¹¹ Moreover, practice also demonstrates that an individual member of an employers' association may prefer to agree an accord (and not a collective agreement) since conclusion of a formal company-level collective agreement could provoke major repercussions within that as-

7. *Ib id.*

8. P. Berg, H. Platow, C. Schoof and H. Unterhinninghofen *Tarifvertragsgesetz und Arbeitskampfrecht*. Kompaktkommentar, 3rd edition, Frankfurt 2010, AKR paragraph 24; W. Däubler in W. Däubler (ed.) *Tarifvertragsgesetz. Kommentar*, 3rd edition, Baden-Baden 2012, Introduction, paragraph 872; T. Dieterich in R. Müller-Glöge, U. Preis and I. Schmidt (eds) *Erfurter Kommentar zum Arbeitsrecht*, 12nd edition, Munich 2012, Art. 9 Abs. 3 GG paragraph 114; F. Gamillscheg *Kollektives Arbeitsrecht*, Volume I, Munich 1997, § 22 I 3 b (p. 1070); M. Jacobs 'Die Erkämpfbarkeit von firmenbezogenen Tarifverträgen mit verbandsangehörigen Arbeitgebern', *Zeitschrift für Tarifrecht* 2001, pp. 249-257, at p. 252; M. Löwisch and V. Rieble *Tarifvertragsgesetz*, 2nd edition, Munich 2004, § 1 paragraph 422; H. Otto, *Arbeitskampf- und Schlichtungsrecht*, Munich 2006, § 5 paragraph 19 et seq.; U. Zachert in E. Kempen and U. Zachert (eds) *Tarifvertragsgesetz*, 4th edition, Frankfurt 2006, § 1 paragraph 761. For a different view, see T. Mayer-Maly 'Gemeinsame Einrichtungen im Spannungsfeld von Tarifmacht und Organisationspolitik', *Betriebs-Berater* 1965, pp. 829-834, and recently to the same effect S. Greiner "'Tarifsozialplan" bei Betriebsübergang?' *Neue Zeitschrift für Arbeitsrecht* 2008, pp. 1274-1281, at p. 1277 with further references.

9. See judgments of 28 September 1983 in Case 4 AZR 313/82, reported as AP Nr. 2 zu § 1 TVG Tarifverträge: Seniorität; 28 July 1988 in Case 6 AZR 249/87, reported as AP Nr. 1 zu § 5 TVArb Bundespost and in *Betriebs-Berater* 1988, p. 2111; 5 November 1997 in Case 4 AZR 872/95, reported as AP Nr. 29 zu § 1 TVG; and 14 April 2004 in Case 4 AZR 232/03, reported in *Neue Zeitschrift für Arbeitsrecht* 2005, p. 178.

10. See, for example, the facts in Case 1 AZR 676/92, judgment of the Federal Labour Court of 13 July 1993, reported as AP Nr. 127 zu Art. 9 GG Arbeitskampf.

11. A similar conclusion is reached by G. Thüsing in H. Wiedemann (ed.) *Tarifvertragsgesetz*, 7th edition, Munich 2007, § 1 paragraph 24.

sociation.¹² In addition, accords have been reached on any number of issues from the modernisation of the public administration¹³ to the retention of worker participation at company level.¹⁴ These are all situations in which it is doubtful whether a collective agreement (as defined in legislation) would be permitted.

The conclusion of collective accords constitutes an activity specific to the collective actors of labour and management and hence derives its legitimacy from Article 9(3) of the Basic Law.¹⁵ In turn, this constitutional foundation means that these accords must relate to ‘working and economic conditions’, as specified in that provision. Outside of this area, the parties enter a terrain beyond the scope of their specific competence. Whether or not strikes may be used to persuade an employer to sign a collective accord remains undecided by the courts. Different views are possible on this question.

If one takes the view that strikes are permissible even if they are not directed towards the conclusion of a collective agreement, the situation at issue here does not pose any problems. Strikes in pursuit of a collective accord are evidently much more closely aligned with the traditional model (pursuit of a collective agreement) than those intended as a means of (political) protest or concerning terms and conditions included in individual employment contracts.¹⁶ The question whether the legality of a strike is contingent on the pursuit of an objective capable of regulation by means of collective agreement was expressly left open by the Federal

