Q&A Session for "Managing European Employees In International Deals, Redundancies and Business Restructuring: The Evolving Legal Landscape"

By Simeon Spencer, François Vergne, and Walter Ahrens (Morgan, Lewis & Bockius LLP)

1. Are there employee consultation or government approval requirements in the EU for implementation of an employer code of conduct?

Simeon Spencer (United Kingdom): If the policy is to become part of the employees' terms and conditions, then express consent is required. Otherwise, collective consultation may be required if the policy falls within the ambit of a trade union agreement or, if the company is large enough, a works council's remit. No government approval is required.

François Vergne (France): The introduction of a code of conduct is subject to (1) prior information with the works council, and (2) control by the labor authorities (the labor inspector), the purpose of which is to verify that the code of conduct meets the test of proportionality and relevancy.

Walter Ahrens (Germany): The introduction of a code of conduct is usually subject to prior information and consultation with the works council. You may also need the works council's consent for introducing certain parts of the code, e.g., a whistleblower hotline.

2. Are there employee threshold levels for the information and consultation procedure in Germany (e.g., terminating more than 50 employees)?

Walter Ahrens: Numerous thresholds apply.

(a) An economic committee must be established in all companies that have a works council and employ more than 100 employees on a regular basis.

(b) A works council can be established in all operations that have at least five employees who are 18 years or older. At least three of them must have at least six months of service.

(c) Information, consultation and negotiations with the works council in connection with restructurings are required in companies with at least 20 employees.

(d) A reduction in force constitutes a restructuring only if at least the following number of employees is affected thereby:

- In operations with more than 20 and less than 60 employees on a regular basis: more than five employees.
- In operations with at least 60 and less than 500 employees on a regular basis: 10% of the employees employed on a regular basis or more than 25 employees.
- In operations with at least 500 employees on a regular basis: at least 30 employees but no less than 5% of the employees employed on a regular basis.

An economic committee must be established in all companies that have a works council and employ more than 100 employees on a regular basis.

(e) If the restructuring consists only of a reduction in force, the conciliatory body has decision-making power for a social plan only if at least the following number of employees shall be laid off for operational reasons (irrespective of the period during which such layoffs shall occur):

- In operations with less than 60 employees on a regular basis: 20% of the employees employed on a regular basis but no less than six employees.
- In operations with at least 60 and less than 250 employees on a regular basis: 20% of the employees employed on a regular basis or at least 37 employees.
- In operations with at least 250 and less than 500 employees on a regular basis: 15% of the employees employed on a regular basis or at least 60 employees.
- In operations with at least 500 employees on a regular basis: 10% of the employees employed on a regular basis but no less than 60 employees.

(f) Collective dismissal notification to the federal employment agency is required if at least the following numbers of employees are to be laid off within 30 calendar days (the giving of notice is relevant, not the expiration of the notice period):

- In operations with more than 20 and less than 60 employees on a regular basis: more than five employees.
- In operations with at least 60 and less than 500 employees on a regular basis: 10% of the employees employed on a regular basis or more than 25 employees.

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- In operations with at least 500 employees on a regular basis: at least 30 employees.

(g) A selection of employees to be dismissed is required under § 1 of the Protection Against Dismissal Act. It applies to all employees with at least six months of service, provided that the relevant operation employs more than 10 employees on a regular basis. Employees working no more than 20 (30) hours per week count as 0.5 (0.75) FTE. In principle, the threshold is still five instead of 10 employees for employees whose employment relationship commenced prior to January 1, 2004.

(h) Information and consultation with the works council about individual notices is required in each operation having a works council.

3. In Germany, as a penalty for premature implementation, can damages be pursued by the individual employee, by the works council, or by either?

Walter Ahrens: Damages can be pursued only by the individual employees.

4. If a corporation has a global divestiture that only impacts, say, five employees in France, is it necessary to inform and consult with the works council?

François Vergne: It is necessary if and when the French company has over 50 employees (threshold to set up a works council). However, when the number of employees to be dismissed is less than 10 employees in a given period, the procedure is less heavy and there is no obligation to set up a "social plan."

5. In France, who is considered management—the president? Are supervisors considered management?

François Vergne: Management is the company's legal representative (chairman or CEO) or any person whom the legal representative has formally entrusted with the duty of managing HR, pursuant to a written delegation of authority.

6. In France, does "pay" also require average commission payments for sales employees? If so, how do you calculate commission payout?

François Vergne: In France, the matter may differ depending on the provisions of the applicable collective bargaining agreement. Statutory provisions (which set out minimal that can be improved by collective bargaining agreements) provide that the reference basis for determination of the severance pay is the most favorable of the average salary received during the three- or 12-month period preceding the termination. Such average includes commission payments relating to the concerned period: bonuses.

