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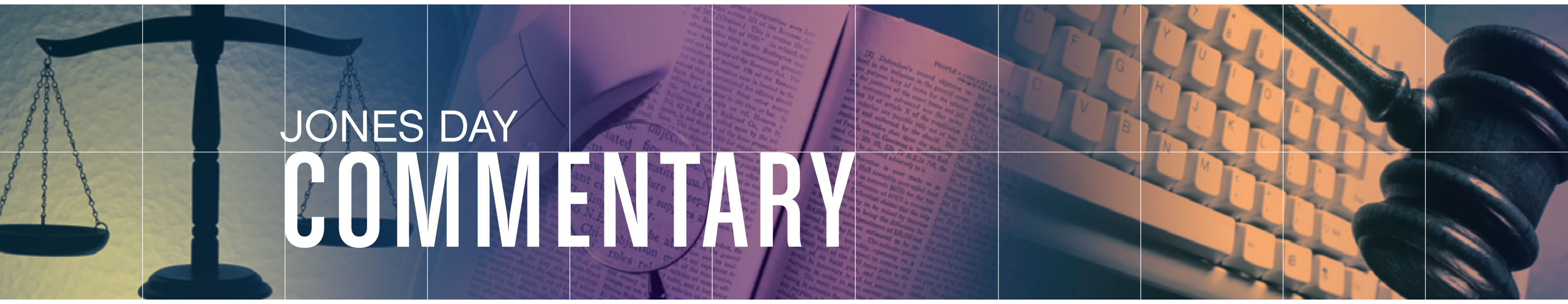

PENSION ISSUES ON ASSET TRANSFERS: A EUROPEAN PERSPECTIVE

Although the regulation of asset transfers in Europe is underpinned by European legislation, the treatment of pension issues varies significantly between jurisdictions. What follows is a summary of what transfers, and the major issues that may arise, on an asset sale in the UK, Germany, Spain, Italy, Belgium and France

GENERAL

European asset transfers are governed by the provisions of the Acquired Rights Directives (Directives 77/187/EEC, 98/50 EC and 2001/23/EC) (the "ARD"). In accordance with the ARD, the employees of the business being sold (the "Transferring Employees") will transfer automatically to the buyer.

As a result of this transfer of employment, the ARD places a number of obligations on both the seller and the buyer. These include an obligation on the seller to consult with employees about the transfer and any proposed changes to their terms and conditions of employment. It also affords employees with greater protections against dismissal. When contemplating an asset sale in the jurisdictions discussed below, particular consideration should be given to any specific requirements to consult with employee representatives, works councils, or trade unions (as appropriate). Such consultations can be time consuming and costly for both the seller and the buyer.

The general rule under the ARD is that the Transferring Employees' terms and conditions of employment must be replicated by the buyer. The ARD, however, enables member states of the European Union to exclude pension benefits provided under occupational pension schemes on "old age, disability or death" (the "ARD Exemption") from its application. Consequently, pension benefits do not always transfer with the Transferring Employees.

THE UK

As a general rule, the rights of employees under occupational pension plans (“OPPs”) (i.e. plans established under trust) do not transfer to the buyer. This is because the UK enacted the ARD Exemption into domestic law, and as these plans offer benefits which are provided on “old age, disability or death,” they fall within that exemption. The buyer must offer a matched contribution of up to 6 percent gross basic salary to a stakeholder pension plan (a designated personal pension arrangement, meeting certain ‘stakeholder’ requirements) or a defined contribution or defined benefit OPP to any Transferring Employees who, before the transfer, were members or were in a waiting period for membership. It is unusual for a buyer to offer the employee access to a defined benefit plan, due to the high liabilities associated with such plans.

A number of European Court of Justice decisions have established an exception to this general rule, holding that early retirement and/or redundancy benefits under a defined benefit OPP are not benefits provided on “old age, disability or death”. Consequently, these benefits do not fall within the ARD Exemption and must be provided to the Transferring Employees by the buyer. At present it is unclear how these benefits will be calculated, and it is likely to remain unclear until this issue is addressed in another case that reaches the ECJ. What is clear, however, is that the likely cost of providing these benefits will be significant. If the buyer does not replicate these benefits post-transfer, then it faces a risk of employee claims for breach of contract. Due to the potential costs of such claims, it is market practice for the buyer to seek an indemnity from the seller.

Rights to participate in contractual pension arrangements such as personal and stakeholder pension plans form part of the Transferring Employee’s terms and conditions of employment, and as such transfer with the employee. The buyer must provide the Transferring Employees with access to an equivalent plan and any employer contributions to the plan to which the employees were contractually entitled pre-transfer. Any life assurance benefits to which the employees are entitled, whether by virtue of a life assurance trust (providing death in service benefits only) or by virtue of their employment contract only, must also be replicated by the buyer.