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12. For an example of this practice, see the accords concluded in Eastern Germany according to which teachers agreed to a reduction of 10% or 15% in working hours and in return employers made a commitment not to introduce compulsory redundancies.
 13. On this point, see T. Blanke *Verwaltungsmodernisierung. Direktionsrecht des Arbeitgebers, Mitwirkungsrechte des Personalrats und Tarifautonomie*, Baden-Baden 1998, p. 79 et seq.; H. Plander ‘Nichttarifliche Übereinkünfte zwischen Gewerkschaften und Trägern öffentlicher Gewalt’, in U. Engelen-Kefer, M. Schoden and U. Zachert (eds) *Arbeitsrecht in der Bewährung: Festschrift für Karl Kehrmann*, Cologne 1997, pp. 295-320; K. Lörcher and R. Armbruster ‘Die Vereinbarung über die Rahmenbedingungen des Wechsels von Beamten der Deutschen Postbank AG zur Deutschen Post vom 9. September 1999’, *Zeitschrift für Tarifrecht* 2000, pp. 483-489.
 14. See, for example, accords made in the 1950s with a view to retaining special forms of worker participation in the coal and steel industries. On this, see W. Spieker ‘Tarifautonomie und Mitbestimmung’, *Mitbestimmungsgespräch* 1962, p. 182. On current practice, see C. Seibt ‘Privatautonome Mitbestimmungsvereinbarungen. Rechtliche Grundlagen und Prozesshinweise’, *Die Aktiengesellschaft* 2005, pp. 413-429.
 15. This is the view taken by the Federal Labour Court. See the case-law cited in footnote 10.
 16. On this point, see W. Däubler in W. Däubler (ed.) *Arbeitskampfrecht*, 3rd edition, Baden-Baden 2011, § 13 paragraph 17 et seq.

Labour Court in judgments of 2002¹⁷ and in 2007.¹⁸ However, having regard to the interpretation generally accorded to the strike guarantee enshrined in Article 6(4) of the European Social Charter,¹⁹ relevant also in defining the scope of the right guaranteed by Article 11 of the European Convention on Human Rights,²⁰ the Federal Labour Court would be well advised to abandon its traditional approach. This would avoid further defeats at the hands of the European Court of Human Rights in Strasbourg and ongoing conflict with the various European courts and supervisory bodies. If, on the other hand, one continues to take the traditional approach, that is, that strikes constitute a means to facilitate free collective bargaining as only where strikes are permitted can negotiations take place on an equal footing, the same logic must apply in the case of collective accords. These, too, cannot be achieved simply by appealing to employers or, in the well-known words of the Federal Labour Court, by engaging in ‘collective begging’.

3.3 Contracts under the law of obligations

Finally, it is open to the collective organisations of labour and management to regulate their relations using regular contracts governed by the law of obligations. To the extent that their agreement covers issues which cannot be classified as ‘working and economic conditions’ this is the only option available. A trade union has the legal capacity to conclude such contracts even if it has not been entered in the register of associations. In this case, pursuant to section 54 of the Civil Code (*Bürgerliches Gesetzbuch*), the law governing partnerships applies. According to recent case-law of the Federal Court of Justice (*Bundesgerichtshof*),²¹ a partnership acquires legal capacity as soon as it assumes the appearance of a partnership in dealings with third parties. For the purposes of persuading an employer to conclude such a contract, industrial action may not be used.

17. Judgment of 10 December 2002 in Case 1 AZR 96/02, reported in *Neue Zeitschrift für Arbeitsrecht* 2003, p. 735, at p. 740.

18. Judgment of 24 April 2007 in Case 1 AZR 252/06, reported in *Neue Zeitschrift für Arbeitsrecht* 2007, p. 987, at p. 994 point 79.

19. On this, see K. Lörcher in W. Däubler (ed.) *Arbeitskampfrecht*, § 10 paragraph 34.

20. *Ibid.*, § 10 paragraph 42.

21. Judgment of 29 January 2001 in Case II ZR 331/00, reported in *Juristenzeitung* 2001, p. 655 et seq.

3.4 Freedom to choose the appropriate legal instrument

The collective organisations of labour and management are free to choose whether to conclude a collective agreement, a collective accord or a contract under the law of obligations.²² There is no compelling reason why, as a matter of law, a collective agreement should take precedence. Although only collective agreements are endowed with a normative function pursuant to section 4(1) of the Collective Agreements Act, the parties should not be obliged to use this legal instrument. They are entitled to restrict themselves to instruments with fewer capabilities. In these circumstances, there will not be any risk that the requirement for the written form established in section 1(2) of the Collective Agreements Act will be circumvented or deprived of its meaning through the conclusion of a collective accord not subject to any requirements as to form. If a trade union wishes to enter the terrain of collective accords or contractual agreements in pursuit of which strikes are not permitted and, consequently, foregoes the opportunity to conclude an agreement with normative effect, it is entitled to benefit from this absence of requirements as to form. Moreover, given that such agreements do not automatically establish individual terms and conditions of employment, there is no comparable requirement for transparency.

