POST-M&A EMPLOYEE INTEGRATION
COMBINING AN INTERNATIONAL WORKFORCE

Suzanne Horne and Ross McNaughton of Paul Hastings (Europe) LLP consider the key issues that may arise when integrating an international workforce after the completion of a cross-border M&A transaction.

In July 2013, the aggregate value of global M&A transactions totalled $237.3 billion, the highest since the collapse of Lehman Brothers in 2008, according to Thomson Reuters. These cross-border transactions give rise to a wealth of corporate and employment-related issues that, if not properly managed, can cause headaches for lawyers, human resources (HR) professionals and others involved in the deal.

It is only when the ink is dry that the real work begins for most buyers seeking to realise value from the deal through integration, synergies and costs savings. The post-acquisition exercise may be less high profile than announcing and completing the deal, but for most organisations it is critical to a successful transaction.

There are a myriad of legal, commercial and HR issues that arise when a buyer integrates a company or a business that has international operations, such as corporate culture, rules and reporting lines, where the business, assets and revenues are located and generated, regulatory restrictions and requirements, tax, finance, and IT systems and technology issues. These matters can be further complicated by business timelines and the need to comply with competing commercial needs and local laws.

This article focuses on the HR aspects of the integration exercise and considers, in particular, the issues where there are employees in the UK, the US and/or the People's Republic of China (PRC). It considers:

- How the structure and strategy of the transaction relates to employees.
- The planning process.
- The typical integration activities that a buyer of a company or business with an international workforce should address.

PRELIMINARY CONSIDERATIONS

A successful employee integration exercise needs a clear strategy and a number of issues should be considered carefully before the sale and purchase agreement is executed.

Is integration the way forward?

Many buyers seek to integrate a newly acquired target or business as quickly as possible after completion. However, this approach is not universal and there is a trend among some Asian companies, for example, not to integrate at all. Their rationale appears to be that business stability and growth outweigh the value achieved through synergies and rationalisation. Whether some of these companies simply integrate later is

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another issue. However, at an early stage of the deal lifecycle, understanding the buyer's intentions post-completion is key.

Deal structure

The structure of the transaction is critical to the approach to employee integration, and an acquisition of a company or group of companies will result in a different employee integration strategy than the acquisition of a business (*see "Employee integration" below*).

In addition, the employment laws that apply at and after completion will broadly depend on whether the transaction was an asset or share purchase or a mixture, and the location of the employees.

Share purchase. The employment issues during a share purchase deal are typically far less complicated than in other types of transactions as there is no change in the identity of the employer on completion. Existing employment contracts merely continue under the new ownership; formal offers or new contracts of employment will not be necessary.

That said, in some deals, it will be necessary to consider the implications of (and address):

- The separation of the target company from the selling parent, if applicable, particularly if incentives and benefit plans (such as pension or health and welfare plans) were maintained at the parent level.
- Any contractual change of control clauses in employment contracts or compensation agreements.
- An integration exercise that is so substantial as to trigger business transfer legislation and automatically transfer staff from a subsidiary to the new holding company.

Asset purchase. More difficult issues arise for buyers if the transaction is structured as an asset purchase, particularly with regard to the transfer of employees to the buyer. Different countries have different mechanisms for employee transfers and this has an immediate impact on who transfers, how they transfer and integration planning.

The EU has business transfer legislation in the form of the Acquired Rights Directive (*2001/23/EC*) (the Directive), which applies to all 28 EU member states (*for background, see feature article "Cross-border transfers of undertakings: lost in translation?", www.practicallaw.com/1-372-7984*).

In the UK, the Directive has been implemented by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (*SI 2006/246*) (TUPE). If TUPE applies to the transaction, the employees who are assigned to the organised grouping transfer automatically with certain rights and protections (*see feature article "Cross-border transfers: does TUPE apply?, www.practicallaw.com/1-381-8494*).

Other jurisdictions, such as Brazil, Colombia, India, Singapore, South Africa and South Korea also have business transfer legislation that operates automatically to transfer employees of an acquired business from the seller to the buyer. For the transaction to have amounted to a "business transfer" under most local law tests, an independent business unit has to transfer and the activities of the unit must continue with the buyer.

