

Recent Developments in the EU and Germany

- Transfer of Undertaking
 - Matrix Structures
 - Working Time

Danish Employment Lawyers' Association
Copenhagen, November 11, 2011

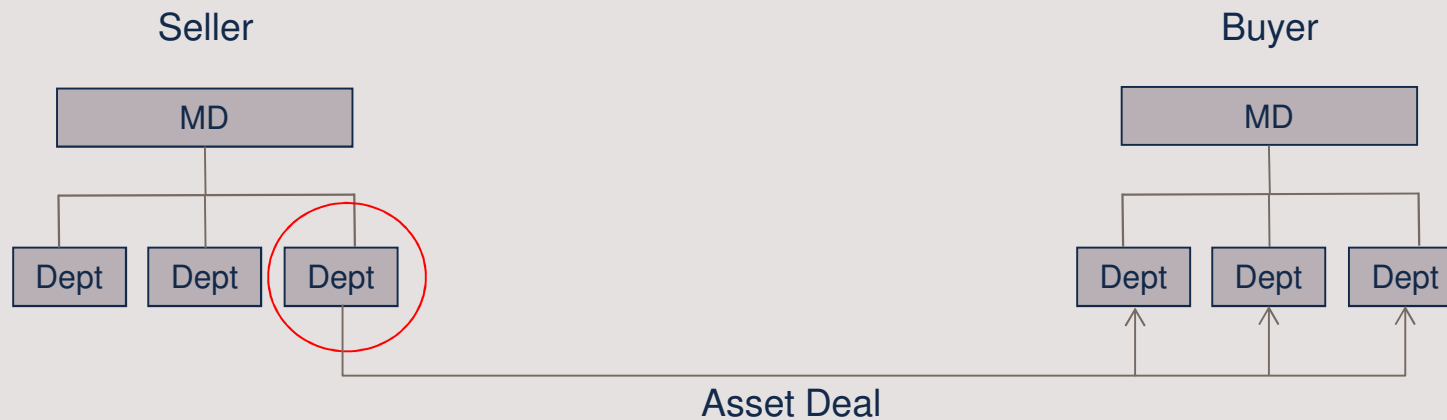
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Agenda

- Transfer of Undertaking:
impact of ECJ cases on Germany
- Employment issues in matrix structures
- Working time of mobile employees:
"Blackberry & Co"

Good-bye to the "Principle of Organizational Autonomy"

- Directive **applicable** even if part of establishment that **does not maintain its organizational autonomy** after acquisition
- Retention of **functional link between transferred production factors** required for performance of at least the same type of economic activity



Germany

– Previous **rulings**:

- In the event of an identity-destroying incorporation of tangible assets into an already existing operational organization of the acquirer: **no transfer of business!**
- **No retention of identity**

⇒ Destruction of identity = common way to do avoid transfer of business

– **New decision of Federal Labor Court:**

ok, but part of business to be sold must have organizational autonomy to be in scope

"Ownership of Assets" irrelevant

– **Facts:**

New service provider to do passenger security checks at Düsseldorf airport; assets (metal detectors, gates provided by airport)

– **ECJ:**

- Ownership of tangible assets or their independent commercial use **not** relevant
- Aim of Directive: protection of workers where there is a change of employer

Germany (new)

– New Rulings:

- Criterion of **independent commercial use abandoned**
- Decisive criteria for transfer of business:
 - Factual **retention of identity in continuation** of operations
 - Use of essential tangible assets
 - *"Retention of the core of the functional connection required for adding value"*

– Consequence:

- Increased risk of having to take over seller's employees, esp. in second generation outsourcing
- Example: catering service

Old Collective Agreements do not apply dynamically

– ECJ:

- **No dynamic continued applicability** of CBA's to which seller is bound if acquirer is not bound
- Static applicability of clauses in seller's employment contracts referring to CBA's
- Acquirer's freedom of association; protected under EU law