Whether or not an agreement must be regarded as collective agreement, a collective accord or a contract under the law of obligations depends on the wishes of the parties.²³ Sometimes it is expressly stated in an agreement (or made clear in some other manner) that the accord is not to be regarded as a collective agreement. Naturally, this is then binding. The most important agreements of this kind are the social partner agreements in the German chemicals industry.²⁴ The same applies if an agreement is specified as merely preliminary to the conclusion of a collective agreement.

22. This view is also taken by R. Krause in M. Jacobs, R. Krause and H. Oetker *Tarifvertragsrecht*, Munich 2007, § 1 paragraph 140.

23. See the judgments of the Federal Labour Court of 5 November 1997 in Case 4 AZR 872/95, reported as AP Nr. 29 zu § 1 TVG Bl. 4 R; and 14 April 2004 in Case 4 AZR 232/03, reported in *Neue Zeitschrift für Arbeitsrecht* 2005, p. 178. To the same effect, see F. Gamillscheg *Kollektives Arbeitsrecht*, Volume I, § 12, 9c (p. 510); H. Plander, cited above, p. 307; G. Thüsing in H. Wiedemann (ed.) *Tarifvertragsgesetz*, § 1 paragraph 25; U. Zachert 'Sozialpartnervereinbarungen – ein Modell für die Zukunft?', in U. Isenhardt and U. Preis (eds) *Arbeitsrecht und Sozialpartnerschaft Festschrift für Peter Hanau*, Cologne 1999, pp. 137-148, at p. 141.

24. On this point, see U. Zachert (footnote 23) and for a more recent assessment W. Däubler 'Soft law und kollektives Arbeitsrecht', Supplement 1/2011 to the *Neue Zeitschrift für Arbeitsrecht*, pp. 42-47.

If, however, the agreement is silent on this point, interpretation will be required. As the issue to be resolved is the nature of the legal instrument chosen by the parties, the principles of contractual interpretation established in sections 133 and 157 of the Civil Code apply.²⁵ Inclusion of provisions clearly intended to govern individual employment relationships points in favour of a collective agreement. On the other hand, a collective accord may be presumed if the agreement establishes only objectives requiring further implementation or concerns matters unconnected to the individual employment relationship, for example, on worker participation at company level. A further aspect to be considered is the previous conduct of the parties. A sudden switch from one legal instrument to another may only be presumed if there is compelling evidence to support this. Where there is considerable uncertainty over the parties' competence to conclude a collective agreement in the matter at hand, this may well suggest that the parties, wishing to avoid a dispute, opted, instead, not to use a collective agreement. Hence, it must be presumed a fortiori that the parties did not intend to adopt a legal instrument which would result in the failure of their agreement. In certain circumstances, this may point in favour of a purely contractual arrangement.

3.5 Mixed forms

It is conceivable that the parties may adopt hybrid or mixed agreements in which certain provisions are intended to have the characteristics of a collective agreement, others have the quality of a collective accord and the remainder are of a purely contractual nature. There is nothing objectionable to this approach as long as the legal character assigned to each provision can be determined through interpretation. In substance, this is nothing other than a special form of a mixed contract in which certain elements of various contractual forms are brought together under one roof.²⁶ This possibility to make use of a mixed contract has not been called into question by the case-law of the Federal Labour Court.²⁷ In the case of company agreements involving both trade unions and works councils, it requires simply that the agreement is clear on which part

25. See the case-law cited in footnote 23.

26. On this point, see W. Däubler *BGB kompakt*, 3rd edition, Munich 2008, Chapter 13, paragraph 16 et seq.

27. Judgment of 15 April 2008 in Case 1 AZR 86/07, reported in *Neue Zeitschrift für Arbeitsrecht* 2008, p. 1074.

constitutes a workplace agreement (*Betriebsvereinbarung*) and which part must be characterised as a collective agreement. This need to categorise provisions according to their legal character does not pose any problems of principle in the situation being examined in this chapter. A dual legal base,²⁸ something which may be useful in the case of a social plan or an ‘alliance for jobs’, is not essential here.

