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Collective Dismissals in Europe: Changes in France and the United Kingdom

European Union employers are required by an EU directive to consult with employees and their representatives, including works councils (an existing employee representative body), when proposing collective dismissals to downsize a workforce due to employee redundancies. EU member states have flexibility when implementing this directive, which has resulted in subtle (and not-so-subtle) variations to requirements in local jurisdictions based on a state's pre-existing local laws and economic and political circumstances. These differing requirements can have a significant impact on the timing and implementation of a purchaser's proposal for a target business, particularly when the acquisition hinges on the approval of a downsizing related to a redundancy.

Imminent changes to collective dismissal laws in France and the U.K. are relevant to companies looking to make acquisitions that will result in a downsizing. The new laws intend to secure collective consultation requirements and, if successful, these significant changes should have a positive impact on future transactions and business plans in those countries.

France: The LSE Bill — A Revolution in the Works Council Consultation Process

A major change in the collective dismissal procedure is happening in France with the *Loi de Sécurisation de l'emploi* (the LSE Bill), which was published on June 14, 2013. The LSE Bill will provide employers with a more secure works council consultation process for a redundancy, as well as virtually any proposed change to a company's structure. In exchange, employees' representatives will be provided with in-depth economic information and forecasts to anticipate any potential restructuring that will impact the French workforce.

Threshold. The works council consultation is included in a complex set of rules that would concern any company with more than 50 employees in France.

This threshold triggers the obligation to set up an elected employees' representative body whose members may or may not be representatives of a trade union. In this situation, the employer is bound to organize the works council's election, and this representative body will be established on a permanent basis. The situation is very different in the U.K., where the employer's obligation is to consult with a representative body in specific cases, including collective dismissals, but not to set up a permanent representation unless this is agreed upon or the majority of the workforce request it, following a prescribed process.

Added Security and Defined Schedule. For the first time in the history of the French Labor Code, the LSE Bill provides that works council consultations will have to be completed within a mandatory timeline.

Previously, the redundancy process had not been subject to specific deadlines. For large international businesses wishing to restructure or, for example, close a manufacturing plant, this made it very difficult to forecast how long it would take to complete a collective dismissal procedure involving more than nine employees. This is mainly because

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the employer must first consult with and obtain an opinion from the works council before any definitive decision is taken. Failure to follow this process is a criminal offense under French law. Although works councils do not have the power to veto the restructuring, they often use delaying tactics. Many companies experience delays in the implementation of a restructuring project, lasting up to several years, when the works council or unions are able to obtain a court order to suspend the consultation process for various reasons, including allegations that they have not received sufficient information to issue an opinion.

In this context, it was vital for employers that the works council consultation process was clarified. The consultation deadline can be included in a collective bargaining agreement entered into with union representatives. In the absence of such an agreement, the LSE Bill provides that the consultation should be completed in two to four months, depending on the number of employees concerned (two months when fewer than 100 dismissals are planned, three months for 200 to 250 dismissals, and four months when more than 250 employees are to be dismissed). At the end of the consultation period, the works council will be deemed to have been consulted, even if they have refused to issue the legally required "opinion" before the employer can start to implement any restructuring project and serve notice on the affected employees. The works council also has the right to get help from an "expert" (*e.g.*, a chartered accountant), whose costs are fully paid by the employer, to better understand the economic and financial situation of the French company and the industry to which it belongs. Under the LSE Bill, such expertise should be sought in a timely manner to comply with the new deadlines.

Government Approval. The downside of this more secure legal process is that the company will have to seek the French labor administration's agreement to its redundancy plan. Such a plan has to be discussed with the union's representatives and/or the works council in the course of the consultation process and includes everything that the employer will offer to terminated employees to help them find a new job (including mobility aid, training and additional severance packages). The labor administration's agreement should be made within eight days if the unions have agreed to the redundancy plan, or otherwise within 21 days. Without the labor administration's agreement, the company can elect to resume the consultation process or to bring the matter before the administrative court, which has to make a judgment within three months. If that judgment is appealed, the court of appeal and the supreme court each have three-month deadlines to issue a ruling. Finally, any dismissal on economic grounds would be judged null and void if the new consultation procedure had not been complied with.

Bottom Line. Compared to the U.K. timeline below, the French consultation process is more time consuming. However, the LSE Bill provides employers with a much higher level of comfort and should help businesses to better plan any restructuring in France and assess the related costs.

