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MiLoG in judicial crossfire of the Federal Constitutional Court of Germany!

The introduction of a statutory minimum wage was a substantial part of a political compromise between the Union (CDU/CSU) and SPD, which ultimately enabled the formation of the Grand Coalition in 2013 and was eventually implemented with the enactment of the Minimum Wage Act (*Mindestlohngesetz, MiLoG*) with effect from 01.01.2015. The Act stipulates that every employee is entitled to a payment from the employer of an amount at least equal to the minimum wage. This amounts to – from 01.01.2015 – 8.50 EUR gross per hour. And yet, MiLoG has a number of structural deficiencies that have not been "cured" also within the legislative process. Therefore it remains utterly unclear which components of compensation "voluntarily" provided by the employer prior to the entry into force of the Minimum Wage Act shall be regarded as such, in order to determine whether a company actually pays its employees the statutory minimum wage. Are premiums and additional allowances, or even Christmas or holiday bonuses taken into account? And what about performance-related bonuses? The legislator leaves the employer alone with these questions and assigns the task of the interpretation of the law to courts.

Moreover, the introduction of MiLoG gave rise to a (considerable) political opposition, so that Federal Ministry of Labor and Social Affairs (*Bundesministerium für Arbeit und Soziales, BMAS*) after its entry into force must have taken a stand in regards to some legally doubtful "interpretations" of the MiLoG's scope, e.g. about the removal of amateur athletes. The MiLoG likewise caused unrest in the area of the European law. The application of MiLoG to the domestic transit traffic previously was strongly criticized in particular by Polish and Czech politicians, so that the German federal government found it necessary already in January 2015 to suspend (for a limited time) the application of MiLoG to transit journeys. Even the European Commission joined in, initiating so-called infringement proceedings against the Federal Republic of Germany concerning the application of the German minimum wage to the transit traffic and certain cross-border transport services. The Commission sees in these provisions a disproportionate restriction of the freedom of services and the free

movement of goods. This way undue administrative obstacles would be set, which disabled the proper functioning of the internal market.

Likewise, the Federal Constitutional Court had to deal most recently with MiLoG: 14 transport and logistics companies from Austria, Poland and Hungary that are active in Germany as well addressed the Court with a constitutional complaint against the obligations resulting from MiLoG (the reporting obligation pursuant to § 16 MiLoG, documentation requirements according to § 17 para. 2 MiLoG and the obligation to pay the minimum wage according to § 20 MiLoG). At the same time a temporary injunction has been requested to temporarily – until the main decision is reached – override the application of the named provisions to transport companies based in another EU country, which provide transportation, cabotage and cross-border drives within the country.

In his ruling, the German Federal Constitutional Court did not accept the constitutional complaint for adjudication (decision no. 1 BvR 555/15 dated 25 June 2015). The transport companies were required to take legal actions primarily before specialized courts of lower instance. Under the principle of subsidiarity, a constitutional complaint is inadmissible if – in a reasonable manner – legal protection could be obtained by appealing to specialized courts of lower instance. This obligation does not apply only in exceptional cases, in particular if taking actions before specialized courts is unreasonable. This was not the case here. Indeed it is unreasonable to violate the obligations penalized with a fine under MiLoG in contemplation of the opening of the proceedings before specialized courts, in order to enable in this manner the examination of the challenged provisions in administrative offence proceedings. However, the principle of subsidiarity stretches wider. There is a possibility of bringing a declaratory judgment action before specialized courts of lower instance to obtain a declaratory ruling, confirming that the employer is not required to comply with the actions demanded by § 16, § 17 para. 2 and § 20 of MiLoG. Such negative declaratory actions are not *a priori* inadmissible, since it would appear that specialized courts would consider a legitimate interest in a declaratory judgement as a given fact.

Furthermore, the previous clarification by the specialized courts of the raised legal questions appears advisable. Their decisions would be suitable to process the ambiguities already raised in the professional legal discussions about the scope of MiLoG; in this manner, they could also influence the review of the Act from the German constitutional, as well as European law perspective. The need for clarification exists particularly in regards to whether the condition of a domestic employment should be understood in the same sense as under the social

insurance law, whether without exceptions every, even short-term activity in the territory of the Federal Republic of Germany constitutes a domestic employment, or whether perhaps a specific period or a reference to the German social security systems and to the costs of living in Germany should be required. In this context also a further question arose whether a minimum wage requirement in connection with brief appearances in Germany is necessary in order to achieve the objectives pursued by MiLoG.

Taking actions before specialized courts would not therefore be unreasonable, because the company would have to fear the occurrence of serious disadvantages with continued application of MiLoG. There would be doubts about a sufficient substantiation, insofar insolvency risks of concerned shipping companies had been maintained, but not supported by balance sheets. In any event, in order to avoid disadvantages one could in this respect take advantage of an interim relief granted by specialized courts. With the refusal to accept the constitutional complaint, likewise the request for a temporary injunction was resolved.

The requirements for a constitutional complaint, which – as in the case of MiLoG – are directly aimed against the application of a law, are high. This is reflected in a very illustrative way in the decision of the Federal Constitutional Court in the MiLoG case, where the court refers the complaining transport companies primarily to the specialized courts. These should – and in this respect the Federal Constitutional Court offers a practice relevant guideline – firstly bring a declaratory judgment action before "normal" courts, in order to obtain a declaratory ruling that the disputed MiLoG provisions do not create obligations for foreign transport companies. This illustrates the way which should be pursued in order to bring about a (judicial) clarification, whether these are in fact to be observed or not.

Against this background, of interest are particularly the (substantive) remarks of the Federal Constitutional Court, despite the refusal to accept the constitutional complaint due to its inadmissibility: the court clearly indicates that there are numerous legal "stumbling blocks", whether foreign transport companies could be actually (without restrictions) subjected to the minimum wage requirement. This has already been observed shortly after the entry into force of MiLoG by two authors in a journal article (ArbRAktuell 2015, 4), who argued that the concept of employment of drivers of foreign transport companies within Germany does not cover every short-term appearance in Germany, as well as every transit journey. The Federal Constitutional Court relates to this idea explicitly with reference to the above article (see para. 12 and 14 of the decision dated 25 June 2015).

It now remains to be seen whether the foreign transport companies would – as "sketched out" by the Federal Constitutional Court – claim the judicial protection from specialized courts in order to clarify the issue of the application of the MiLoG provisions. This way is likely – based on the remarks of the Federal Constitutional Court – to be very promising.