4. Does an investor in a company have the legal capacity to conclude a collective agreement?

The uniform view taken by the authors of the leading commentaries on the Collective Agreements Act is that a business cannot conclude a collective agreement unless it is the employer of one or more employees.²⁹ It suffices for these purposes that a business intends to conclude contracts of employment; the contracts do not need to have been signed.³⁰ For that reason, if a parent company in a group or a holding company does not have any employees of its own it will be regarded as lacking the capacity to conclude a collective agreement. To this extent, only contractual agreements under the law of obligations are possible.³¹ This is consistent with the wording of section 2(1) of the Collective Agreements Act which specifies as possible parties to a collective agreement, in addition to trade unions and employers’ associations, only individual employers.

28. Previous case-law of the Federal Labour Court regarded it as self-evident that an agreement may constitute both a workplace agreement and a collective agreement. See its judgment of 24 November 1993 in Case 4 AZR 225/93, reported in *Der Betrieb* 1993, p. 2436. In support of this approach, see C. Meyer ‘Der Firmentarif-Sozialplan als Kombinationsvertrag’, *Der Betrieb* 2005, pp. 830-833. However, in passing, it should be noted that the 2008 judgment of the Federal Labour Court (see previous footnote) made no mention of the 1993 judgment. An omission of that kind might possibly have been avoided through a more careful study of the legal commentaries.

29. E. Kempen in E. Kempen and U. Zachert (eds) *Tarifvertragsgesetz*, § 2 paragraph 88; H. Oetker in H. Wiedemann (ed.) *Tarifvertragsgesetz*, § 2 paragraph 123 et seq.; and G. Peter in W. Däubler (ed.) *Tarifvertragsgesetz*, § 2 paragraph 84.

30. See the judgment of the Federal Labour Court of 24 June 1998 in Case 4 AZR 208/97, reported as AP Nr. 1 zu § 20 UmwG. See also M. Löwisch and V. Rieble *Tarifvertragsgesetz*, § 2 paragraph 149; and H. Oetker in H. Wiedemann (ed) *Tarifvertragsgesetz*, § 2 paragraph 128. Moreover, the Federal Labour Court has upheld the conclusion of a company-level collective agreement covering the employees of a company that at the time the agreement was signed had not yet been founded. See its judgment of 24 January 2001 in Case 4 AZR 4/00, reported as AP Nr. 1 zu § 3 BetrVG 1972.

31. See M. Löwisch and V. Rieble *Tarifvertragsgesetz*, § 2 paragraph 148; and H. Oetker in H. Wiedemann (ed.) *Tarifvertragsgesetz*, § 2 paragraph 145.

However, to be regarded as an employer a party must employ or intend to employ one or more employees.³²

Even if an investor acquires 100% of the shares in a company it will not become a party to the contracts of employment. It is true that, in practice, even in a public limited company (*Aktiengesellschaft*), where decision-taking powers are vested with the management board and supervisory board, an investor will be in a position to exercise considerable influence on working conditions such as to impact on the company's fortunes. Nonetheless, this does not change the fact that it will not become party to the contracts. The question whether in cases of severe abuse of the corporate form different rules apply need not detain us here. The possibility to pierce the corporate veil remains the exception not the rule. Moreover, this technique simply extends the list of parties which may be held liable or widens the basis of their liability. However, it does not result in any change to the identity of the contracting parties.³³

Given the fact that the real authority and decision-making power can hide behind the corporate veil and, as a result, may counteract any possibility to have sensible negotiations with a view to reaching an agreement, this situation might be regarded with some concern. However, reform to section 2(1) of the Collective Agreements Act remains unnecessary provided that the instrument of collective accords continues to be legally recognised as a device by which agreements at a collective level can be made also involving the parties with the real decision-making powers.

The investor agreement concluded between IG BAU and ACS does not constitute a collective agreement. For good reason, it is not specified as such. Instead, the parties refer to an 'accord'. Moreover, it does not contain any provisions which seek to directly shape the substance of individual employment relationships.

32. The fact that ACS is an employer of workers in Spain does not justify treating it as having the capacity to conclude a collective agreement in the entirely different role of an investor.

33. For an overview of the various types of liability following the piercing of the corporate veil, see W. Däubler in W. Däubler, M. Kittner, T. Klebe and P. Wedde (eds) *Kommentar zum BetrVG*, 13th edition, Frankfurt 2012, §§ 112, 112a paragraph 188 et seq.