The UK: Further Simplification Should Translate Into Effective Downsizing Plans

The U.K. coalition government is on a concerted drive to reduce red tape by removing unnecessary legislation and ending previous administrations' practices of exceeding the terms of EU directives. Employment law is in the spotlight this summer, and various changes are proposed that relate to collective dismissals.

Collective Dismissals – U.K. Characteristics and Changes. In the U.K., the concept of consultation with employee representatives derives from EU law and, although there is a strong union presence in some sectors, compulsory collective consultation is not as developed as in other EU jurisdictions, such as France.

Employers are, however, required to consult with "appropriate representatives" if proposing to dismiss 20 or more employees within 90 days. Appropriate representatives include any recognized trades union or, absent one, either an existing employee representative body with a mandate to consult about the dismissals or employees elected specifically for this purpose. Although employers have relatively broad discretion, there are minimum requirements for the election of representatives (*e.g.*, all affected employees should be represented and have an opportunity to vote, and the ballot should be held in secret). If the employer is to comply in full, elections can take two to three weeks.

There is a minimum period of consultation from the appointment of the employee representatives before the first dismissal can take effect: 30 days if fewer than 100 employees are to be dismissed, and 45 days if 100 or more are at risk (the latter period was reduced from 90 days in April 2013). Unlike France, these periods are certain and cannot be extended by the need to seek approval from a government authority.

Consultation entails providing the employee representatives with certain information, including the reasons for the dismissals and whether they can be avoided, how the employer proposes to mitigate the dismissals, severance terms and, if applicable, how employees will be selected. The process is made "with a view to reaching agreement," which in practice means considering the points made by the employee representatives and responding to them, but not actually having to agree — and the employee representatives cannot delay or veto the transaction. The employer is, however, at risk of a protective ward of up to 90 days' pay per employee if the consultation requirements are not met. This award is punitive, not compensatory.

New Government Guidelines. When the minimum period for consultation was reduced, the government-sponsored Advisory Conciliation and Arbitration Service (ACAS) published a guide to collective dismissals. This guide does not have the force of law, but employment tribunals (the U.K. forum for employment disputes) will take an employer's compliance with the ACAS guidance into account when determining, for example, the fairness of any redundancy dismissal and whether collective consultation has been properly implemented. The guidance has clarified a number of points that were previously unclear in light of developing case law, including:

Confirmation that notice can be given before the end of the 30- or 45-day minimum period, provided the dismissals do not become effective before the minimum consultation period expires. Previously the prevailing view was that notice could not be served until the end of that period. Employers still need to ensure that the consultation is in fact complete before notice is given. For example, the employee representatives could sign a record of the final consultation meeting to confirm their agreement.

The collective consultation requirements are paired with a separate obligation to the employees at risk to ensure that the manner of their dismissal is fair. This includes following a fair consultation and selection process with them on an individual basis. The ACAS guidance clarifies the steps that employers should take to achieve this.

The TUPE Factor. The transfer of a business (such as on an asset sale) is covered by the Acquired Rights Directive, as implemented in the U.K. by the Transfer of Undertakings (Protection of Employment) Regulations (TUPE). As the law stands, consultation about collective dismissals and in relation to a proposed TUPE transfer should be conducted as separate exercises.

However, the measures envisaged in connection with the proposed business transfer likely would be inextricably linked to the redundancy process. The TUPE consultation obligation rests with the transferor (or seller) of the business, but it is the transferee (buyer) who will be required to effect any dismissals if the parties are to benefit from an "economic, technical or organizational reason entailing

a change in the workforce" (ETO), which is the defense available to dismissing employers to avoid a dismissal connected to a TUPE transfer being deemed unfair. According to TUPE, the seller cannot benefit from the buyer's ETO. The ETO's availability would mean that the buyer has to continue to employ the affected employees for the duration of the 30- or 45-day collective consultation period after closing before dismissals can be confirmed for either party to benefit from the defense.

However, the TUPE amendments, which will go into effect in October 2013, will change this situation:

- The seller will be able to benefit from the buyer's ETO reason; and
- The buyer will be able to have the benefit of any pretransfer consultation if it dismisses the employees after closing.

Bottom Line. The ACAS guidance and TUPE amendments will make it much easier for parties to plan and manage a downsizing in the context of an asset purchase in the U.K.

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The changes to the legislation in both France and the U.K. are intended to simplify and clarify collective consultation requirements. While this has not resulted in a cohesive approach across the English Channel, these developments can only benefit future transactions and business planning.