Germany

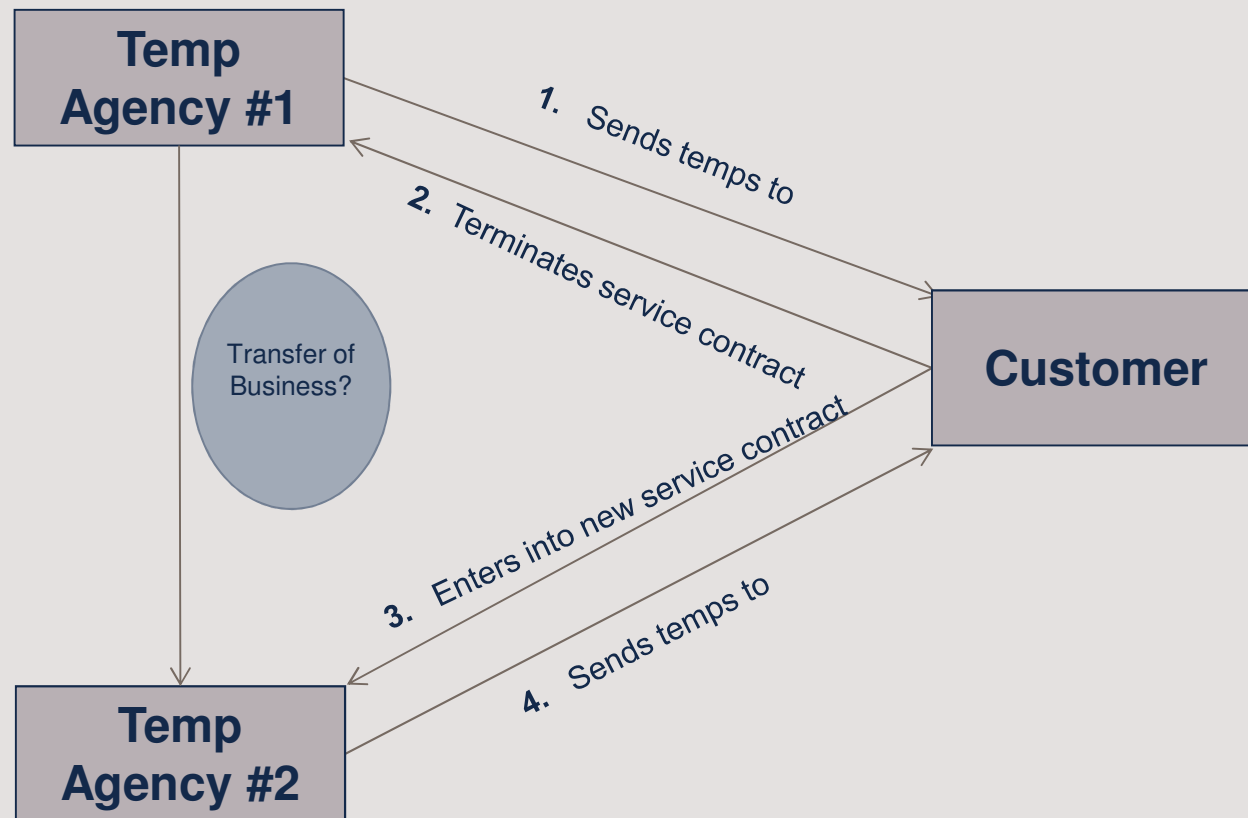
– New Rulings:

- Dynamic reference to acquirer's collective bargaining agreement possible in employment contract
- Wording of clause in employment decisive
- Reference clause might establish continued dynamic applicability of CBA
- No violation of freedom of association because only freedom of contract between employee and employer concerned