5. Can an investor agreement be regarded as a collective accord?

Both the permitted scope of a collective accord and the parties competent to conclude such accords are matters which have attracted relatively little attention hitherto. One explanation may be the fact that such accords have generally always been concluded on a consensual basis and, as a result, legal challenge would have been counterproductive. It can be taken as agreed that the parties to such agreements must address matters considered to be within the domain of 'working and economic conditions'. There does not appear to be any justification for removing certain issues from that domain and precluding regulation by way of collective accord. On the contrary, the diversity of industrial practice, in which all manner of issues have been made subject to collective accord,³⁴ would appear to suggest that further restrictions are unnecessary. Similarly, the fact that the entity on the employers' side is not itself the employer would appear immaterial. In light of the spirit of Article 9(3) of the Basic Law, that is, to facilitate an equal footing for negotiations between the parties on the matters specified in that provision, it must be regarded as sufficient that the partner to the agreement is in a position to influence the working and economic conditions of the employees represented by the trade union. For this reason, the law allows collective accords to be reached with a parent company not having any employees of its own.³⁵ Similarly, the 1991 agreement on the calculation of social plan benefits³⁶ negotiated between trade unions and the Treuhandanstalt (the agency responsible for privatising companies previously controlled by the State in the German Democratic Republic) had as a signatory party an entity which was not as such employer of the workforce threatened by the redundancies. Only in the purely theoretical situation that a party to the agreement is a third party without any ability to influence the employers' side would the agreement no longer fall within the ambit of Article 9(3) of the Basic Law.

Thus, all the factors appear to suggest that the investor agreement may be regarded as a collective accord. It is conceivable, nonetheless, that

34. For a more detailed overview, see W. Däubler in W. Däubler (ed.) *Tarifvertragsgesetz*, Introduction, paragraph 847 et seq. and U. Zachert in E. Kempen and U. Zachert (eds) *Tarifvertragsgesetz*, § 1 paragraph 736 et seq.

35. See above footnote 32.

36. For more details on this agreement, see W. Däubler, 'Verbesserungen im Sozialplanrecht der neuen Bundesländer', *Arbeitsrecht im Betrieb* 1991, pp. 179-180.

certain elements lack the necessary link to working and economic conditions and, as a result, only take effect as provisions of a contract under the law of obligations. However, this cannot be presumed in the present case simply by reason of the fact that at the time the accord was reached ACS was merely a prospective controlling shareholder. The task of maintaining and improving working and economic conditions includes the taking of measures with a view to avoiding future problems and pursuit of agreements with those parties expected to take the helm in the near future.³⁷ This approach is reflected in part in the law on the constitution of the workplace which accords to the economic committee (a committee appointed by the works council in firms with over 100 employees), pursuant to point 9a of section 106(3) of the Works Constitution Act (*Betriebsverfassungsgesetz*), the right to be informed within the scope of its competence on all matters connected with an upcoming third-party takeover of the employer.³⁸

Could the trade union IG BAU have organised lawful industrial action in pursuit of the investor agreement? Although this question did not arise in the case at hand, the answer in legal terms must be ‘yes’. Had industrial action been contemplated, the particular twist to the situation would have been the fact that such action would not have hit the investor directly (with whom the trade union wished to reach an agreement) but simply the company in which that investor was seeking to acquire a majority holding. However, if the investor had already acquired a significant holding and its intention to increase that was definitive, it would have to be presumed that the industrial pressure was aimed not against some unconnected third party but against a party with a substantive interest in the matter.

At the same time, the case at hand provides an opportunity to re-examine the effectiveness of industrial action with a view to achieving certain goals. Evidently, there are circumstances which are considerably more unattractive to a company than a withdrawal of labour lasting for a week or so and which result, therefore, in more far-reaching concessions. From the perspective of ACS, the crucial issue was whether as a

37. To the same effect, see the short written opinion by U. Preis of 25 January 2011.

38. The fact that this right is of limited practical effect is, of course, an entirely different matter. On that point, see W. Däubler in W. Däubler, M. Kittner, T. Klebe and P. Wedde (eds) *Betriebsverfassungsgesetz*, 13th edition, § 106 paragraph 86 et seq., with further references.

foreign investor it would be treated as an ‘intruder’ or whether German competitors and authorities would apply the usual standards of fairness. The first possibility is laden with risks which are difficult to predict and, should they materialise, these could result in a detriment, if not a serious detriment, to the company’s financial position. For that very reason, ACS was willing to make far-reaching concessions going significantly beyond the standard content of collective agreements.

