

Managing European Employees in International Deals, Redundancies, and Business Restructuring: The Evolving Legal Landscape

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Welcome!



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The Framework—Today's Webcast

1. Background: Restructuring and Deals in the U.S.
2. The Evolving Landscape in Europe—General
3. Restructuring and Collective Dismissals
4. Acquisitions, Sales and Other Deals
5. Top 10 Problems—Managing European Workforce Change
6. Concluding Remarks and Recommendations

Business Drivers—The Big Picture (Or “What Everyone Has in Common”)

Restructuring, Reorganizations and Reductions

- *Avoid unnecessary delays, costs and liabilities*

Employment Issues for Deal-Makers

- *Don't buy problems you don't want*
- *Avoid unwanted costs for seller*
- *Increase deal value for buyer and seller*
- *Avoid deal risk for buyer and seller*
- *Prevent general employment liabilities*

1. Background

Restructuring and Deals in the U.S.

Notice

- *Federal Worker Adjustment and Retraining Notification Act (WARN)*
 - *60 days’ written notice before “plant closing” or “mass layoff”*
- *Some more onerous state notice statutes (e.g., Wis., Ill., Cal.)*

Consultation (Bargaining)

- *Almost completely limited to unionized employees (only 7.8% of U.S. private-sector employees in 2005)*
- *“Decision bargaining” vs. “effects bargaining” distinction*
- *Union consent not required*
- *Can be an unforgiving and challenging process (the “litigation delay/remedy” dynamic)*

1. Background

Restructuring and Deals in the U.S.

Legislated Employment-Related Requirements

- *Relatively few legislative requirements (apart from federal union-related statutes and WARN):*
 - *ERISA requirements applicable to employee benefit plans (especially retirement plans)*
 - *Other conventional federal and state employment statutes (discrimination, wage-hour/overtime, safety/health, etc.)*
- *But deals/restructuring have a relatively high litigation risk*
 - *Discrimination claims*
 - *Benefits litigation*
 - *Selected other high-risk compliance issues (e.g., overtime)*
 - *Particular risk of class action/collective action litigation*

1. Background

Restructuring and Deals in the U.S.

Acquisitions, Sales and Other Deals

- Stock transactions—buyer generally inherits all employment/benefits obligations (watch deal structure)
- Asset transactions—buyer employment/benefits obligations depend on complex “successorship” rules and deal structure
- High U.S. litigation risks make due diligence, representations, warranties and indemnification provisions very important
- Severance pay for displaced employees—generally governed by what seller/buyer agree (Watch: benefit plans/ERISA)
- Employment status of employees still generally governed by “employment at will” doctrine

2. The Evolving Landscape in Europe—General

Multiple and Overlapping Legal Obligations

- *Individual country requirements, and limited EU-wide harmonization*

Information, Consultation and Notice Requirements

- *Especially important with “collective dismissals”*
- *Prior involvement of European or local works council—can affect process and, in some cases, severance packages*
- *Notice can be required: employees and government officials*
- *EU data protection requirements*

Lower litigation risk than in the U.S., but catching up

3. Restructuring and Dismissals—Germany

Complex information and consultation procedure before any management decision is taken

- *Economic committee*
- *Works council*

Negotiations with works councils on:

- *Implementation agreement—details and timing of restructuring*
- *Social plan—to compensate or alleviate the impact of the restructuring on the employees*

3. Restructuring and Dismissals—Germany

Conciliation

- *Required if negotiations fail to result in an implementation agreement*
- *Conciliatory body must be involved and heard prior to any step towards implementation*
- *Equal number of employer and works council representatives plus neutral chair (usually labor court judge)*
- *Mixed role: mediation, decision-making power only for social plan*

3. Restructuring and Dismissals—Germany

Premature Implementation—Damages

- *Implementation before reaching implementation agreement or final conciliation body hearing:*
 - *Damages to affected employees of up to one year's remuneration*
 - *Court order suspending the implementation (not in all states)*
 - *Fine of up to €10,000*