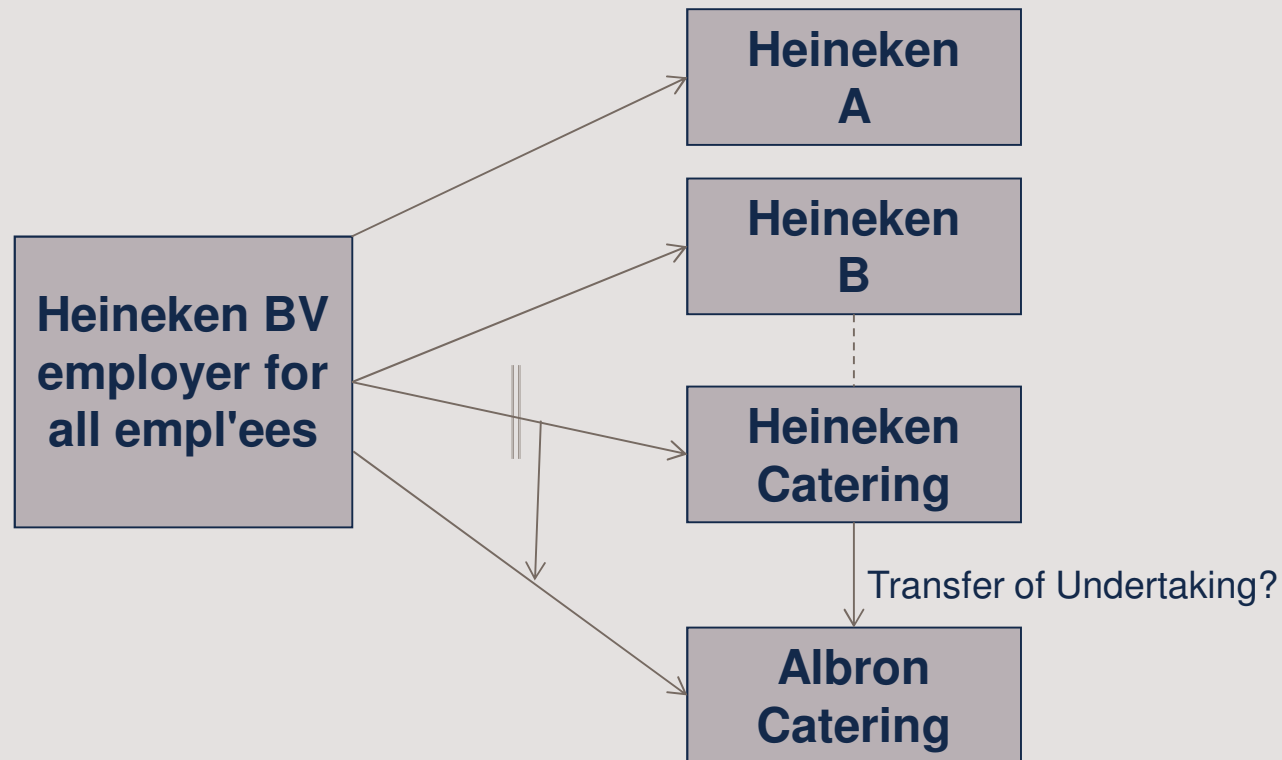
Transfer of business re Temps?

ECJ ⊕ :

- if same type of work
- if same customer
- no relevant tangible assets needed



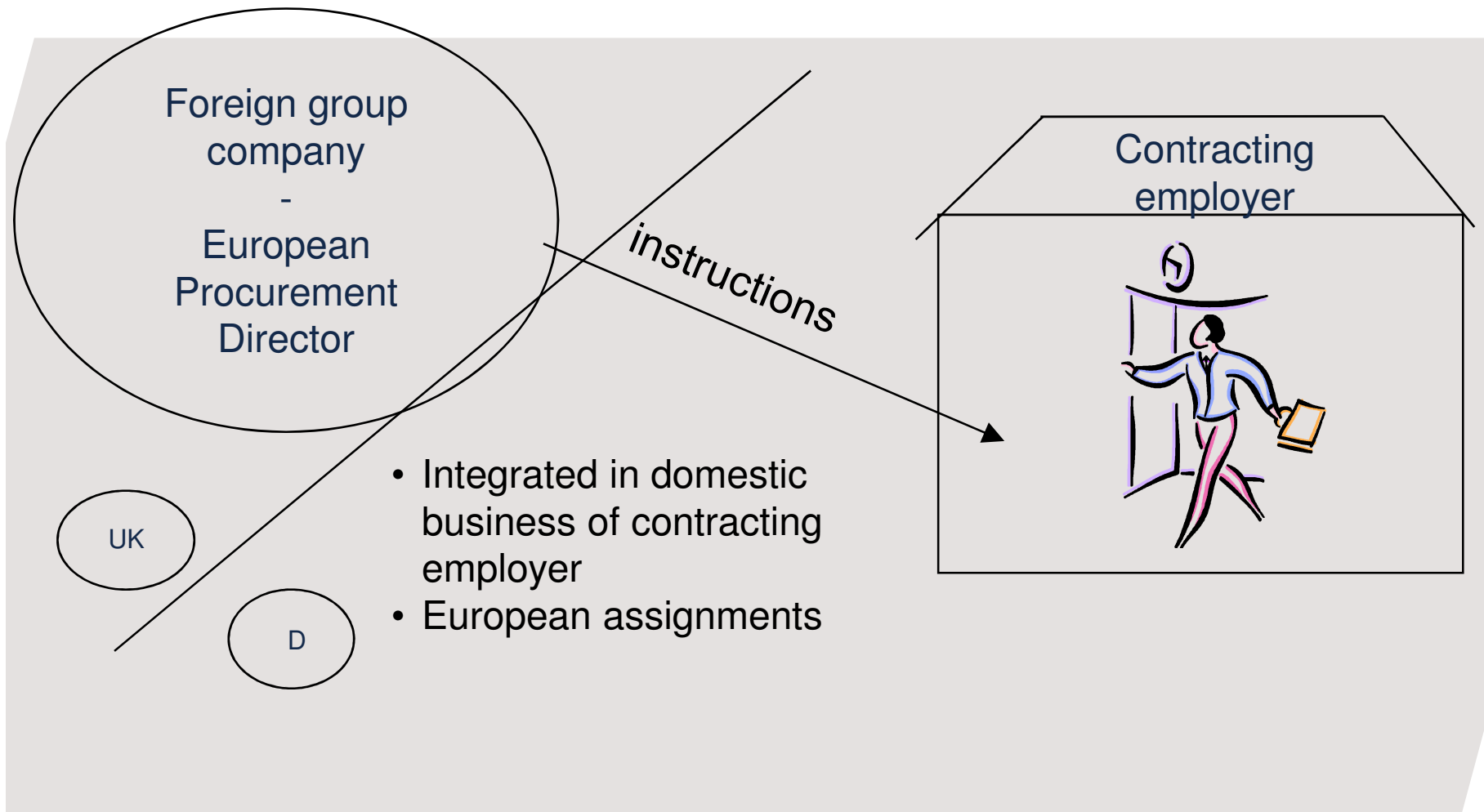
Transfer of business re Temps?