For the most part, employees that work exclusively for the transferred business will become employees of the transferee company. Inevitably, the issues can become more complicated with regard to shared service employees providing non-exclusive

Employee protection after Kraft/Cadbury

In 2009, Kraft Foods Inc launched a highly publicised campaign to acquire Cadbury plc, which resulted in a long, drawn-out period in which Cadbury was subject to the possibility of a hostile takeover. Although a deal was eventually struck in 2010, the fallout from the takeover was significant and the episode received a large amount of political attention and press coverage (*see News brief "Cadbury takeover: a krafty manoeuvre", www.practicallaw.com/1-501-5227*).

One of the particular points in issue surrounded Kraft announcing that it intended to keep open Cadbury's factory at Somerdale (which Cadbury had previously earmarked for closure) and then, shortly after completion of the takeover, saying that it would not be able to deliver on that intention. This led to the Takeover Panel Executive (the Panel) publicly criticising Kraft and a Parliamentary Select Committee hearing on the issue (*www.practicallaw.com/3-502-6376*).

The Panel also issued a well-publicised consultation that ultimately led to several changes to the Takeover Code (the Code) (*www.practicallaw.com/6-507-8948*). Among other things, the Panel determined to provide greater recognition of the interests of target company employees in public takeovers through enhanced disclosure, including:

- The disclosure of offerors' intentions, by requiring offerors to continue to disclose details of any plans regarding the target's employees and locations of business. While this was already generally required, the Code was amended to make clear that these statements would be expected to hold true for at least one year following the offer becoming, or being declared, unconditional (unless another period is stated) and to require offerors to make negative statements if there are no such plans.
- Employee representatives' views, by requiring:
  - the target's board to inform employee representatives at the earliest opportunity of their right under the Code to circulate an opinion on the effects of the offer on employees;
  - the target's board to publish the employee representatives' opinion at the target's expense; and
  - the target to pay the employee representatives' costs in obtaining any advice that is reasonably required for the verification of information contained in their opinion.

services (such as finance, IT and HR) to both the retained and transferred business.

In jurisdictions where employees do not transfer automatically with a business sale, including the US, Australia, the PRC, Japan and Hong Kong, the buyer and the seller would need to determine the employees that they wish to be transferred in the deal, and the employees would need to consent to their transfer or accept an offer of employment. While this gives some flexibility over the terms to be offered, it can create uncertainty as to whether key employees or a sufficient number of employees will transfer.

Statements of intention

At all times in the lead up to the announcement and completion of a deal, a buyer should be careful as to any statements that it makes about its future intention towards the workforce of the target business. As well as creating minimum expectations in practice for the workforce, in some cases, such statements may form binding obligations on the buyer. In addition, in the UK public company context, they will be the subject of focus and scrutiny, in particular following the Takeover Code amendments implemented as a result of the Kraft takeover of Cadbury in 2010 (*see box "Employee protection after Kraft/Cadbury"*).

THE PLANNING STAGE

A key aspect of a successful employee integration exercise is the planning process.

The initial business case for carrying out the acquisition will determine and focus the outline strategic and business goals for the employee integration exercise (*see box "Employee integration: key questions"*). But it should be a dynamic exercise. It is only through the commercial, legal and financial due diligence process that the buyer will get a better understanding of the international workforce and how to integrate the employees into its own workforce.

A large-scale employee integration exercise will typically include:

- Information gathering (including deal due diligence).
- An initial planning stage, which includes obtaining any required approval of key stakeholders.
- Detailed planning and the creation of an integration plan.
- The identification and appointment of the appropriate employee integration team with input from the business, finance, tax, legal, regulatory and IT departments, and the creation of a plan that identifies each step in the process.
- The verification of information and the proposed integration activities.
- Final sign-off from key stakeholders.
- Implementation.

Once the goals and objectives of the post-completion activity have been identified, the HR team will need to gather and review information for each location that includes affected employees. While a significant amount of this data should be available from the deal due diligence process, the buyer will also need to gather the requisite information on its own workforce, including employment terms and benefit arrangements (*see box "Checklist of employee integration information"*).

