IFLR
INTERNATIONAL FINANCIAL LAW REVIEW
INTERNATIONAL BRIEFINGS 2014

Switzerland
Bär & Karrer

Social plans for mass dismissals

Until recently, Switzerland's regime for social plans was rather liberal. No obligation to conclude a social plan existed unless one was foreseen in a collective employment agreement. If companies offered severance payments or other benefits in case of redundancies, they usually did so on a purely voluntary and fully discretionary basis.

Since January 2014, the amended Swiss restructuring law has been in force and the situation has changed. As a compensatory measure for loosening the legal requirements for the transfer of insolvent businesses, the new rules introduced a duty to implement a social plan in case of mass dismissals. Employers are now required to negotiate a social plan if the criteria summarised below are met.

In a nutshell

The new requirements apply to companies that employ more than 250 employees and intend to issue notices of termination to at least 30 employees within 30 days for reasons not attributable to those employees (for example, due to a restructuring). They do not apply if mass dismissals occur during bankruptcy or composition proceedings concluded with a composition agreement.

Notices of termination issued over a period of more than 30 days but based on the same operational decision are added together. Consequently, staggering the notices of termination will not help to circumvent the duty to negotiate a social plan. However, certain room for interpretations exists, since the term 'same operational decision' remains undefined.

If the above-mentioned criteria are met and a collective employment agreement is in place, employers are required to negotiate a social plan with the trade union. If no collective employment agreement exists, the negotiations will take place with the organisation representing the employees or, if no such organisation exists, with all employees directly. The employee associations, the representative body or the employees have the right to invite specialist advisers (such as trade unions) to the negotiations.

Swiss law defines social plans as agreements in which an employer and employees set out measures to avoid or reduce redundancies and mitigate their effects. However, it does not give any indication about the minimum content of a social plan and, in particular, contains no criteria to calculate severance payments.

If the employer is unable to reach an agreement with the representative body or the employees respectively, an arbitral tribunal decides on the social plan.

What remains unclear

Many questions remain. How is the term employer to be interpreted; for instance, will the relevant threshold really be calculated per company or will it be calculated per business establishment? Whereas the former interpretation is in line with the wording of the relevant legal provision, the latter corresponds with the provisions on mass dismissal where relevant thresholds are calculated per business establishment, not per company.

The interpretation of the term 'set out measures to avoid redundancies or to reduce their numbers' also remains unclear. Social plans traditionally included measures to mitigate the effects of the redundancies, such as outplacement, prolongation of notice periods, severance payments, early retirement provisions and hardship clauses. The new term might be interpreted much broader and go far beyond that.

Finally, it is not clear what happens if negotiations for a social plan fail. The new law only states that arbitral proceedings may be initiated if the parties fail to agree on the content of a social plan. There are no guidelines whatsoever about the procedure or

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the award's content. The appointed arbitrator or arbitral tribunal seems to be completely free to render a binding award, as long as the social plan does not jeopardise the survival of the company. Based on the wording 'set out measures to avoid redundancies or to reduce their numbers' mentioned above, an arbitrator or arbitral tribunal might even prohibit an employer from issuing notices of termination, although legislative materials do not indicate that this was actually intended.

Outlook

In view of the risk of having an arbitrator or arbitral tribunal freely deciding on a social plan, employers are advised to take social plan negotiations seriously and to prepare them carefully. Companies with more than 250 employees but no institutionalised representative body may want to consider introducing one to make discussions and negotiations more efficient if a social plan needs to be implemented.

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