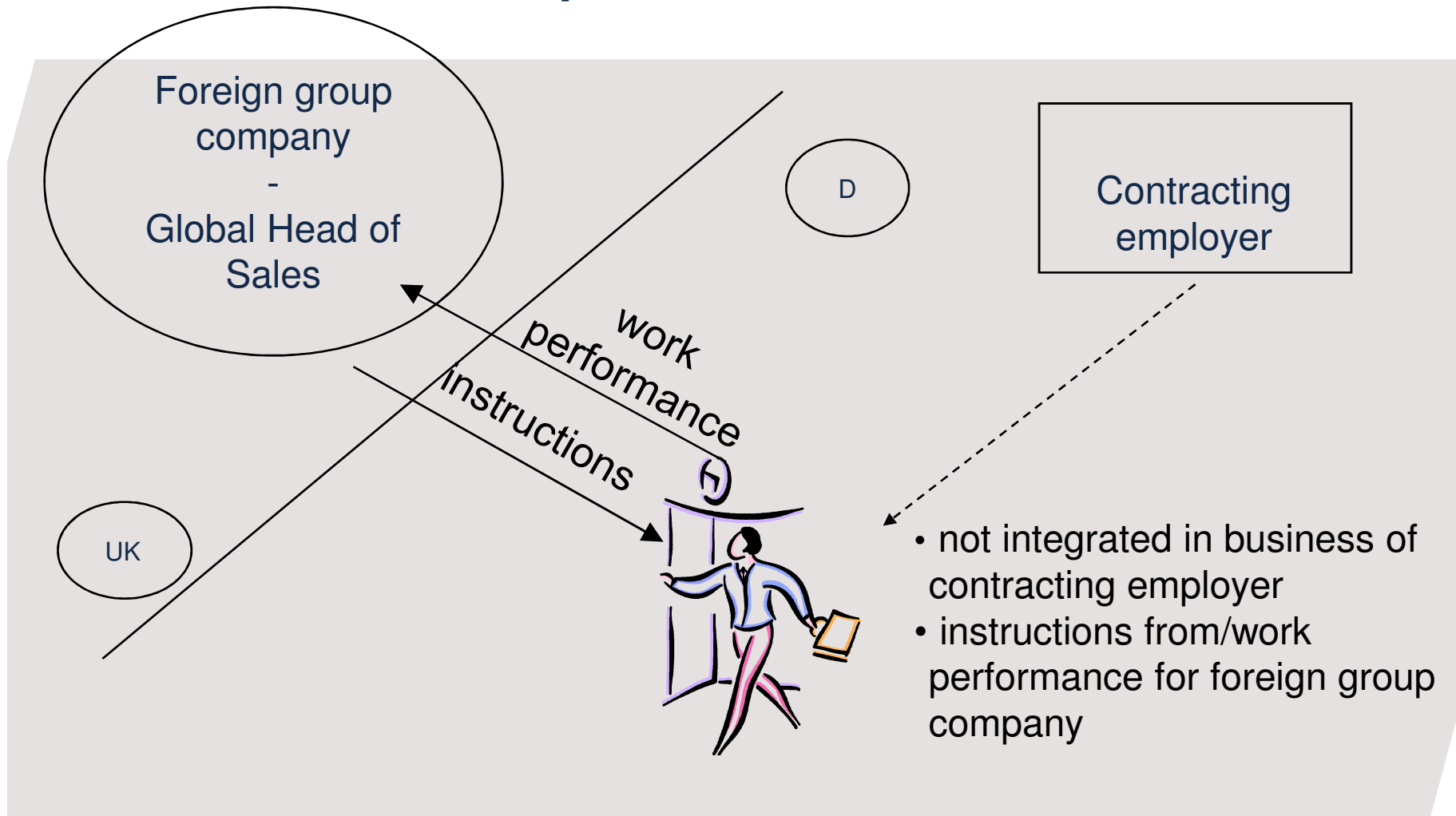
ECJ (+) :