Recent corporate behaviour features two further instances in which public pressure resulted in decisions being taken which cannot easily be conceived as the objective of a legitimate strike. The first concerns the retail group Lidl, whose image was already seriously tarnished following revelations that surfaced in 2008 detailing the illegal surveillance of its workforce.³⁹ A year later, a further scandal emerged. Data stored illegally concerning health and sickness records of the workforce was found abandoned in a waste disposal container. As a result, the head of its German operations had to leave⁴⁰ and leading data protection experts were hired to develop a scheme for improved data protection. By way of contrast, it is barely conceivable that a strike could be pursued with the objective of forcing the chairman of a company’s board to resign. Such a tactic would almost certainly be opposed by the argument that, as a matter of company law, the board must ‘exercise its own responsibility’ in managing the company’s affairs (section 76(1) of the Stock Corporations Act (*Aktiengesetz*)) and, hence, that this cannot be questioned by means of a strike. The risk of a drop in sales as a result of consumers avoiding its stores is likely to be perceived by a company as a considerably greater threat than the much more remote likelihood of being hit by a strike lasting for a few days.

The second case concerns the retail group Schlecker, a well-known retailer of household essentials which in the meantime became insolvent. This company hit the headlines in connection with the restructuring of its stores. It emerged that it had dismissed the workers in those stores for redundancy before re-hiring them on only 50% of their previous wages through Meniar, another company in the group, which operated as

39. On the specific incidents, see the interesting report by the data protection supervisor for Baden-Württemberg published in *Recht der Datenverarbeitung* 2008, pp. 216-218.

40. See the report published in the *Süddeutsche Zeitung* newspaper www.sueddeutsche.de/wirtschaft/datenschutzaffaere-bei-discounter-das-system-lidl-1.402173 [accessed 27 August 2011].

a temporary employment agency. That agency then placed those workers in jobs similar or identical to their previous positions. The public criticism of that scheme resulted in Schlecker abandoning the practice within a few months and, in its place, concluding a collective agreement with the trade union ver.di applying to all employees within the group.⁴¹ A trade union demand backed by the threat of a strike that Schlecker should close its subsidiary Meniar would certainly have provoked considerable legal controversy. Many would have argued that the decision whether or not to continue the operations of a subsidiary is a commercial decision which is protected by the constitutional freedom to pursue a trade or business (Article 12(1) of the Basic Law).

These examples help underline the fact that the decline in the importance of the collective bargaining system is caused not only by falling membership levels on both sides and a splintering of the workforce into smaller and more diffuse groups. Also the limitations imposed on the right to strike have weakened the collective bargaining system such that other market-based and consumer-driven strategies are now deployed, generally with considerable support from the media, to resolve problems which are, traditionally, core matters for industrial relations. Whether this leads to companies having an easier ride is difficult to judge. Suffice it to say that clumsy and short-sighted corporate behaviour can provoke losses considerably greater than those resulting from a week-long strike.⁴²

6. Individual issues

In light of the novelty of the IG BAU – ACS accord, it appears appropriate to undertake a legal analysis of its individual provisions. This may be of assistance in the case of comparable accords in the future.

6.1 Provisions on working and economic conditions

In paragraph 4 of the accord, ACS indicates that it ‘respects’ the collective and workplace agreements in force at Hochtief and that it does

41. For more details, see www.mindestlohn.de/news/meldung/2010/juni-2010/schlecker-lohndumping-gestoppt/ [accessed 4 January 2012].

42. On the adverse effects of a strike and the possibility to minimise these as a result of overtime working following a strike, see W. Däubler in W. Däubler (ed.) *Arbeitskampfrecht*, § 8 paragraph 26 et seq.

not intend to introduce changes to employees' working conditions or to the system of worker participation at plant level and on the supervisory board. This constitutes an acceptance of the existing labour law framework at Hochtief. ACS undertakes to refrain from any initiatives seeking to bring about change in that regard. The accord does not specify what those initiatives might be. However, one can easily imagine steps to influence members of the supervisory board and more particularly members of the management board seeking to persuade them to reduce labour costs. Consequently, it would be difficult to dispute the fact that paragraph 4 relates to 'working and economic conditions'.

Paragraph 5 of the accord strengthens this point in relation to workforce reductions through compulsory redundancies. ACS undertakes not to take any initiatives in that direction. On the contrary, ACS promises to support the board of Hochtief should it decide to give a commitment not to introduce any redundancies. It is clear that here, too, the accord concerns matters within the ambit of Article 9(3) of the Basic Law.