3. Restructuring and Dismissals—Germany

Selection of Employees to Be Dismissed

- *Compulsory criteria: length of service, age, number of dependents, disability (if any)*
- *New antidiscrimination legislation does not apply (contrary to EU directive)*
- *List of employees selected for dismissal can be made part of implementation agreement (higher hurdles for judicial review)*

3. Restructuring and Dismissals—Germany

Collective Dismissal Notification of Federal Employment Agency

- *Federal agency notification now required prior to giving notices to terminate (recent ECJ judgment)*
- *Send draft notification to works council*
- *File notification with agency, with works council's comments or after expiration of two weeks*
- *Notice to terminate must not be given prior to expiration of one month from notification (can be extended to two months)*

3. Restructuring and Dismissals—Germany

Employer must inform and consult with works council about each individual notice to be given

- *Undisclosed information may not be used to justify termination in any ensuing labor court proceedings*

Notices to Terminate Served

Additional Agency Filing

- *Recommended if notice period does not expire within 90 days from expiration of one to two months after notification of federal employment agency*

3. Restructuring and Dismissals—Germany

Termination Costs

- *Pay and benefits until end of notice period*
- *No statutory severance pay but usually social plan severance*
- *If employees challenge termination in the labor court, the court will order reinstatement if termination does not meet the requirements under the Protection Against Dismissal Act—in most cases employees settle against (additional) severance*

3. Restructuring and Dismissals—France

Information and Consultation

- *Complex requirements (“Book IV” and “Book III”)*
- *Impact on timing*

Additional Obligations to:

- *Draw up a social plan*
- *Try to reclassify employees*
- *Apply selection criteria to workforce to be reduced*

3. Restructuring and Dismissals—France

“Book IV” Procedure—General Operation

- *Works council must be informed and consulted*
- *Notice/consultation*
 - *Required before any management decisions regarding the organization and general operation of the business are taken*
- *Process is compulsory (but management is not bound by the opinion rendered by the works council)*
- *Three steps:*
 - *Information of the works council*
 - *Consultation with the works council*
 - *Management decision*

3. Restructuring and Dismissals—France

“Book IV” Procedure (cont.)

- *Failure to comply may lead to:*
 - *Criminal sanction against management (fine of €3,750 and/or one year of imprisonment)*
 - *Civil court may order suspension of management decision until works council has been adequately informed and consulted*

3. Restructuring and Dismissals—France

“Book III” Procedure—Dismissals

- *Giving reasons for the dismissal*
- *Discussion of selection criteria for employees to be dismissed*
- *Exploring alternative employment solutions*
- *Measures to avoid termination or limit the consequences thereof—including social plan if more than 10 employees are to be laid off in a company having more than 50 employees*
- *Other obligations, e.g., setting out a plan of “prospective HR management”*

3. Restructuring and Dismissals—France

Labor Authorities Control Process/Social Plan Content

No Adequate Social Plan—Risks Include:

- *Timing affected*
- *Terminations declared null and void in court*
- *Reinstatement or damages*

3. Restructuring and Dismissals—France

Termination Costs

- *Pay and benefits until end of notice period*
- *Statutory right to severance pay—depending on seniority/age provisions in the applicable collective bargaining agreement*

3. Restructuring and Dismissals—France

Termination Costs (cont.)

