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URL: http://mobile.deloitte-tax-news.de/german-tax-legal-news/possible-changes-regarding-the-liability-of-a-business-acquirer-in-the-event-of-insolvency.html

31.01.2019

German Tax and Legal News

Possible changes regarding the liability of a business acquirer in the event of insolvency

Deviation from the previous interpretation of Section 613a (1) German Civil Code in the case of opened insolvency proceedings: Decision of ECJ could substantially increase the risk of additional costs for the purchaser.

On 16 October 2018 (Ref. 3 AZR 139/17 (A), 3 AZR 878/17 (A)), the Third Senate of the Federal Labor Court (Bundesarbeitsgericht - BAG) requested a preliminary ruling from the European Court of Justice (ECJ) in two proceedings on the question of whether its previous restrictive interpretation of Section 613a (1) of the German Civil Code (Bürgerliches Gesetzbuch - BGB) in the case of opened insolvency proceedings with regard to the purchaser's obligations to pay occupational pension benefits is compatible with the requirements of Union law.

Subject of the main proceedings
The plaintiffs were promised company pension benefits during their existing employment. This company pension is calculated in accordance with the relevant pension scheme on the basis of the number of eligible years of service and the amount of the gross monthly salary on a certain cut-off date before leaving the company. Insolvency proceedings were opened against the employer's assets in March 2009.

Since August 2015, one of the plaintiffs has received a monthly company pension of around EUR 145.00 from the defendant and a monthly pension of around EUR 817.00 from the pension security association, i.e. a total monthly payment of around EUR 962.00 gross.

Without insolvency of the employer and transfer of business in the context of the sale of the business operations of the insolvent employer the plaintiff would have undisputedly received a claim on a monthly pension at a value of EUR 1,111.50 gross with application of the pension scheme. The difference to the actually paid out entire pension (EUR 149.50) follows from the fact that the pension security association disburses only the portion of the pension which was earned vested before the insolvency and that the acquirer disburses only the portion of the pension which is calculated from a consideration of the period of service starting from the occurrence of the insolvency.

One plaintiff claims with his action before the BAG that the defendant must pay him a higher company pension. In accordance with the provisions of the pension scheme, this must be calculated on the basis of the salary received on the cut-off date before the insured event, deducting only the amount received from the pension security association, i.e. taking into account the total years of service eligible under the pension scheme and not only taking into account the eligible years of service after the insolvency occurred.

When the insolvency proceedings were opened, an other plaintiff did not yet have a legally vested entitlement, so that he is not entitled to any claim against the pension security association upon the occurrence of the insured event (Section 7 para. 2 BetrAVG). He holds the defendant obliged to pay him a company pension in full in future, i.e. taking into account all eligible years of service under the pension regulations.

Current judicature of German labour courts
The German labour courts currently interpret Section 613a para 1 BGB, which is decisive for the legal consequences of a transfer of undertaking, in a restrictive manner in the case of acquisition after the opening of insolvency proceedings. Insofar as the special distribution principles of insolvency law apply to claims or expectancies of employees which have already arisen, these are to take precedence over Section 613a para. 1 BGB.

As a result, the liability of the business acquirer in the case of benefits under the company pension scheme is therefore limited to the portion earned by the employee through his length of service in the period after the opening of insolvency proceedings. Taking into account these principles of judicature, the plaintiffs would not succeed with their claims.

This is essentially justified by the principle of equal satisfaction of creditors, according to which all asset rights existing at the opening of insolvency proceedings are to be satisfied solely in accordance with the provisions of the Insolvency Code, Section 1 InsO. The claims of the employees, also from company pension schemes, should not be privileged in this regard. If necessary, the employees would have to assert unpaid claims like all other creditors of the insolvency proceedings as a mere insolvency claim.

Questions of the BAG and practical outlook
The BAG now asks the ECJ in particular whether such a limited application of Section 613a para. 1 BGB in the case of a transfer of an undertaking in insolvency proceedings is compatible with the Council Directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (in particular Art. 3 para. 4, Art. 5 para. 2 lit. A of Directive 2001/23 EG).

The answer to this question can, depending on the outcome, have considerable effects on company acquisitions after insolvency. If the ECJ were to assess the previous judicature of the German labour courts as incompatible with Union law, the liability risk or the liabilities of the company purchaser would increase significantly, unless the pension security association is considered – in the end – as the liable party.

This could considerably reduce the attractiveness of a company purchase, depending on the extent of the obligations from the company pension scheme. Tactical considerations to buy a company only after insolvency, among other reasons, in order to avoid at least some of the claims from company pension schemes, and the associated design considerations would in any case have to be adapted to the changed framework conditions.