Paragraph 6 of the accord establishes as an objective the safeguarding of the existing jobs in Germany and the creation of new jobs. To achieve this, the accord provides for the 'development' of markets, in particular the German market, in a manner which is sustainable and achieves an 'appropriate profitability'. In this case, it is less the subject-matter of the provision than its enforceability that causes problems. What is meant by the phrase 'development of the German market'? What should be the size of the company's advertising budget? Is the company required to take on an unprofitable order if follow-up orders with comfortable profit margins are likely? Detailed questions of this kind cannot be answered by reference to the wording of the accord. Consequently, to this extent – as is also the case with certain social partner agreements in the chemicals industry – the accord must be regarded as simply establishing overarching goals. Only in extreme circumstances, for example, if the company were to withdraw from the German market, is it conceivable that the provision could confer actionable rights. On the other hand, it is clear simply by reference to the fact that the provision's wording is similar to that used in section 92a of the Works Constitution Act that it concerns 'working and economic conditions'.

Paragraph 8 of the accord provides that IG BAU will remain the sole negotiating partner for the Hochtief group. This prevents collective bargaining with other trade unions. Given that German law on collective bargaining – unlike the law on the constitution of the workplace – does

not recognise a duty to bargain,⁴³ an individual employer is entitled to enter into a sole bargaining agreement with a specific trade union. However, that would not prevent a competitor trade union from seeking to open negotiations with the employer and, should things go that far, forcing it to the bargaining table by means of a strike. In such a situation, the provision in the accord that allows for departure from the agreed terms following a change in circumstances might come into play.

Paragraph 9 of the accord provides that a candidate for the board of directors position responsible for human resources in each of the relevant companies in the Hochtief group will only be proposed ‘following negotiations with the trade union representatives on the relevant supervisory board’. This provision refers to any proposal advanced by ACS, which, having regard to the voting power of the various shareholders at the general meeting, would carry considerable weight. From its wording, the phrase ‘following negotiations’ does not have a meaning as firm as ‘subject to agreement with’ and, hence, cannot be regarded as a right of veto. On the other hand, it means more than mere consultation. What is likely to have been intended is that both sides should negotiate with a view to reaching an agreement and that a proposal coming from ACS may depart from the trade union position only where there are good reasons for doing so. Infringement of this procedural rule potentially could be sanctioned by a court order setting aside the election result. Such a solution presupposes, however, that the substance of this procedural requirement has been incorporated into the company’s rules or the rules of procedure of the supervisory board.

6.2 Provisions relating only to corporate and business freedoms

The ambit of Article 9(3) of the Basic Law does not extend to paragraph 3 of the accord concerning the operative business of Hochtief. This is a matter for which that company’s board continues to remain responsible.

43. See the judgments of the Federal Labour Court of 2 August 1963 in Case 1 AZR 9/63, reported as AP Nr. 5 zu Art. 9 GG; 14 July 1981 in Case 1 AZR 159/78, reported as AP Nr. 1 zu § 1 TVG Verhandlungspflicht; and 14 February 1989 in Case 1 AZR 142/88, reported as AP Nr. 52 zu Art. 9 GG. See also M. Löwisch and V. Rieble, cited above, *Grundl.* paragraph 55; K. Nebe in W. Däubler (ed.) *Tarifvertragsgesetz*, § 1 paragraph 107 et seq.; and U. Zachert in E. Kempen and U. Zachert (eds) *Tarifvertragsgesetz*, § 1 paragraph 27. For an opposing view, see F. Gamillscheg *Kollektives Arbeitsrecht*, Volume I, § 7 I 4 (p. 276), and G. Thüsing in H. Wiedemann (ed.) *Tarifvertragsgesetz*, § 1 paragraph 216 et seq.

As shareholder, ACS will not become involved in the operative decisions of management and also will not seek to conclude an agreement which places Hochtief under its control. These are all questions concerning relationships amongst shareholders and between shareholders and management. For that reason, in classifying this provision, the only form of agreement conceivable is a contract under the law of obligations.

Paragraph 7 of the accord also concerns purely commercial issues. Cooperation is to be improved between the various business areas of the Hochtief group. Greater emphasis is to be placed on generating orders for other business areas within the group. This provision, too, has only indirect repercussions (if any) on the workforce and, as a consequence, this also must be classified as the term of contract under the law of obligations. As to its effectiveness, however, there cannot be any doubts.