- *Court-awarded damages:*
 - *Minimum of six months' salary to employees with more than two years of service (if there is a failure to apply selection criteria or explore fair reclassification possibility, or the absence of "fair economic reason")*
 - *Repayment of unemployment benefits to public unemployment agency (cap of six months' benefits)*

3. Restructuring and Dismissals—UK

Redundancies

- *Broad meaning, especially for collective consultation purposes*
- *“Consultation” not generally codetermination*
- *Different/overlapping regimes applicable to individual and collective redundancies*

3. Restructuring and Dismissals—UK

General Fairness

- *Definition of redundancy satisfied*
- *Fair selection pool*
- *Objective selection criteria, fairly applied*
- *Information and consultation with individuals*
- *Search for alternative employment*
- *Compliance with relevant procedures (including statutory)*
- *Appeal*

3. Restructuring and Dismissals—UK

Consultation: Collective Redundancies

Statute	Timing	Nature of Obligation	Information to Be Given	With Whom	Penalty
TULR(C)A S 188.	<p>“In good time”:</p> <p>“Proposing” 100 or more “redundancies” within 90 days or less: at least 90 days before the first dismissal takes effect.</p> <p>Twenty or more within 90 days or less: at least 30 days before the first dismissal takes effect.</p>	<p>Consultation shall include ways of:</p> <ul style="list-style-type: none"> •avoiding dismissals •reducing the number of employees to be dismissed •mitigating the consequences of dismissals <p>Consultation with a view to reaching agreement.</p>	<ul style="list-style-type: none"> •Reasons for proposals •Number and description of employees proposed to be dismissed •Total number of employees of that description employed •Proposed method of selecting and carrying out dismissals •Proposed method of calculating payments <p>Ways of avoiding dismissals, reducing numbers, mitigating consequences.</p> <p>Notification to public authority is required before commencement of consultation.</p>	All who are appropriate reps of any affected employees: recognised trade union; authorized employee reps; employee reps elected for purpose.	<p>Protective award not exceeding 90 days’ actual per affected employee.</p> <p>Penal, not compensatory.</p> <p>Cumulative with TUPE protective award.</p> <p>Criminal penalty.</p>
TULR(C)A S192.					

3. Restructuring and Dismissals—UK

Additional Trade Union Obligations

Statute	Timing	Nature of Obligation	Information to Be Given	With Whom	Penalty
Collective agreement: voluntary or under Employment Relations Act 1999/Trade Union and Labour Relations Consolidation Act 1992.	Varies.	Varies—may include negotiation.	<p>General duty to disclose info to recognised trade union on request: All info relating to the employer's undertaking in possession without which TU is impeded and good IR practice to disclose.</p> <p>Collective bargain can cover:</p> <ul style="list-style-type: none"> •Ts and Cs of employment •Engagement/suspension/termination of employment •Allocation of work or duties •Matter of discipline •Trade Union Membership •Facilities •Machinery for negotiation or consultation 	Trade union representatives.	<p>Duty to disclose info—complaint to Conciliation and Arbitration Committee.</p> <p>Unlikely to be enforceable if voluntary; legally enforceable if under statutory regime.</p>

4. Acquisitions & Deals—The European Model

Stock/Share Transactions

- *All employees remain with the same employing legal entity*
- *Predecessor's employment obligations usually stay intact*
- *No further employment implications*
- *Exceptions in individual countries—examples:*
 - Germany: Management must inform economic committee of the transaction and consult with it, usually preclosing
 - France: Consultation with works council prior to transfer

4. Acquisitions & Deals—The European Model

Asset Transactions

- *Often constitute “transfer of undertaking” under the EU Acquired Rights Directive*

EU Acquired Rights Directive

- *Consequences of a “transfer of undertaking”:*
 - *Employment relationships of predecessor employees transfer to the purchaser of assets*
 - *Terms and conditions of employment are unchanged*
 - *The assets transfer by itself does not constitute grounds for dismissal, but employment terminations may occur for other reasons*

4. Acquisitions & Deals—The European Model

What Constitutes a “Transfer of Undertaking”?

- *The ECJ considers all the facts characterizing the individual transaction, in particular:*
 - *Type of undertaking*
 - *Transfer of tangible/intangible assets*
 - *Majority of employees taken over by purchaser*
 - *Transfer of customers*
 - *Similarity between activities before and after transfer*
 - *Period, if any, for which activities were suspended*

4. Acquisitions & Deals—The European Model

What Constitutes a “Transfer of Undertaking”? (cont.)

