

KEEPING AFLOAT OF EU EMPLOYMENT LAW

Tuesday, 28th June 2005



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COMPARATIVE LABOUR LAW CHALLENGES: SNAPSHOT	

Agenda

KEEPING AFLOAT OF EU EMPLOYMENT LAW

4.30 Registration

4.40 Welcome and introduction

David Williams, UK Chapter, ACC Europe
European Legal Counsel, Astellas Pharma Europe

4.45 EU employment law compliance

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5.05 Managing change successfully in an EU workforce

Allen & Overy LLP

5.25 Case studies

- Discrimination
- Restructuring
- Workplace privacy

6.00 Feedback and questions

6.15 Drinks and canapés

These are only lecture notes. They do not contain definitive advice. They should not even be used as the basis for giving definitive advice without checking the primary sources.

June 2005

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EU Employment Law Compliance

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Why is employment law compliance important?

- ◆ Increasing employment liability risks
- ◆ Corporate accountability and governance pressures
 - ◆ more scrutiny of ethical conduct following corporate scandals
 - ◆ impact of Sarbanes-Oxley
- ◆ "Socially responsible" employment practices




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What are the costs of non-compliance?

- ◆ Financial costs
- ◆ Criminal liability for company, managers and officers
- ◆ Ineffectiveness of decisions/actions
- ◆ Significant time demands defending claims
- ◆ Damage to industrial relations
- ◆ Damage to corporate reputation

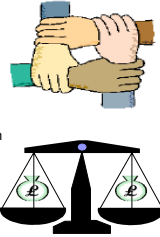


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Discrimination

- ◆ Anti-discrimination protection on grounds of sex, race, sexual orientation, religion/belief, age and disability
- ◆ Additional grounds of protection in some countries (e.g. national origin, birth, wealth, physical characteristics, political belief)
- ◆ Four types of conduct prohibited: direct discrimination, (unjustified) indirect discrimination, harassment and victimisation
- ◆ Protection in recruitment, training, employment and working conditions




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Discrimination: key challenges for employers

- ◆ Sexual orientation: provision of benefits to partners
- ◆ Religion or belief: facilities for religious observance, religious holidays, dress and dietary requirements
- ◆ Age: recruitment, seniority-related pay/benefits, dismissal systems and retirement
- ◆ Disability: requirement to provide "reasonable accommodation" for disabled persons, sick pay and dismissal systems
- ◆ Practical steps




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Harassment, bullying and stress

- ◆ Specific EU protection against harassment, but not against workplace bullying or stress
- ◆ "moral harassment" protection in some countries (e.g. Belgium and France)
- ◆ health and safety protection broad enough to cover workplace stress
- ◆ Obligations for employers/directors to take preventive measures
- ◆ High-risk areas for employers
- ◆ Practical steps





Whistleblowing

- ◆ UK whistleblower protection
 - ◆ "qualifying disclosures" made in good faith and through correct channels
 - ◆ protection against detrimental treatment/dismissal
- ◆ Less developed protection in other EU countries, but protection under general dismissal laws
- ◆ First cases
- ◆ Policies





Compliance tips

- ◆ Communication between corporate counsel and HR is important
- ◆ Review/monitor existing policies and procedures to ensure compliance
- ◆ Implement effective policies and procedures to identify/manage risk
 - ◆ get management buy-in
 - ◆ global policies
 - ◆ other issues (e.g. cultural sensitivities)
- ◆ Educate managers and employees on their responsibilities (e.g. through training programmes)

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Managing Change Successfully in an EU Workforce

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CHANGE = Challenges

- ◆ Change
 - ◆ M&A transactions
 - ◆ Integration
 - ◆ Restructurings (i.e. collective dismissals)
- ◆ Law
 - ◆ EU-law minimum standards
 - ◆ Local law pitfalls, challenges and opportunities