Employee integration: key questions

The buyer of a target company or business will need to understand the business goals and objectives for the employee integration exercise and how the people issues fit within the new organisation. In order to do so, the following fundamental questions should be asked:

- What does the buyer need to do to retain and incentivise key talent?
- Does the buyer need to restructure roles and responsibilities across jurisdictions?
- Is there a need to effect redundancies to achieve cost savings?
- Should the buyer seek to harmonise or modify employee terms, conditions and benefit schemes?
- Does the buyer need to do a wider exercise of harmonisation of policies and procedures?
- What benefits will the buyer need to replicate or replace following completion, particularly if no identical replacement exists (for example, group pensions and employee share schemes or options)?
- Do any valued consultants, contractors, or secondees also need to be considered?
- Might any outsourcing arrangements or contracts for the provision of staff be affected?

Retaining talent

Any announcement or communication about the deal can sometimes cause concern and conjecture among the workforce, particularly if the transaction is a share purchase as there is no requirement on the seller or buyer to inform and consult. In this situation, "business as usual" is difficult to maintain. It is crucial at this stage to sit down with key employees and to start communications with the wider workforce. People need to know what is planned and how it will affect them, even if management do not have all the answers.

In this interim period, it is also important to keep key talent incentivised. Financial incentives are still the best way forward. It is now common for some form of retention incentive to be put in place at completion for those key employees being acquired or transferred. This is likely to take the form of cash, equity, or for more senior employees, a combination of the two.

Before starting the integration exercise, it is also important to assess the impact of any integration activity on these incentives to ensure that they are not triggered too early and remain operative, and that retention

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incentives for new employees do not alienate existing key employees.

EMPLOYEE INTEGRATION

In most post-completion integration scenarios, there will be an "on-boarding" process, which may entail some harmonisation of terms and conditions. In addition, there may be a need to restructure or carry out redundancies.

On-boarding

When integrating the newly acquired workforce into the buyer, employees need to go through an induction process, like any new hire. This is commonly referred to as "on-boarding". It may involve the clarification of reporting lines, roles and responsibilities, and training on company processes, procedures and policies.

The buyer will also need to consider practical matters, such as logins, IT equipment and even new business cards. The buyer will often want the new workforce to sign up to obligations to protect its confidential information and trade secrets, intellectual property and legitimate business interests post-termination by means of restrictive covenants. These may be included in a separate proprietary information and invention agreement if the buyer is a US company, or a new contract of employment for a UK buyer. Either way, this will entail some harmonisation of terms and conditions.

Harmonisation

A significant number of multinationals, particularly those headquartered in the US, want to ensure that the newly acquired employees are on the same terms and conditions as existing staff. This is not only for consistency and ease of administration but also to embed the corporate culture.

In the US, under the doctrine of "at-will" employment, there are generally few restrictions on such actions other than in specialised contexts (such as where a workforce is unionised or an employee has contractual rights to certain benefits or a certain period of employment). However, outside the US, modifying terms and conditions of employment either for economic reasons or to harmonise is often much more difficult (*see box "Some harmonisation challenges in practice"*).

In most non-US jurisdictions, an employer cannot make detrimental modifications

Checklist of employee integration information

Before carrying out an integration exercise, the buyer of a target company or business will need to gather a large amount of information relating to the employees that it has inherited and its own workforce who potentially will be affected by the integration activity. Buyers should consider the following:

- ✓ The business case and justification for change.
- ✓ The number of employees based in each location by establishment, and the number of employees potentially affected by the relevant integration activity, including part-time and contract employees, their date of hire, age, salary and benefits, role and job category.
- ✓ The terms and conditions for the affected employees setting out benefits, perquisites, pension or retirement plans (and any early retirement benefits), information regarding change-of-control, golden parachute and other clauses in any employment contract or other agreement that could be triggered on integration or in the event of other integration activity, post-termination restrictions, confidentiality provisions or non-disclosure agreements, and indemnification or expatriate arrangements.
- ✓ Any impact on insured benefits arrangements with providers.
- ✓ Any impact on retirement benefits and existing equity incentive schemes.
- ✓ Any applicable collective agreements.
- ✓ Any visa or work permit issues.
- ✓ Information on any redundancies conducted in the previous few years and any social plans or severance plans from previous redundancies.
- ✓ Any trade union presence and details of any applicable collective bargaining arrangements or agreements.
- ✓ Any other employee representative bodies, such as works councils or European works councils.
- ✓ Local employment laws for the planned activity, including notice and consultation requirements.
- ✓ Any country-specific sensitivities or agreements that affect or limit employment flexibility (for example, past acquisition agreements or agreements limiting reductions in force).
- ✓ Any local labour office filing requirements.
- ✓ Any other local on-going projects or public relations issues that may affect the integration activities.
- ✓ Any threatened or actual employment claims, disciplinary or grievance proceedings, government investigations or unpaid judgments.
- ✓ The internal/external communications strategy.
- ✓ Risk analysis and attitude to risk.
- ✓ The proposed timetable.