- *There are certain industry-specific principles:*
 - *In manufacturing, the type and extent of acquired machinery and equipment most relevant*
 - *In the services industry, employing a majority of the predecessor’s personnel may suffice (actual assets transfer not always necessary)*
- *All assets are relevant which are used by the undertaking transferred (ownership not relevant)*
- *Details vary from country to country*

4. Acquisitions & Deals—Germany

Stock/Share Transactions—General Rule Applies

Assets Transactions: “Transfer of Undertaking”
Principles

- *Transferring employees have to be informed in detail about the transfer of their employment relationship prior to the transfer (closing)*
- *Transferring employees may object to transfer (remain with seller)*
- *Works council involvement required prior to signing if only parts of an operation are to be transferred*

4. Acquisitions & Deals—France

Stock/Share Transactions—General Rule Applies

Assets Transactions:

- *“Transfer of undertaking” principles*
- *Collective status*
 - *Collective bargaining agreements and companywide agreements must be renegotiated with unions within 15 months following completion of the transaction (transaction closing)*
- *Purpose: Adopt the new collective status applying to the enlarged workforce*

4. Acquisitions & Deals—UK

Redundancies During the Transfer of an Undertaking

- *Automatically unfair if connected with transfer*
- *Liability transfers if made pre transfer*
- *Defense:*
 - *“ETO” justified, and*
 - *General fairness criteria satisfied*
- *Harmonization of terms may be “ETO” justified*

4. Acquisitions & Deals—UK

Stock/Share Transactions—General Rule Applies

Asset Acquisitions and Service Provision Changes
Subject to TUPE:

- *Pay (including sick pay, etc.)*
- *Benefit plans*
- *Holiday*
- *Company car*
- *Bonus/commission*
- *Profit share schemes*
- *Incentive schemes*
- *Redundancy pay*
- *Maternity*
- *Collective rights*

4. Acquisitions & Deals—UK

Exceptions to Automatic Transfer Under TUPE:

- *Old-age benefits*
- *Invalidity and survivor benefits*
- *Watch: Contractual pension promises DO transfer*

2005 Pension Protection Regulations

- *Articulate minimum standards*

4. Acquisitions & Deals—UK Info/Consultation & TUPE

Statute	Timing	Nature of Obligation	Information to Be Given	With Whom	Penalty
TUPE 2006 Reg. 13 and 14.	<p>Long enough before a relevant transfer to enable employer to consult all appropriate reps of affected employees.</p> <p>Not less than 14 days before transfer.</p>	<p>Information/consultation with a view to reaching agreement with regard to “measures.”</p> <p>Employee Liability Information (Transferor to Transferee)</p>	<ul style="list-style-type: none"> •Facts of the relevant transfer •approximately when •reasons for it •legal economic and social implications of the transfer for affected employees <p>Measures envisaged in connection with transfer (or, if none, that fact).</p> <p>All rights and obligations in relation to employees who will be transferred.</p>	All who are appropriate reps of any affected employees; authorized employee representatives; all elected for the purpose.	<p>Protective award not exceeding 13 weeks’ actual pay per employee.</p> <p>Joint and several liability for transferor’s protective awards.</p> <p>Cumulative with TULR(C)A protective award.</p> <p>Not less than £500 per employee in respect of whom transferor failed to comply.</p>

4. Acquisitions & Deals and Restructuring and Dismissals—UK ICE Obligations

Statute	Timing	Nature of Obligation	Information to Be Given	With Whom	Penalty
Information and Consultation Regulations Reg. 20 (“standard I and C provisions”).	At such time, in such fashion and with such content for standard I and C reps to conduct study and prepare for consultation.	<p>Inform.</p> <p>Inform and consult.</p> <p>Inform and consult with a view to reaching agreement.</p>	<p>Recent and probable developments of undertaking’s activities and economic situation.</p> <p>Situation’s structure and probable development of employment within undertaking and on any anticipatory measures envisaged, in particular where there is a threat to employment.</p> <p>Decisions likely to lead to substantial changes in work organisation or in contractual relations, including in re TUPE matters and collective redundancies.</p>	Information and consultation reps.	Order of compliance and possible fine, not exceeding £75,000 per breach.