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EU: Law relevant to CHANGE

- ◆ 2002/14/EU – “Framework Information & Consultation Directive”
 - ◆ general framework for informing and consulting employees in the EU
 - ◆ implemented in the UK in 2005 – “Information & Consultation of Employees Regulations 2004”
- ◆ 94/45/EU – “European Works Council Directive”
 - ◆ companies or groups with more than 1000 employees in EU
 - ◆ provided there are enterprises/companies in at least two EU states with a minimum of 150 employees

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EU: Law relevant to CHANGE

- ◆ 2001/23/EU – “Acquired Rights Directive”
 - ◆ Employee protection in case of transfer of business
- ◆ 98/59/EU – “Collective Redundancies Directive”
 - ◆ Inform and consult with employees & local authorities




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M&A: transactions

- ◆ Share sales: usually more straightforward
 - ◆ no change of employer, so ARD does not apply
 - ◆ may be obligations to inform/consult
- ◆ Business sales
 - ◆ ARD does apply
 - ◆ obligations to inform/consult
 - ◆ complexities re. transferring employees, transferring pension obligations, changes to employment terms



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M&A: transactions

- ◆ Can employee representatives delay/stop the deal?
 - ◆ not according to European Directives (ARD; Information & Consultation Directive)
 - ◆ not in most European Countries
 - ◆ but in some European Countries...



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Can they stop the deal? Difficult countries

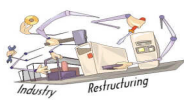
- ◆ Netherlands
 - ◆ works council may apply to court
 - ◆ court can block decision if it considers decision "one which could not reasonably have been made"
- ◆ Germany
 - ◆ on split-up of business, works council may seek injunction to prevent split-up proceeding
 - ◆ injunction will be granted for period until information and consultation requirements have been satisfied
 - ◆ "split up", e.g. acquisition of retail business of a bank which also has investment bank business
- ◆ France/Italy
- ◆ Tactics for pan-European transaction
 - ◆ "A chain is only as strong as its weakest link"

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Restructurings: collective redundancies

- ◆ Information and consultation requirements
 - ◆ in all EU member states (Collective Redundancies Directive)
 - ◆ inform and consult employee representatives
 - ◆ inform local labour authorities
 - ◆ in all EU member states (European Works Council Directive)
 - ◆ Renault case



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Collective redundancies: local pitfalls

- ◆ Failure to inform and consult works councils
 - ◆ France/Germany:
 - ◆ injunction against terminations/dismissals ineffective
 - ◆ criminal offence
- ◆ Works councils can force employer to agree to collective agreements
 - ◆ Germany: social plan, providing for e.g. severance
- ◆ Process may take couple of months – delay measures
- ◆ Tactics
 - ◆ due diligence on employee representatives + communication
 - ◆ intelligent "fee arrangements" with advisors of employee representatives



Integration

- ◆ Integration = Unifying Terms and Conditions
- ◆ Global Company v. local laws
 - ◆ often consent of works councils required
 - ◆ alternatives?
- ◆ Global Company v. local customs
 - ◆ PR-pitfalls
 - ◆ Wal-Mart "Code of Ethics"
 - ◆ whistleblowing policies



Managing change

- ◆ Practical advice
- ◆ In other words:
 - ◆ "Think Globally...."
 - ◆ But ...
 - ◆ "Never underestimate the importance of local opportunities/threats"



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DISCRIMINATION CASE STUDY

Facts

You work for a European subsidiary of Megacorp Inc. You arrive in the office one day to find that you have been passed three letters threatening legal action against the company. Mart Megabucks, the CEO of Megacorp Inc. has left you a message asking you to advise him "right away".