7. Where the redundancy impacts less than 10 employees, is there a fixed period of time for consultation—e.g., would one week be enough time before the final decision?

Simeon Spencer: There is no fixed period as this is below the collective redundancy threshold. However, consultation must be carried out "in good time." One week may be enough but it depends on the individual circumstances.

François Vergne: The termination procedure varies depending on the number of employees to be dismissed, the size of the company, the existence or absence of a works council and the decision of the works council to consult with a certified public accountant during the consultation process. One week will generally not be enough, as a minimum of two meetings need to be organized. Then, if there is a works council, a "dual consultation"—based on book IV and book III of the former labor code—must be carried out.

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Walter Ahrens: A redundancy impacting less than 10 employees may require information, consultation, and negotiations with the works council (see response to question 2 above). There is currently no fixed period of time for consultation. One week will work only in exceptional cases.

8: Are the challenges associated with restructuring and dismissals in Great Britain different from those in Northern Ireland?

Simeon Spencer: In all material respects, they are the same in Northern Ireland.

9. In Germany, France, or the United Kingdom, are there significant labor regulatory proposals before government authorities which may impact requirements on restructuring or dismissal processes?

Simeon Spencer: Not in the UK.

Walter Ahrens: Not in Germany.

François Vergne: Not in France.

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10. Is there a threshold number of employees for requiring the presence of a collective bargaining agreement in France, Germany or the UK?

Simeon Spencer: Not in the UK.

Walter Ahrens: Not in Germany.

François Vergne: Collective bargaining agreements are agreements entered into between employers' and employees' unions in order to complement basic labor and employment law. They may be entered into at various levels, either by level of operation (branch/industry/company/plant) or geographically. Normally, collective bargaining agreements apply only to their signatories.

Subject to a particular procedure, including any advice rendered by a national commission and a governmental decree), certain collective bargaining agreements referred to as "extended collective bargaining agreements" will automatically apply to any employer falling within its scope (industrial and/or geographical).

11: If employees are redundant because the work is to be "offshored," what are the employer's obligations in the UK?

Simeon Spencer: Broadly, the employees will have the right to be informed and consulted about the potential redundancies, either collectively or individually, depending on the number of employees who are to be made redundant. Depending on the exact circumstances, there could also be a separate and concurrent obligation to inform and consult under TUPE. Whether this is carried out by the employer or the transferee will depend on the circumstances of the outsourcing, for example whether there is a transition period. In reality, these matters are generally addressed by the parties in the commercial agreement and the liability is likewise commercially agreed. ❑

Binding Corporate Rules Now a More Attractive Option for Europe-to-US Data Transfer

By Heidi Salow and Micah Thorner (DLA Piper LLP)

Two notable developments will make Binding Corporate Rules (BCRs) a more attractive option for companies that transfer data from Europe to the United States and other parts of the world.

First, the Article 29 Working Party has released a third revision of the Frequently Asked Questions (FAQs) for Binding Corporate Rules (BCRs). Second, several new countries have agreed to a "mutual recognition procedure" which greatly simplifies the heretofore cumbersome approval process required for companies that choose to use BCRs as a mechanism to lawfully transfer personal data outside of Europe.

Background: The EU Data Protection Directive and Restrictions on Transfers of Personal Data

The European Union Data Protection Directive (95/46/EC) (Directive), adopted in1995, permits the transfer of personal data from Europe to a non-EU country only if the receiving country is deemed to offer an "adequate" level of data protection. Many countries, including the US, are not deemed by EU authorities to have enacted laws that "adequately" protect personal data. However, the Directive permits transfers to those countries if adequate safeguards and mechanisms have been implemented by the "data controller."[1]

Thus, when a company (i.e., data controller) (i) is established in the EU or (ii) uses equipment (e.g., computer servers) located in the EU to process personal data, the company must implement one of several mechanisms for complying with the Directive (unless an exception applies):

- incorporate the European Commission's model contractual clauses into a company contract that addresses such data transfers;
- obtain consent from each affected individual (where consent is considered "freely given");
- certify compliance with the US Department of Commerce's Safe Harbor program; or
- adopt BCRs.

Binding Corporate Rules

BCRs are internal corporate rules that allow data to flow freely between a company's affiliates and subsidiaries without violating the Directive. As a general rule, each

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For additional information or for assistance on ensuring your company is compliant with EU data protection laws, please contact us. Micah Thorner, Associate, DLA Piper LLP (US), Washington, DC may be contacted by phone: (202) 799-4456, by fax: (202) 799-5456, or by email: micah.thorner@dlapiper.com. Heidi Salow, CIPP, Of Counsel, Communications, Privacy and eCommerce Practice, DLA Piper LLP (US), Washington, DC may be contacted by phone: (202)799-4444, by fax: 202.799.5444, or by email : Heidi.Salow@dlapiper.com.