4. Acquisitions & Deals and Restructuring and Dismissals—UK European Works Council (EWC) Obligations

Statute	Timing	Nature of Obligation	Information to Be Given	With Whom	Penalty
Transnational Information and Consultation Regulations (Works Councils) Reg. 18 and Schedule 6 (“Subsidiary requirements”).	Annually.	Inform and consult on the basis of a report drawn up by central management.	Progress of business, particularly the structure, economic and financial situation, the probable development of the business and of production and sales, the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cutbacks, or closures of undertakings, establishments or important parts thereof, and collective redundancies.	European Works Council reps.	Order of compliance and possible fine, not exceeding £75,000 per breach.
	Exceptional EWC meeting (to take place as soon as possible).	Right to be informed and consulted.	Exceptional circumstance affecting employees’ interests, particularly in the case of relocations, the closure of establishments or undertakings, or collective redundancies.	European Works Council reps.	Order of compliance and possible fine, not exceeding £75,000 per breach.

5. Top 10 Problems: Managing European Workforce Change

1. “We focus on substance, not process”
 - *Process is everything (more important than in U.S.)*
2. “We’re buying assets” so “employee issues” don’t count
 - *Watch: EU Acquired Rights Directive (“transfer of undertaking”)*
 - *Watch: U.S. “successorship” principles*
3. European Union: “One size fits all”
 - *EU “harmonization” is far from complete*
 - *Many country-by-country differences*
4. Inadequate time for due diligence, information, consultation, and/or notice
 - *Watch: The “different time zone” (twice as long) problem*

5. Top 10 Problems: Managing European Workforce Change

5. “European unions are just like U.S. unions”
 - *Different rules, laws, functions, and purposes*
6. “You can’t get sued in Europe”
 - *Multiplicity of directives, laws, works councils, unions, courts, and more (“the European lawyer’s dream” or “Litigation was not invented in America”)*
7. Publicity, public pressure, protests and more . . .
 - *The “stock-price hit” problem*
 - *The “CEO or Board of Directors got blindsided” problem*
 - *The “We can go to jail” problem*

5. Top 10 Problems: Managing European Workforce Change

8. Unhappy Surprises

- *Severance/other requirements imposed by national law*
- *Forgetting to “read your own benefit plans”*
- *“I thought ‘data protection’ meant backing up my computer”*

9. Forgetting About U.S. Restructuring/Deal Issues

- *WARN/state law notice requirements*
- *Waiver/release requirements (especially required 45-day/7-day periods and other Older Workers Benefit Protection Act requirements)*
- *Benefit plan/ERISA issues*
- *Decision/Effects-bargaining and labor contract requirements*
- *Potential acquisition/sale “successorship” requirements*

5. Top 10 Problems: Managing European Workforce Change

10. Conventional Restructuring/Deal Mistakes

- *Deal inertia, vendor mayhem, no strategy or objectives*
- *Deal people and operations people don't talk (the "how do you run this business" problem and "due diligence wasted" problem)*
- *Communication is bad, implementation too slow*
- *False, misleading or inflated promises*
- *"Smoking gun" restructuring/reduction problems*
- *Soft-side breakdown, culture clash*

6. Concluding Remarks and Recommendations

Timing – Most Critical

- *Information, notice and consultation—all require time*
- *Especially challenging: coordinating notice/consultation across countries and time zones*
- *Delays are common (and used for leverage)*

Transaction Due Diligence

- *Especially important: field preparation—works councils, labor authorities, local government*

“The World is Flat” (Thomas Friedman)—not yet . . .

- *There remain important country-by-country distinctions*
- *Critical: planning, coordination, experienced assistance*

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