6.3 Provisions falling into a grey area

Paragraph 1 of the accord provides that Hochtief AG will remain an independent company operational in its own right or through the activities of subsidiaries. Moreover, it may not be converted into a European company (SE). In terms of its wording, this provision concerns simply matters of corporate structure and questions of company law. However, the implications for the workforce may be substantial as in the absence of operative independence many jobs could be under threat. These are matters which are addressed separately in paragraphs 5 and 6 of the accord. Consequently, it must be presumed here that the stipulation simply concerns matters of corporate structure and, hence, constitutes the term of a purely contractual agreement under the law of obligations. Moreover, this provision is effective. It is open to a majority shareholder to agree to exercise its influence or to refrain from such. Although it may indeed be questionable whether it could commit itself indefinitely, the present accord is limited in time and expires on 31 December 2013. In accordance with the rule established in the second sentence of section 137 of the Civil Code, a commitment to exclude the adoption of the legal form of a European company (SE) will be regarded a valid stipulation not to exercise rights of ownership in Hochtief AG in such manner as results in their conversion to similar rights in a European company.

Paragraph 2 of the accord specifies that the company's main administration is to remain in the city of Essen. This commitment relates less to

the issue of the company's seat. Instead, it concerns the location of its substantive (administrative) activities. In other words, this is a commitment guaranteeing the future of a particular plant or site which can be the subject-matter of a collective accord. The question whether a strike in pursuit of a commitment of that kind may be regarded as lawful is a matter on which I have written elsewhere.⁴⁴ Following a careful analysis of the opposing arguments, I conclude that such a strike is indeed lawful and, consequently, further discussion is not appropriate here.

6.4 Whether the provisions of the accord are binding

Collective accords and contracts under the law of obligations may be limited to the identification of recommendations where non-compliance does not result in any sanctions. The most prominent example of that approach is to be found in the social partner agreements in the chemicals industry. In commercial dealings, too, the parties may limit themselves to letters of intent.⁴⁵ Whether in a particular case binding commitments or simply recommendations are intended is a question of interpretation.

The accord at issue is clear in its formulation of many (but not all) points and is not limited simply to the identification of an objective. This is true, for example, in relation to the guarantee for the Essen site. Likewise, this applies also to the statement by ACS that it would accept a commitment to guarantee jobs and, hence, its undertaking not to oppose such. Furthermore, the commitment to respect existing collective agreements and collective accords is not hedged or qualified in any way. In addition, it must be noted that the accord is limited in time and set to expire on 31 December 2013. This is hardly a provision that would have been agreed if the stipulations were intended simply as non-binding.

Ultimately, however, all this applies only if ACS acquires the majority of Hochtief shares. Where it retains a holding of between 30% and 50%, ACS merely agrees to act 'in the spirit of these commitments'. The exact meaning of that phrase is unlikely ever to be resolved by a court. The most plausible approach to its interpretation suggests that the same principles should apply subject only to the provision that ACS has the

44. W. Däubler in W. Däubler (ed.) *Arbeitskampfrecht*, § 13 paragraphs 40–46.

45. On the concept of a letter of intent, see W. Däubler *BGB kompakt*, Chapter 11, paragraph 153.

possibility to derogate to the extent that this is justified by its minority position.

Finally, following the practice of many common law jurisdictions, the accord incorporates a material adverse change (MAC) clause. It allows ACS to depart from the agreed terms (whose binding qualities are thus once again emphasised) if there is a material adverse change in the circumstances affecting Hochtief. In the present case, this means changes affecting the basis for the transaction, in other words, new circumstances which were not and could not have been anticipated. These are circumstances which would also have to be taken into consideration in accordance with the rule established in section 313 of the Civil Code or the corresponding principles governing collective agreements and collective accords. However, in the present case, the parties did not take advantage of the possibility to specify the risks and potential changes.⁴⁶

7. Conclusion

This chapter has shown that a relatively new instrument, the investor agreement, can be used to safeguard employee influence. This instrument is interesting within the context of this book's discussion of company law and the Sustainable Company because it can be used to supplement board level employee representation. It will therefore be worthwhile to observe the evolution of the Hochtief-ACS agreement in practice as well as its take-up by trade unions in other situations. It would also be interesting to look at how this instrument could be implemented in other national contexts.

46. For a more detailed comparison of the rule established by section 313 of the Civil Code and the MAC clause, see G. Picot and R. Duggal 'Unternehmenskauf: Schutz vor wesentlich nachteiligen Veränderungen der Grundlagen der Transaktion durch sog. MAC-Klauseln', *Der Betrieb* 2003, pp. 2635-2642.

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