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STAFF RESTRUCTURING: HOW INTERNATIONAL COMPANIES ARE DEALING WITH REDUNDANCIES IN THE EU

The scope and scale of the current economic difficulties for major international businesses are unprecedented. In the past, where international companies have had to review overseas operations, it has generally involved underperforming business units in a particular country or group of countries. Occasionally, major corporations have had to restructure across the board, but such exercises have been uncommon. Until now. As all developed economies face similar economic turbulence caused by declining demand and difficult credit markets, corporations have had to look at restructuring their businesses, including their workforce, and reducing their cost base on a scale unknown to those in the business community today. This *Commentary* looks briefly at what, in our experience, companies undertaking these difficult exercises in Europe are doing well, and some of the pitfalls they may encounter.

COMMUNICATIONS AND CONSULTATION

These are the areas most fraught with difficulty, particularly for employers whose key decision-makers operate outside the European Union.

Communication can be a double-edged sword. When handled well, internal PR and communications can smooth out difficult issues and help bring about the best possible outcome. In general, sophisticated international businesses handle such communications very well. However, when communication breaks down or is mishandled, the consequences for the employer can be dire and can, in some jurisdictions, give employees cast-iron legal claims, and, in others, derail the process so that dismissals are delayed.

Generally, management and HR are sensitive to the situation of workers at risk of redundancy, but it is important that there is consistency and that the employer's representatives in the process stay

"on-message." In all major European jurisdictions, there will be an obligation to consult unions or other formal employee representatives about substantial employee restructuring. In many countries, this will amount to an obligation to negotiate and reach agreement with such representatives (often called "co-determination rights"). Difficulties can arise where a representative of the employer (or another group company, in a different location) makes a statement or announcement that suggests that decisions have already been taken prior to the conclusion of formal consultation. Sometimes a desire to make a statement to the market and investors will be at conflict with the demands of employment law. In the UK, for example, there are instances where unions have successfully challenged before the courts the integrity of consultation exercises where it has become clear that an irreversible decision (*e.g.*, to close a site) has been taken before consultation has taken place. Where an employer is in default in the UK, the penalty on the employer is up to 13 weeks' pay for each employee in the affected business—effectively one quarter of the annual payroll bill.

In France, the consequences extend beyond civil law—executives can be guilty of a criminal offense for failing to comply with requirements to involve works councils before final decisions are taken. French and German law also require an employer to meet the costs of experts to assist works councils in deciding their response to an employer's proposal. The experts could, for example, analyze an employer's accounts to form a view as to whether the employer's economic rationale for proposed redundancies stacks up.

Most international corporations are now aware of the demands placed on them by the diverse consultation obligations across Europe. The timing, content, and nature of such obligations vary significantly. Examples of the diversity of local consultation laws include:

In France, collective consultation obligations are triggered when two or more people are to be made redundant, whereas in the UK, the threshold is 20.

The time required for proper consultation can vary significantly. In some jurisdictions, a redundancy consultation process can take several months and can require careful negotiation with worker representatives to reach agreement on a way forward. Indeed, in Germany, there is no maximum period set down for consultation since an agreement (or reconciliation of interests) must be reached before the dismissals can proceed. By contrast, in other jurisdictions, the process can often be wrapped up in one month, regardless of whether the union/employee representatives are satisfied with the outcome.

In some countries, the union or works council will have full co-determination rights in determining the redundancy process and on negotiating a "social plan" to alleviate the effects on employees. Without agreement, in jurisdictions such as France and Belgium, dismissals cannot be effective. The law effectively renders dismissals void and makes the employer start the process all over again. In Germany, the courts have on occasion granted injunctions preventing the employer effecting dismissals until the negotiation process has been completed. In Spain, although the law does not render the dismissals void, the labour authorities have to validate a collective dismissal process and will not do so as a matter of practice unless an agreement has been reached between the employer and worker representatives. Elsewhere (*e.g.*, the UK and Ireland), the obligation is merely to discuss the implications in good faith with a view to seeking agreement on areas of conflict.

Corporations are generally alert to their obligations on timing when it comes to consultation. The reality of this is that the key date will be that on which consultation has to start in the jurisdiction requiring the longest consultation/negotiation. In practice, this can mean that, in jurisdictions where agreement with employee representatives is not a statutory requirement, employees are often consulted earlier than strictly necessary as employers recognize that they cannot start consultation in one country without starting the rumor-mill throughout the organization.

SELECTION AND SCORING

In those European countries where the means of selecting those to be made redundant are not set out in law nor are matters that legally have to be agreed upon with worker representatives, it is common for employers to take too narrow an approach to selection. For example, it is not necessarily correct simply to compare employees doing exactly the same job—often it would be necessary to include in the

pool all employees whose roles are broadly comparable and where there are common skills required. A failure to define the pool properly can itself make a redundancy dismissal unfair at law.

In relation to "scoring" those in a selection pool against criteria (again, where these are not set out in law), some employers apply criteria that are too subjective. A redundancy dismissal can be unfair simply because the process allowed too much subjectivity—*e.g.*, an assessment of "performance" by a manager at the time of the redundancy exercise rather than relying on past appraisals could make a dismissal unfair.

Where a redundancy dismissal is successfully challenged, compensation can be significant and remedies can include reinstatement.

REDEPLOYMENT

Many employers have excellent systems for notifying potentially redundant employees of vacancies elsewhere in the business or group. However, some fail in their legal duty by leaving it to the employee to deal with, for example, by looking at intranet message boards. It is the employer's obligation to consider whether there are roles available and then whether the employee may be suitable. Being proactive in this regard can diminish the risk of a challenge to the fairness of a dismissal.

ALTERNATIVES TO REDUNDANCY

Certain countries encourage alternatives to redundancy. In Belgium and Italy, for example, subject to certain conditions being satisfied, it may be possible to "suspend" the employment relationship. The employee remains technically employed but receives benefits from the State. As and when economic conditions improve, he or she recommences active duties with length of service intact.

In France, larger entities may need to undertake steps such as finding a buyer or a strategic partner before being able to declare redundancies. Regional authorities may also require the payment of compensation by the employer to the authorities to alleviate the cost to the authorities of benefits and retraining, for example.

In the current climate, many employers are also looking at shorter working hours, sabbaticals, and pay freezes or cuts as alternatives to redundancy. Any measures to alleviate the number of compulsory dismissals are generally actively encouraged and supported by local labor laws and practice, but issues such as basic contractual rights need to be taken into account—such matters cannot simply be imposed, even with broad consensus.

LAWYER CONTACTS

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