

## Reduced Protection against Mass Layoffs? – ECJ on Consequences of Errors in the Mass Layoff Process

### INTRODUCTION

The so-called notice of mass layoffs is certainly one of the most unpleasant tasks in connection with personnel reduction measures. In Germany, this is (in implementation of the European Collective Redundancies Directive (Directive 98/59/EC)) regulated in Sections 17 et seq. of the Protection Against Unfair Dismissal Act. Briefly put, the law here requires prior notification to the Employment Agency (*Agentur für Arbeit*) and involvement of the works council, if there is one (so-called consultation process), if an employer plans to execute layoffs at a larger scale within a period of 30 calendar days.

These requirements have achieved enormous practical relevance because it had been the previous understanding of the Federal Labor Court (BAG) that a missing or faulty notice of mass layoffs could result in the invalidity of (all of) the redundancies. The legal basis for this was Sec. 134 German Civil Code, under which a legal transaction is void if it violates a legal prohibition - in this case in the form of Sec. 17 of the Protection against Unfair Dismissal Act. This case law had been criticized from the beginning, particularly with the argument that the primary purpose of the notice of mass layoffs (Preparation of the Employment Agencies for a greater number of people seeking employment) does not require the invalidity of the redundancies. And, indeed, remarkable things are currently happening here which would indicate an at least possible change in the case law.

### ECJ JUDGMENT OF JULY 13, 2023 – C-134/22

The European Court of Justice has just recently commented (following a submission by the BAG) on the failure to forward a copy of the information provided to the works council in the course of the consultation process to the Employment Agency (cf. Sec. 17 (2) and (3) sentence 1 Protection against Unfair Dismissal Act). The notification to the works council should also be forwarded to the Employment Office, which did not happen in the case at hand. The ECJ has now taken the view that the European provision upon which the German regulation in Sec. 17 Unfair Dismissal Act is based merely serves the purpose of informing and preparing the responsible government agencies and that employees may not derive any personal protection from the violation of these regulations with regard to their termination. In other words: The purpose of this regulation does not require the assumption of the invalidity of the redundancy.

### SUSPENSION ORDER OF MAY 11, 2023 (AZ. 6 AZR 157/22)

It is also noteworthy that, upon express reference to the (at that time still outstanding) aforesaid decision of the ECJ, the BAG had already suspended other proceedings in May of this year concerning the complete failure to provide the required notice of mass layoffs. Three further proceedings in which errors in the mass layoff process were in dispute were also suspended on that same day. This all allows one to infer that the BAG is putting its previous understanding of the legal consequences of missing or faulty notices of mass layoffs as a whole to the test. It appears possible that the previous case law will be fundamentally changed or at least toned down.

### OUTLOOK

It remains to be seen what overall conclusions the BAG will draw from the decision of the ECJ, which relates to a very specific situation and duty, for its „system of sanctions“ in connection with errors in mass layoff notices. The decisions of the BAG will hopefully provide some specifics as soon as possible in the proceedings that have recently been suspended. It would be very positive from the standpoint of employers if the court continued to “relax” its previously strict rulings. It also remains to be seen if lawmakers feel moved to provide for alternative consequences for employer misconduct in the mass layoff notification process (e.g. rights of works councils or fines).

Please do not hesitate to contact us if you have questions concerning this topic. If you would like to be included on our mailing list of the subscribers to our free newsletter, please send us a brief [E-Mail](#) with your request.

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