- dual employership: contractual and non-contractual
- decisive: continuous temps within group

1. Alternative – Local Purchase Manager



2. Alternative – European Sales Director



Who is the employer?

– **Joint employment contract** with contracting employer and
instructing company

- Employer = contracting employer and group company
- Consultations between the two legal entities are required;
evidence: if both corporations are joint debtors for the
remuneration
- In practice: unusual!

Who is the employer?

- Dual employment relationship (2 employers)?
 - 1. Alternative
 - Local Purchase Manager:
Employer = receiver of work performance, only contracting company is employer.
But instructions from the European Procurement Director.
 - 2. Alternative
 - European Sales Director:
Employer = contracting employer and group company

- Criteria to determine the employer:
 - With whom was the employment contract concluded?
 - Who has the right to issue directions?
 - In whose company is the employee integrated?
 - Who pays for and benefits from the work performance?
 - Formal evidence (e.g. payroll, social security payments, personal files)?

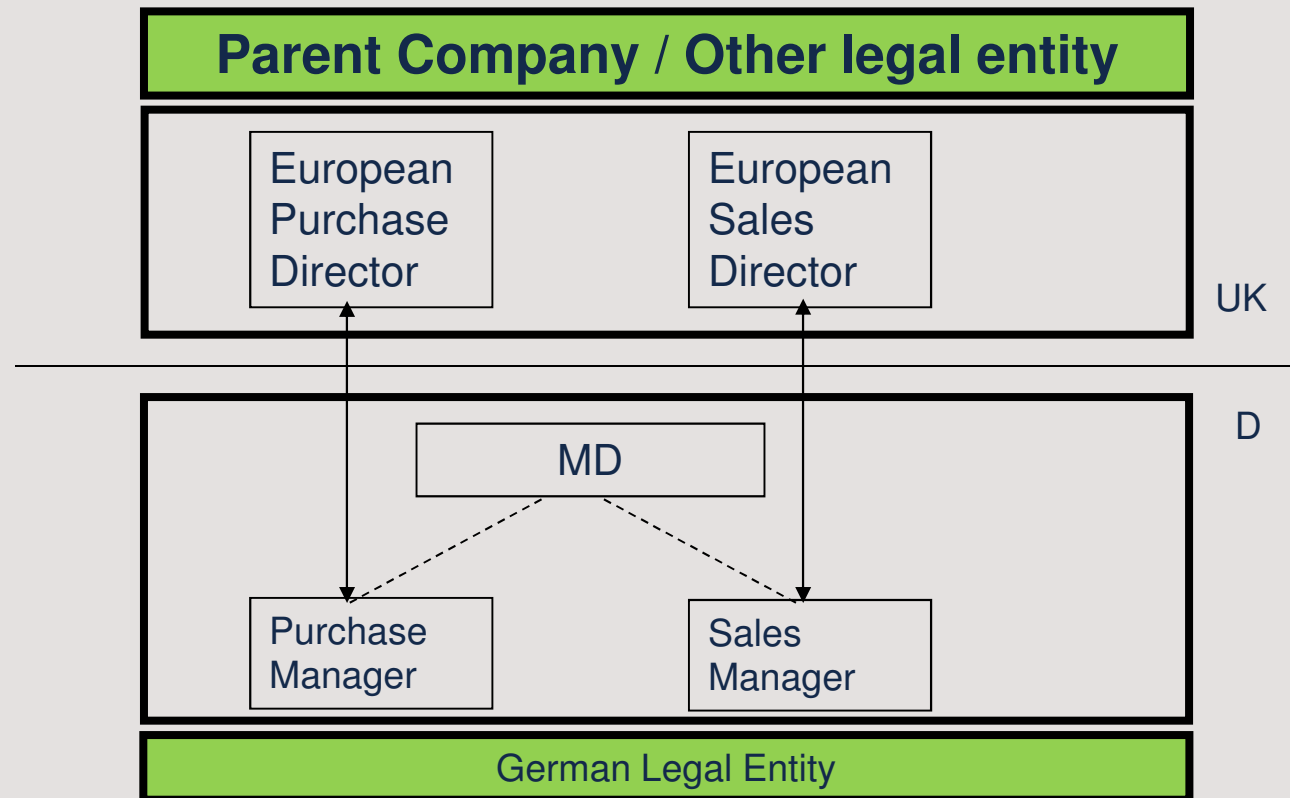
Who has to terminate?