unilaterally, and employees who are subject to them may be able either to claim constructive dismissal (which would entitle them to payments due on termination of employment) or to bring claims for unpaid wages or benefits. Depending on the jurisdiction, employers may be able to modify terms and conditions for economic reasons if they meet the requirements for redundancy terminations, but similar advance notice may be required.

In most jurisdictions, employees can consent to the modification of their terms and conditions, but this is not universal. Brazil, for example, adheres to a principle of no waiver of labour rights, meaning that an employer cannot, under any circumstances, modify employment terms to an employee's detriment, even with the employee's consent.

UK. If there has been an asset sale to which TUPE applied, post-completion harmonisation can only be achieved if the transfer-related changes are for an economic, technical or organisational (ETO) reason entailing changes in the workplace or for a reason unconnected with the transfer (*regulation 4(5), TUPE*).

An alternative approach of dismissing employees and then re-hiring them on modified terms is fraught with employee-relations issues and legal difficulties (including the risk of automatic unfair dismissal), and there is no perfect solution.

The planned changes to amend certain aspects of TUPE (due to be implemented in January 2014) will include amendments to:

- Allow transferees to renegotiate terms derived from collective agreements one year after the transfer, provided that the changes are no less favourable to the employee.

- Expressly provide for a static approach to the transfer of terms derived from collective agreements. This will mean that a transferee will not be bound by any terms negotiated as part of a collective bargaining process after the relevant transfer where the transferee is neither a party to those subsequent collective agreements nor to the bargaining process for them.

- Provide that changes to the workforce's location following a transfer can amount to an ETO reason entailing changes in the workforce.

- Amend the provisions restricting changes to terms and giving protection against dismissal in each case to reflect the wording of the underlying Directive and/or European Court of Justice case law more closely.

At the time of writing, the government has published its response to the consultation on these proposed changes, but the draft regulations making these amendments have not been published and are not expected until December 2013 (*see News brief "TUPE changes: the government responds", this issue*). In any event, it is difficult to see how the proposed changes will solve the problem in practice.

Even if the employees do not have the protection of TUPE, the buyer still only has the following three options:

- Agree the change with the employee, possibly with a sweetener to encourage the employee to sign up to revised terms or "buy out" certain benefits (for example, by agreeing to an alternative benefits structure that is overall more advantageous to the employee). This option is generally low risk.

- Terminate existing contracts (by giving notice) and re-employing on new contracts containing the desired terms and conditions. This may require specific consultation obligations, for example, under the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). This could be classed as medium risk.

- Unilaterally impose the change. This would be a high-risk strategy.

Each of the above options may require information, consultation and/or negotiation with independent trade unions or employee representatives. Depending on the scale of the exercise, the buyer may also consider using settlement agreements although, again, these have their limitations (*see feature article "Pre-termination negotiations: looking for the exit?", www.practicallaw.com/9-534-5498*).

US. Unlike in the UK, harmonising terms and conditions for a non-unionised US workforce is simply a question of negotiation. The buyer of a US business or company has the flexibility to assume or reject virtually any aspect of the seller's relationship to its employees provided that the harmonised terms do not breach federal or state laws on, for example, discrimination or wage and hour issues.

However, it is a different matter with a unionised workforce due to rules relating to "successorship" under applicable state law. In certain circumstances (such as where the seller's collective bargaining agreement requires that, in the event of a sale, the buyer must recognise the union and/or assume the collective bargaining agreement), the buyer essentially inherits the seller's union relationship and will have to bargain with the union.