GERMANY

The buyer will assume all pension liabilities with respect to the Transferring Employees, including the liability for accrued and future benefits. The pension arrangements which provide benefits to the Transferring Employees, and any liabilities relating to those arrangements, will automatically transfer to the buyer and it must continue to run those pension arrangements for the benefit of all Transferring Employees who are eligible to participate in those arrangements. If, due to any legal constraint, the buyer cannot continue an arrangement it must provide any affected Transferring Employees with comparable pension benefits.

Deferred and pensioner members of any pension plan, who are no longer in the employment of the seller, will not transfer to the buyer and as such the liability for their pension benefits remains with the seller. It is not possible to transfer the liabilities for any former employees of the seller with the agreement of the parties. The inability of the seller to pass its pension liabilities for former employees may make an asset sale in Germany unattractive to a seller.

The seller may hold assets for the purpose of supporting its pension liabilities. The parties may agree to transfer these assets (or an appropriate proportion) to the buyer. Depending on the type of pension plan, the liabilities under that plan will appear as a liability on the balance sheet of their employer. The value of pension benefits accrued as at the date of transfer must be taken into account when setting the purchase price, as must the assets which the parties have agreed to transfer to the buyer.

Complex issues also arise if pensions are provided through a third party (like a pension fund or a support fund) which belongs to the seller’s group and is not open for external members.

SPAIN

Whereas the buyer must replicate the pension benefits provided to the Transferring Employees pre-transfer, neither the plan nor the provider necessarily transfers. If the original plan or provider is not transferred, the buyer must ensure that a replicated plan is put in place. This may require considerable effort given that both employers and employees must be consulted when changes are made to the rules of any pension plan or when a new plan is created.

Whether or not the original plan is transferred, for three years following the asset transfer, the seller and the buyer will be jointly liable for unpaid contributions that were due prior to the transaction, in accordance with the original pension provisions of the seller. It is not possible for this joint liability to be avoided by the agreement of the parties.

ITALY

The buyer must replicate the benefits of the Transferring Employees post-transfer.

The buyer and the seller are jointly liable for the accrued benefits of the Transferring Employees as at the date of transfer. The buyer is also jointly liable with the seller for all pension liabilities due to the Italian National Social Security Institute in connection with the compulsory social security contributions to the extent that these liabilities are contained in the accounts of the transferring business. Italian law is unclear whether the buyer's liability for voluntary contributions is limited to the liability as shown in the accounts of the transferring business.

The parties may agree to indemnify each other in respect of these liabilities; however, such agreement cannot prohibit employees from making a claim against both the buyer and seller.

BELGIUM

Pension plans in Belgium do not automatically transfer to a buyer on an asset transfer; however, the buyer must maintain the pre-transfer salary levels of the Transferring Employees either by maintaining the pension plan that was put in place by the seller or by providing other benefits, such as an alternative pension plan or an increase in salary, of equal value. The buyer will invariably require actuarial advice to assess whether its proposed alternative pension benefits are 'of equal value', in order to maintain the pre-transfer levels of salary. The additional cost and time involved in obtaining this advice should be factored into any asset transfer to take place in Belgium.

An additional issue for the buyer in having to provide the Transferring Employees with the same level of salary post-transfer is the effect this may have on any business that the buyer already operates in Belgium. Employers must provide all employees with benefits of the same value, so that when the Transferring Employees join the buyer, they and the buyer's current employees must receive the same level of pension benefits. The buyer cannot automatically reduce either the Transferring Employees' or its current employees' benefits to obtain this equal treatment and therefore it is necessary to enter into negotiations with the entire workforce (including the Transferring Employees) to agree on a level of benefits which is affordable to the buyer and acceptable to all employees.

FRANCE

French law draws an important distinction between the transfer of a pension plan and the transfer of employee's rights to benefits under a pension plan. Only the rights to benefits under a plan are automatically transferred to the buyer. Whether the pension plan transfers depends on the agreement of the parties and the transferability of the plan. For example, the seller's group pension plan may not be transferable to the buyer. If the plan is not transferred the buyer must, by either setting up a new pension plan or by allowing the Transferring Employees to join any of its existing pension plans, provide the Transferring Employees with identical or greater benefits as they were entitled to receive pre-transfer.

If a pension plan was not transferred to the buyer, all liabilities in respect of that plan will normally remain with the seller. If the plan is transferred to the buyer, the agreement of the parties will determine the extent to which liabilities under the plan relating to facts or events that occurred before the transfer will pass to the buyer. The parties may agree that the seller will indemnify the buyer for all, or some, of any liability which arises in the event of a claim relating to a pre-transfer event being made.

CONCLUSION

Pension-related issues on asset transfers vary greatly depending upon the jurisdiction in which the transfer takes place. Due to the differing complexities and considerations that arise between the jurisdictions discussed in this *Commentary*, it is important that any party contemplating an asset transfer in those jurisdictions obtains appropriate legal advice.

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