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## PRESS RELEASE

### **Off, off, off for good...! Or maybe not?**

Munich, 21 June 2021 – The Federal Labor Court (BAG) will decide tomorrow, Tuesday, whether the "DHV-Die Berufsgewerkschaft e.V." (DHV) is capable of collective bargaining (Case Number: 1 ABR 28/20).

The DHV is an employee association organized in the Christian Trade Union Federation of Germany (Christlicher Gewerkschaftsbund - CGB). After its foundation in 1893, it was re-established in 1950 as the Union of Merchants' Assistants. According to its Statutes in force in 1972, it saw itself as a trade union of employees\* in commerce, industry and the private and public service sectors, and since 2002 as a trade union of employees in sectors characterized by commercial and administrative professions. As a result of multiple, in part ineffective amendments to the Statutes, its most recent claimed jurisdiction extends to employees in various sectors, including private banks and building societies, retail stores, inland wholesale, rescue services, Arbeiterwohlfahrt (Workers' Welfare Association), Deutsches Rotes Kreuz (German Red Cross), the meat industry, tour operators, and IT service companies for tax consultants, auditors, and attorneys.

The applicants (IG Metall, ver.di, NGG, among others) claim that the DHV lacks the necessary power and capacity to be an employee association with collective bargaining capacity. According to the Statutes, the scope of organization (=responsibility) extends to approximately 11.4 million employment relationships. However, a maximum of 10,000 members can be assumed, resulting in a degree of organization of less than 0.1%. The DHV countered, among other things, that its organizational area covered only about 7.01 million employment relationships, but that it had far more than 10,000 members; at the end of December 2014, there were 75,065 members. Its organizational efficiency could be concluded from its long-standing participation in the collective bargaining process. In addition, it had to be taken into account that its collective bargaining capacity had already been unsuccessfully challenged in two labor court proceedings in 1956 and 1997. The present application is precluded by the res judicata effect of these previous decisions. Nothing else follows from amendments to the Statutes that have been made in the meantime.

The proceedings by which the applicants would like to have the collective bargaining incapacity of DHV established were already the subject of the decision of the BAG of 26 June 2018 (Case Number: 1 ABR 37/16). The court had overturned the decision of the Regional Labor Court (LAG) rejecting the application and referred the case back to the latter. The LAG had wrongly assumed a lowering of the requirements for the enforcement and performance of the DHV with regard to the Minimum Wage Act and the Collective Bargaining Unity Act. DHV could not base its social power on its long-standing participation in the bargaining process. In some cases, it had concluded collective bargaining agreements outside its organizational area and, moreover, in changing areas of responsibility. On the basis of the previous findings, the BAG had not been able to reach a final decision on the request for a declaratory judgment and had therefore referred the matter back for further clarification of the facts - in particular with regard to the number of members of the DHV and the related degrees of organization. Following a new hearing of the parties involved, the LAG then determined that DHV had not had collective bargaining capacity since 21 April 2015. The DHV is defending itself against this.

"As DHV has jeopardized the protection afforded by the legal force of previous decisions regarding its collective bargaining ability by amending its Statutes and thus extending its collective bargaining competence, it is more likely that DHV will ultimately lose the proceedings," said *Dr. Wolfgang Lipinski*, labor law specialist at the Munich office of BEITEN BURKHARDT Rechtsanwaltsgesellschaft. "Decisive for practice, however, will also be the cut-off date on which collective bargaining capacity no longer existed. But even if this date is fixed, a number of further questions arise. This concerns, among other things, relevant employment contracts with regard to the past, but also for the future: What applies now? It should be noted here that each case may be different. Regardless of the outcome of the proceedings, employers would be well advised to have the relevant contracts put through their paces by a specialist and to think carefully about their future collective bargaining strategy," says the lawyer.

"If the BAG were to deny the DHV trade union status, this would ultimately lead in practice to a certain 'closed shop' in favour of the established DGB trade unions in particular," *Dr. Lipinski* continued. "However, smaller employee associations can break up this 'closed shop' themselves - even on the basis of the exaggerated case law of the BAG on the collective bargaining capacity of an employee association - if they limit their self-selected area of responsibility by realistically assessing their own assertiveness and organizational capacity. Numerous trade unions such as Cockpit, the Marburger Bund or the GDL have proven in the past that this path is not impossible. Furthermore, increasing digitization and the need for companies to adapt their business models, partly as a result of the Corona pandemic, may create opportunities for smaller employee associations, at least in the medium term, because

even established unions like ver.di do not have the same number of members in every service sector."

*Dr. Wolfgang Lipinski* is a specialist in labour law and a partner at the Munich office of BEITEN BURKHARDT Rechtsanwalts-gesellschaft. He heads the employment law practice group there with approximately 60 lawyers. He is available for interviews, guest contributions etc. on this topic.

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\* We use the masculine form of address exclusively for ease of reading. Of course, we would like to address all genders equally.