- 1. Alternative (Local Purchase Manager): contracting company
- 2. Alternative (European Sales Director): contracting company and group company giving the instructions



2 dismissals

Liability risks for MDs: The Structural Problem



Duties and Liability of MDs

- Diligence of a "prudent business man" (*Sorgfalt eines ordentlichen Geschäftsmannes*)
 - No authority to make decisions in important strategic or organisational matters?
- Insolvency filing
 - No knowledge about the financial situation of the Company?
- Cash pooling
 - No knowledge about the financial situation of the Company and the Group?
- Liability in tort (*Deliktshaftung*)

Duties and Liability of MDs

- Organisational negligence
 - Charge of inadequate organisation of internal or external business matters can suffice to create liability (e.g., violation of working time laws); regularly MD has burden of proof
 - Knowledge of the violation is not a prerequisite to constitute liability
- Tax Debt (Sec. 34(1) German Tax Code)
 - Even if decisions on tax matters are made without involvement of the MD, the MD is liable (with hardly any possibility of exculpation)
- Payment of Social Security Contributions
 - Incomplete information on freelance status of "employees"

Limitation of liability vis-à-vis third parties

– **No** limitation of liability:

- Vis-à-vis public authorities, e.g., regarding tax debt or social security contributions
- Vis-à-vis other third-party creditors

Intra-company and intra-group restrictions

– Assignment of specific areas of responsibility to specific MDs

- By Management Rules of Procedure



results in

- **Release from primary liability** for areas not assigned to such MD, and liability significantly reduced
- General secondary liability for adequate cooperation and information among MDs

Intra-company/-group limitations of liability

– *Indemnification by employer entity*

- In management services agreement or separate agreement
- E.g., increased criteria for level of negligence, reduced criteria for duty of care, reduced limitation periods
- Arrangement may not endanger orderly management and may not generally set aside all standards of duty of care
- No limitation of liability for
 - Prohibited payments to shareholders
 - Compliance with accounting requirements
 - Responsibility for calling shareholders' meetings
 - Prohibition of granting loans

→ Creates some security for MD

Intra-company/-group limitations of liability

– D&O Insurance

- Protection against claims group entities, third parties or the company managed by the MD
- Cover for civil law and public law liability
- Cover for gross negligence
- Necessary Content:
 - Cover for internal and external civil liability
 - Cover for criminal liability
 - Cover for disputes related to the management services agreement with the Company

Factual limitation of liability by structural changes

- Inclusion of MDs in important communication lines
- Appointment of qualified personnel as MDs
 - Cautiousness regarding appointments of foreign MDs!
- Granting of relevant authority in strategic and operational matters
- Adoption of the corporate structure to the matrix structure
 - Issue: cross-border matrix

Content

Questions about working time – Blackberry & Co.

- **Legal framework**
 - EU Working Time Directive (DIR 2003/88/EG)
 - Scope of employer's right to give directions
- **Annual leave issues**
- **Remuneration issues**
- Sanctions
- Works council's rights
- Practical tips



Working time

C/M/S/ Hasche Sigle

Rechtsanwälte Steuerberater

The facts:

- Employer often requests availability 24/7
- In part voluntary availability/work of the employee
- (P) voluntariness in employment?
- 66 % of employees (73% of male all employees) are available after agreed working time via email or cellphone (BITKOM 2010)

no clear separation
line

working time



leisure time

Working time

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Main questions

Is the use of mobile devices after agreed working hours working time?

And if so, do the employees have a right to receive overtime pay?