Employers have a duty to bargain in good faith with any union representing their employees. In addition, employers whose employees are represented by a union cannot negotiate directly with such employees, except in limited circumstances by agreement with the union.

PRC. As with the US, there is no business transfer legislation in the PRC and so harmonising the terms of the workforce on an asset purchase will necessarily involve terminating existing employment contracts. This will generally require employee consent and the execution of new employment contracts with the new employing entity, often with the employees' prior service being expressly recognised.

If the transaction is structured as a share acquisition and the entities will be integrated, any amendments to employment contracts must "follow the principle of equality, voluntariness, and agreement through consultation" and they must not "run counter to stipulations in laws or administrative decrees" (*Article 3, Employment Contract Law of the PRC, effective 1 January 2008*). In this case, employers must consult with employees to obtain their consent to modify employment contracts or with trade unions to modify collective bargaining agreements. In addition, any employment documents should be in Chinese or at least have a Chinese version in order to be binding on the Chinese employees.

Restructuring and redundancies

Where the business case for the transaction is to create a new improved company or

business in one shape or form, there will likely be some restructuring and rationalisation of employees after completion. There may also be a need to relocate employees to new locations. Mobility clauses in employment contracts can be helpful in these circumstances; otherwise, the relocation can often amount to a technical redundancy.

Restructuring in the US is relatively straightforward if on a smaller scale. Outside of the US, restructuring is often much more difficult as, typically, there needs to be a minimum level of justification, selection, consultation, notice and severance. In the EU, each of the member states has implemented the Collective Redundancies Directive (*98/59/EC*), which requires the employer to consult if certain thresholds are triggered within a certain period of time.

In any event, the costs of carrying out and completing the restructuring and any consequent terminations on the grounds of redundancy should be calculated in advance. Generous severance packages will smooth the path for exits and may also send a message to the remaining employees that they will be treated fairly if they leave in the future.

UK. In the UK, an employee will be fairly and lawfully dismissed provided that the employer complies with the terms of the employment contract; that is, the employer:

- Gives the longer of contractual or statutory notice (unless there is a fundamental breach of contract by the employee entitling the employer to terminate immediately).
- Has a potentially fair reason for dismissal as set out in the Employment Rights Act 1996, which includes redundancy and "some other substantial reason".
- Follows a fair procedure.

If the employer gets it wrong, employees with at least one year's continuous service (or, if employment started on or after 6 April 2012, two years' service) would have a statutory right not to be unfairly dismissed. (The qualifying period is not applicable if the employee falls within one of the automatically unfair categories.)

An employee's dismissal will be due to redundancy if his employer's business has ceased to exist or if the business requirements for employees to carry out work of a particular kind or in a particular place have ceased or diminished (or are expected to cease or diminish), and so this means that relocating employees could trigger redundancies.

For a redundancy dismissal to be fair, it must involve a fair selection process, consultation, and consideration of alternatives to dismissal and suitable alternative employment. Certain special classes of employee, such as employees on maternity leave, have a statutory right to be offered any suitable alternative employment that exists in priority to other redundant employees.

The consideration of suitable alternative employment will usually need to include a search across the buyer's entire group. The selection process will therefore need to be applied to appropriate pools of employees across the relevant establishment, which may include the buyer's group, unless there are cogent reasons why the pool should be restricted to employees within the acquired business only.

However, where redundancies are in the context of an asset transfer, there are severe limitations on the buyer's ability to dismiss in connection with the transfer and, if employees are dismissed, they will be classed as having been automatically unfairly dismissed. Currently, the only circumstance in which a fair dismissal can take place in a transfer situation is if it is completely unrelated to

Some harmonisation challenges in practice

Employers carrying out a cross-border employee harmonisation process after an M&A transaction may be faced with the following challenges in practice:

