Practical Tips For Dealing With The European Acquired Rights Directive

Paul Callegari and Stephanie Wright Pickett

K&L GATES LLP

In the last edition of The Metropolitan Corporate Counsel, we focused on the scope of the Acquired Rights Directive (“Directive”) and the way it and similar local laws address additional layers of employment-related complexities to European business transactions. Under the Directive, all rights, duties and liabilities of the outgoing employer (“Seller”) relating to the transferring employees’ contracts of employment transfer to the incoming employer (“Acquirer”). This includes rights under the employment contract and any rights, including employees’ rights to bring claims for unfair dismissal, redundancy and discrimination. For this reason, it is essential that an Acquirer conduct a full and pertinent information about the employees it might inherit when considering whether to buy a business or enter into an outsourcing agreement. For this reason, it is essential that an Acquirer conduct a full and pertinent information about the employees it might inherit when considering whether to buy a business or enter into an outsourcing agreement in some Member States.

Due Diligence And Pre-Closing Phase

As the Directive transfers contracts of employment and related rights and liabilities automatically to the Acquirer, it is essential when buying a business (or taking on contracts of employment in context) to conduct a thorough audit of the Seller’s business and to have access to all pertinent information relating to the Seller’s employees who will transfer and their contracts of employment. If the Acquirer acquires only part of the business, the Acquirer should seek indemnity against claims from any employees retained by the Seller who may claim that they should have transferred.

The Directive also provides transferring employees with certain rights pre-transfer. Where there is a delay between signing a contract of employment and closing, the Seller is likely to want indemnity from the Acquirer in these areas. For example, in the UK, where the transfer would result in a “substantial change in working conditions to the material detriment” of an employee, that employee can treat himself as dismissed by the Seller and sue before closing.

Pre-closing is also when Seller and Acquirer must comply with their respective consultation obligations under the Directive. The precise scope of the obligations varies from country to country. Both in the UK and in France, there is no minimum period for the consultation to last. In Germany, all individual employees must be informed in writing about the transfer before the transfer occurs, and the information must include, among other things, the implications of the transfer for the employee.

Building consultation into the pre-closing process is vital. Indeed, the businesses concerned can use consultation with employee representatives to their advantage. Such representatives can assist with dialogue and become a force for change in the organization, among other things, the implications of the transfer for the employee.

Closing

One final point to note at this stage is that any collusion between Seller and Acquirer to avoid the Directive’s applicability by dismissing employees pre-transfer will render the employees having claims against both parties for that dismissal.

Post-Closing And Integration

After the deal closes, the Acquirer’s efforts to manage the workforce and, often, integrate the employees begins.

Due Diligence And Pre-Closing Phase

The Directive’s starting point is that harmonizing terms and conditions post-transfer, including compensation changes or changes to working hours – are permitted with employee agreement.

In Germany, what happens to terms and conditions of employment after the transfer largely depends on the scope of those terms. If pre-transfer they were contained in collective bargaining agreements or works agreements, the terms and conditions are treated as transferred for the purpose of the Directive. If post-transfer they were contained in individual agreements, the Acquirer may be required to provide an equivalent.

In France, any substantial changes to working conditions occasioned by the transfer – including compensation changes or changes to working hours – are permitted with employee agreement.

In Germany, any substantial changes to working conditions after the transfer will be treated as a breach of the Directive (if possible) or any dismissal will be unfair – meaning that the Acquirer would be well advised to seek to have the dismissed employees sign compromise agreements waiving all claims in exchange for the employee’s continued employment. The same is the same in France and Germany and, as in the UK, the only way to be sure of avoiding any claims would be to enter into compromise agreements.

Conclusion

Although employee transfer can be complicated from an employment perspective, the Seller and Acquirer can reduce these complexities by taking appropriate local legal advice at the earliest possible stage and ensuring appropriate warranties and indemnities require both parties to ascertain information that allows them to identify and assess their own particular risk areas.

It is important to remember that the Directive gives employees an additional layer of rights beyond those already provided by Member States (which will already be more than most employees’ applicable local law). The Directive’s purpose is to protect employees’ rights, a principle that is often at odds with the Acquirer’s goals of “wrap up” a bundle of changes (some less desirable, more favorable, to the employees’ advantage) without challenge. Although technically in breach of the Directive, this is not unfair – meaning that the Acquirer could challenge it.

If the Acquirer does not wish to purchase its employees into the process, it must conduct the dismissal before the integration is completed (if possible) or any dismissal will be unfair – meaning that the Acquirer would be well advised to seek to have the dismissed employees sign compromise agreements waiving all claims in exchange for the employee’s continued employment. The same is the same in France and Germany. It is important that the Acquirer does not wish to purchase its employees in the process, it must conduct the dismissal before the integration is completed. The Directive’s purpose is to protect employees’ rights, a principle that is often at odds with the Acquirer’s goals of “wrap up” a bundle of changes (some less desirable, more favorable, to the employees’ advantage) without challenge. Although technically in breach of the Directive, this is not unfair – meaning that the Acquirer could challenge it.

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