Worldwide discussion

1/2

- Overtime compensation demands are making global headlines:



USA:

- Dispute between ABC-TV and 3 of its writers and the Writer's Guild of America East (WGAE) about the compensation for the use of mobile devices
- Police sergeant from Chicago sued City for "blackberry overtime pay "



Canada:

- Public Service Alliance of Canada made use of mobile devices outside of official working time a bargaining issue

Worldwide discussion

2/2



United Kingdom:

- Blackberry Blackout during overtime pay dispute: Managers and specialists at British Telecommunications (BT) switched off all their mobile devices after their official working time



France:

- Court so far rejected overtime pay for Blackberry use

EU directives as guidelines

Multiple scopes

Public working time law

legal foundation

DIR 89/391/EWG 
DIR 2003/88/EG 

purpose & scope

- occupational health and safety
- addressed to employer

Private working time law

legal foundation

national law,
employment contracts,
collective agreements

purpose & scope

- length & lay of working time
- remuneration

EU Directive 2003/88/EG ("DIR") as guideline

Definitions

– Working time

- = any period during which the employee is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice
- start & ending: usually regulated by employment agreement (according to national law)

Art. 2 No. 1 DIR



– Maximum weekly working time

- max. **48 hours** per week (including overtime)

Art. 6 b) DIR



EU Directive 2003/88/EG ("DIR") as guideline

Definitions

2/3

– Breaks

- = interruption of work, supposed to serve regeneration
- Mandatory when working day is longer than six hours
- details, including duration, are regulated by national law


Art. 4 DIR



 **Germany:** After 6 hours → **30 min.**, after 9 hours → 45 min.

 **United Kingdom, France:** After 6 hours → **20 min.**

 **Spain:** After 6 hours → **15 min.**

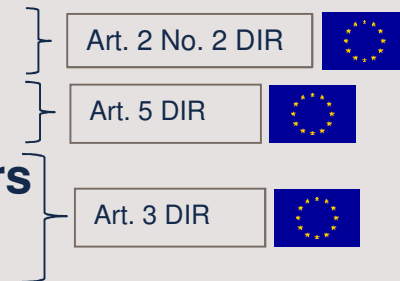
 **Italy:** After 6 hours → **10 min.**

EU Directive 2003/88/EG ("DIR") as guideline

Definitions

– Rest period

- = any period which is not working time
- at least **11 consecutive hours** of daily rest
- per each 7-day period at least **24 uninterrupted hours + 11 hours daily rest**



Problem: A "quick look" at an email will not influence the daily rest period.

But: If the interruption is serious (more than a "quick look") the daily rest period might start again

EU Directive 2003/88/EG ("DIR") as guideline

Mandatory law!

Employer is not allowed:

- to order **more than 48 hours** of work per week to his employees or to tolerate the voluntary expansion of the maximum weekly working hours
- to **interrupt the restperiod of 11 hours per day** or to tolerate the interruption
 - but: the interruption has to be serious (quick look at the email account is not enough ; issued within jurisprudence)
- to let the employees work on **sundays**
- to order or tolerate **night shifts with a length of more than 8 hours**

Consequences: Judicial or administrative proceedings (national law):
fines, cease & desist, withdrawal of permit, jail ...

Annual leave

Wide scope of EU- Directive

- at least **4 weeks/year** of paid leave
- no alternative outpayment

- **no limitation of time** in the subsequent year if employee could not take his leave during the basic year due to sickness

Art. 7 para. 1/2 DIR



European Court of Justice (Schulze-Hoff)
(Decision from 02.08.2006 – Az.: C-350/06)



Mobile devices and annual leave

Transposition into national law

Tight scope in Germany:



- irrevocable grant
- leave entitlement not fulfilled if leave will be interrupted
- consecutive leave at least 2 weeks
- leave < 1 day ≠ leave

Tight scope also in other Member States of the EU, e.g.:



France: Consecutive leave, at least 12 days



Netherlands: Consecutive leave, at least 14 days (or 1 week if agreed/arranged)



Austria: Consecutive leave, at least 6 days



Denmark: Consecutive leave, at least 15 days and one time 5 days

Art. 7 para1/2 DIR



European Court of Justice (Schulze-Hoff)
(Decision from 02.08.2006 – Az.: C-350/06)



Mobile devices and annual leave

3/3

- If use of mobile devices during leave is **voluntary** → no effect on leave
P voluntariness in employment?
- If use of mobile devices during leave is **ordered** → leave might be no leave; depending on the extent of use minimum leave might not be granted; the employee might still have full entitlement to vacation.