- Works council, trade union and information consultation obligations. If there is a statutory or contractual obligation to inform and/or consult, consider how best to maintain good relations and prioritise issues for their input.
- The sophistication of benefits and equity plans. Some benefits and equity plans, particularly in the US, are now so sophisticated as compared to equivalent plans in other jurisdictions that it can be difficult to harmonise plans or roll out a new plan for the transferred or acquired employees.
- Pension and retirement benefits. These tend to be particularly complex in the cross-border context due to the variety of state and private arrangements that are likely to be encountered and differences in local market practice to matters such as funding. Revisions are likely to be extremely important in terms of value implications for the employees and liabilities for the buyer. Any attempt to harmonise retirement benefits post-completion will require detailed local advice and planning and, in some cases, actuarial input.
- Expatriate terms. Expatriates can pose a challenge in any harmonisation exercise due to the bespoke, and often expensive, nature of their contractual arrangements. If the buyer is keen to retain a particular expatriate's skills, it will also need to consider the position as regards immigration visas and work permits to ensure that they are not nullified post-completion.
- Confidentiality, protection of intellectual property and post-termination restrictive covenants. These are often key issues for the buyer and should have been checked during the transaction due diligence. However, the human resources department will need to be mindful of any impact of the integration exercise in light of local laws in the relevant jurisdiction.
- Collective agreements. Where the terms and conditions of employment are contained in collective agreements, the ability to change these agreements and the scope of the change varies enormously across sectors and jurisdictions (*see "Consultation obligations" in the main text*).

the transfer itself, or "where the sole or principal reason for the dismissal is a reason connected with the transfer that is an ETO reason entailing changes in the workforce of either the transferee or the transferor" (*regulation 7(2), TUPE*).

A genuine need on the part of the buyer to make redundancies after the transfer may satisfy this definition, although a fair process would still need to be followed (involving pooling with employees across the buyer's business (as appropriate) and applying selection criteria).

However, the government intends to change some of the protection against dismissal under TUPE as part of the reforms planned for January 2014 (*see "Harmonisation" above*).

It is possible, following either a share or asset deal, for the employees to enter into settlement agreements under which they agree to waive all of their employment claims. Where the transaction involved TUPE, particular care will need to be given to who the parties to the agreement will be and the timing. Certain claims (such as a claim for a failure to inform and consult under TUPE or in a collective redundancy situation) are not capable of being waived in a settlement agreement.

US. In the US, the termination of employees as part of a reduction in force may be limited by contract, including both collective bargaining agreements and individual employment contracts. Some employees (typically, executives) may have contractual arrangements providing protection from termination or providing compensation and/or benefits in the event of a corporate change of control.

Mass terminations may give rise to claims under anti-discrimination laws that the decision had a disparate impact on certain classes of employees. As a result, employers often find it useful to create severance plans that offer benefits to employees who agree to a broad release of claims.

In addition, federal and many state laws require giving notice and/or payments to the employees whose contracts are terminated as part of a plant or facility closing or a mass lay-off. For example, very large terminations, or reductions in force, are governed by a federal law; the Worker Adjustment and Retraining Notification Act (WARN). WARN requires businesses that employ 100 or more full-time employees to provide the affected employees (or their bargaining representatives), and certain state and local government entities, with 60 days' written notice before either of the following occur:

- A shutdown of a site, or of one or more facilities or operating units at a single site, that results in an employment loss for 50 or more employees.
- A large-scale lay-off in the form of an employment loss during a 30-day period (or a 90-day period for lay-offs that occur for similar reasons as part of the same process) at a single site of either a third of that site's workforce (if they number 50 or more) or a loss of 500 or more employees in total.

Many states have their own "mini-WARN" acts that contain similar or more protective provisions.

PRC. In the PRC, terminating the contracts of one employee or a small number of employees is generally not permissible unless the individual termination(s) falls under certain permissible categories set down in the Law of the PRC on Employment Contracts, effective 1 January 2008 (the ECL) or the employer and employee mutually agree to a termination of employment.

If an employer wishes to conduct an economic or mass lay-off (generally, of at least 20 employees or 10% or more of the total number of the employer's workforce), it must:

- Give at least 30 days' notice and explain the circumstances to the union or all of the employees.
- Consider the opinions of the union or employees.
- Report the workforce reduction plan to the local labour administration department.

Laid-off employees are entitled to priority in hiring if the employer re-engages staff within six months of the lay-off. Certain categories of employees are also given preference for retention by the employer in an economic lay-off, including those who:

- Have relatively longer employment contracts with the employer.
- Have concluded open-ended employment contracts with the employer.
- Are the only working member of a household and are supporting an elderly person or minor.

Employees made redundant are also entitled to severance payments. Although the ECL does not require any enhanced severance payment in the event of a mass lay-off, the employer may be required to provide a greater level of severance benefits to obtain consent and co-operation from the employees and the labour authorities.

Consultation obligations

In many countries, works councils, trade unions or other employee representatives have the right to be consulted about planned terminations. A number of countries also require an employer to agree a "social plan" with representatives aimed at preventing or lessening the consequences of terminations, which can create additional costs. In addition, it is necessary to consider government notification or approval requirements at the planning stage, including, for example, where the target business is, or has been, the beneficiary of state aid or subsidies.

For pan-European companies, there may also be information and consultation obligations on a Europe-wide level under a European works council. Where mass redundancies are planned, there are often additional requirements (such as in the UK) with respect to consultation with employee representatives and notification to, and/or authorisation of, the official labour authorities.

UK. In addition to individual consultation obligations, the employer may also have collective consultation obligations (*see News brief "Managing collective redundancies: Acas's top tips", www.practicallaw.com/3-526-6286*).

In summary, there are obligations to consult trade unions or employee representatives where the employer proposes to dismiss at least 20 employees by reason of redundancy at one establishment within 90 days (*section 188, TULRCA*). The meaning of redundancy for the purpose of this section is a dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related (*section 195(1), TULRCA*).

It follows that the collective consultation and notification provisions in TULRCA can

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apply to proposed dismissals, even though there is no intention to lose jobs or workers. Where employers seek to harmonise terms and conditions of part of the workforce by giving notice of termination to the employees concerned and offering them re-engagement on new terms, the employer may also be under a duty to consult under TULRCA.

In the event of collective consultation being triggered, consultation must begin in good time with a view to reaching agreement. Since 6 April 2013, where 100 or more redundancies are proposed, consultation must begin at least 45 days before the first dismissal takes effect and the employer must file a form HR1 within the same time frame (*The Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013 (SI 2013/763)*). For fewer than 100 redundancies, the consultation period is 30 days. Where the redundancy situation arises in a TUPE context, the planned changes to TUPE in January 2014 will, in theory, allow consultation by the transferee on collective redundancies with staff who are due to transfer to satisfy this obligation if the buyer and seller agree and the buyer carries out meaningful consultation. At the time of writing, we await the draft regulations to see how this will operate in practice.

Separately, employees in undertakings with at least 50 employees in the UK have a right to be informed and consulted on a regular basis about key business, employment and restructuring issues in the organisation for which they work if there is an information and consultation agreement in place (*Information and Consultation of Employees Regulations 2004 (SI 2004/3426); see News brief "ICE Regulations: lukewarm response?", www.practicallaw.com/8-369-8087*).

The set-up of these national works councils and the specific agreement for information and consultation is initiated by employees. Typically, agreements require at least the provision of information to representatives with regard to the recent and probable development of the undertaking's economic situation and any threats to employment.

US. Federal law provides most private sector employees with the right to organise and select a collective bargaining representative, but there is no mandatory unionisation or other employee representation mechanism in the US. Employees may obtain unionisation where a majority of employees within an "appropriate bargaining unit" desire such representation.

There are two routes to unionisation: recognition due to a formal election by a majority of employees who vote for it; and voluntary recognition by the employer on a less formal showing that a majority of employees want it. Union representation is not mandatory; it is up to the employees.

Outside of the union context, there is generally no obligation to inform or consult with employees or representatives. However, the WARN and state equivalent legislation does require an employer to notify employees and any applicable union when it closes a facility or location, or engages in a mass lay-off.

The PRC. An employer is required to consult with its union or employee representatives (in the absence of a trade union) on matters that affect the "immediate interests" of employees, such as remuneration, working hours, benefits, job safety, training and discipline. If an employer fails to consult with the union or the employee representatives regarding internal rules and policies that affect employees' "immediate interests", the rules or policies may not be enforceable or effective.

If an employer has a trade union and intends to terminate an employee's employment relationship unilaterally, then it must consult and give prior notice to the union and consider the union's opinions on the matter. Failure to do so could render the employee terminations invalid.

Suzanne Horne and Ross McNaughton are partners at Paul Hastings (Europe) LLP.
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