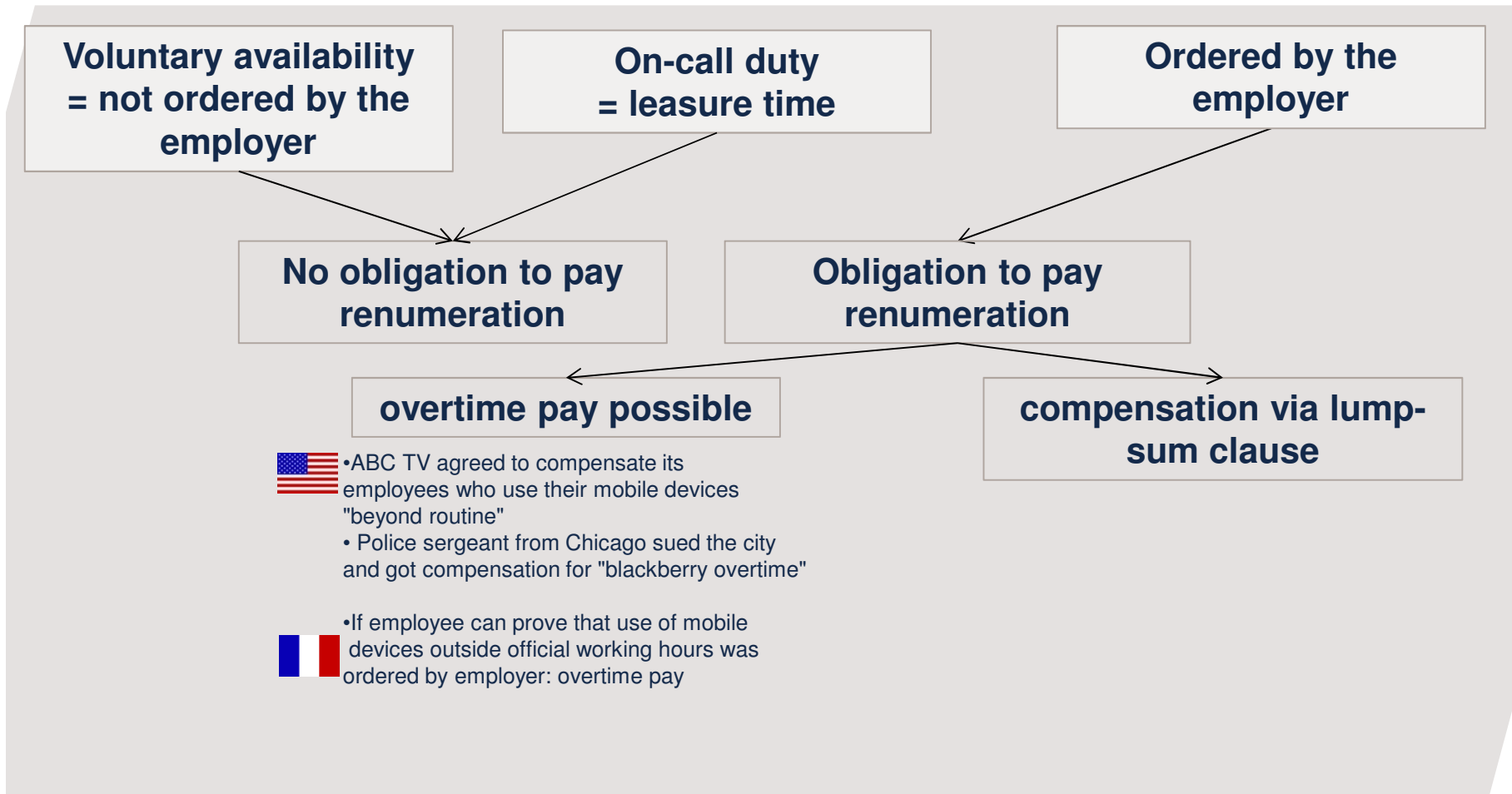
Art. 7 para1/2 DIR



European Court of Justice (Schulze-Hoff)
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Remuneration for availability during leisure time



Remuneration

Exemplary arrangements in other EU Member states:

Lump- sum clause (+)

Lump- sum clause (-)



Germany: ~4h/week lump- sum clause, salary between 50 and 60.000 €; total lump-sum clause for executive employees or as of 65.000 € p.a.

Italy: Increase of salary of 10 % mandatory



France: Increase of salary of 10 % mandatory if collective agreement provide for lump-sum no agreement, increases between 25 % and 50 % mandatory

Spain: Compensatory time off or collective agreement



United Kingdom: No overtime pay; only if provided for in employment agreement

Austria: Increase of salary of 50 % or time off mandatory



Practical tips

- Guidelines about availability and the use of „Mobile Devices“ outside of official working time
- Prevention of abuse: establish company guideline (responsible use of „Mobile Devices“)
- Lack of agreement: put use in the employee's own discretion
- Consider consequences for employee during leave

Precise wording in agreements enhance flexibility, decrease abuse and protect the employee from „always-on“ status.

C/M/S/ Hasche Sigle

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Thank you!

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