The facts in each of the three cases are as follows:

- Jean, a 45-year old, applied for a marketing position within Megacorp in response to an advert describing it as "a young and dynamic organisation". She has over 20 years experience of organising marketing events for previous employers in the same industry. Jean has a nasty scar on her face following an accident last year. Following interview, Jean was rejected.
- Simon was offered a promotion within his department, but the new role required him to work from Tuesday to Saturday. Simon expressed a keen interest in the new position, but asked if he could work from Monday to Friday rather than Tuesday to Saturday due to his religious beliefs. His manager refused, and offered the position to someone else.
- Sally is PA to Barry, one of Megacorp's directors. She alleges that he has been harassing her. For some months he has been making personal comments about her dress sense, and has teased her that she would have to wear shorter skirts if they are to win new business. The final straw has been Barry's recent line of questioning about Sally's sex life. For some time now Sally's blood pressure has been high and she has started having panic attacks on the bus on her way into work. Her doctor has signed her off sick indefinitely, pending her recovery.

Questions

1. What would you advise Mart Megabucks in relation to the claims threatened by each of Jean, Simon and Sally?
2. How could the situations have been avoided? What steps should be taken to avoid similar claims being made in the future?

Notes

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RESTRUCTURING CASE STUDY

Facts

You work for a European subsidiary of Megacorp Inc. One afternoon, you get a call from Mart Megabucks, their CEO. He tells you that the company wants to introduce cost-cutting measures across its European operations. He has various questions on the employment law issues, and wants the answers "right away". The **alternatives** are:

- Selling part of Megacorp's business to the European giant, Minicorp. Minicorp has made it clear that its offer only stands if the deal can be closed within one month.
- Making redundancies of Megacorp staff - possibly several hundred per country. Megacorp would want to deal with these quickly (ideally within a six-week timeframe) and would be willing to "throw some money" at those concerned.
- Making modest cuts to staff benefits. Mart is sure that staff won't mind if it avoids the need for redundancies.

Questions

1. Is it feasible to agree to Minicorp's request for a one-month closing period? What would be the implications of the deal for Megacorp employees if the business is sold?
2. Could Megacorp deal with the redundancies quickly? Could it "buy-out" employment claims with severance packages?
3. Could Megacorp reduce staff benefits? If so, what procedural steps should it follow?

Notes

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WORKPLACE PRIVACY CASE STUDY

Facts

You work for a European subsidiary of Megacorp Inc. One afternoon, you are copied in on an e-mail to Mart Megabucks, their CEO.

Dear Sir,

"I feel that I should draw to your attention the fact that over the last few months, I have been asked to process some very large expenditure claims from Barry Bloomer. Some of them, apparently relating to "client entertainment", run into thousands of pounds, and there have been no receipts, but they have all been authorised by Chris Clanger. The other day I overheard Barry and Chris having a laugh about a £2000 bottle of Petrus which they had chosen at a restaurant the night before.

I know that Barry and I have never seen eye-to-eye - but trust me, something here is a bit fishy.."

Yours truly,

Wayne Whistle
(Accounts Clerk)

Mart calls you immediately and asks you:

- to get IT to download all e-mails from the PCs of Barry, Chris and their team, with a view to further investigation. He wants you to send any relevant ones over to him in the US.
- to discipline Wayne Whistle. He suspects that Wayne is trouble-making after his recent appraisal when he was told to "pull his socks up".

Questions

1. Are there any restrictions on your ability to download the e-mails of Barry, Chris and their team? If not, are there any restrictions on sending them to the US?
2. What are the implications of disciplining Wayne Whistle?
3. What further employment law issues are relevant in handling the investigation?

Notes

APPENDIX

INFORMATION AND CONSULTATION ON BUSINESS TRANSFERS

Overview

Country	Obligation to inform/consult in relation to affected employee?	Inform/consult Whom?	Timing of obligations?	Penalties for failure to inform and consult?
Belgium	Transferor/transferee must inform where business transfer is proposed and consult where measures are envisaged.	Works council (in companies with 100+ employees). Trade union representatives (in absence of works council). Affected employees (if no works council or trade union).	No formal time-scale, but information and consultation obligations must certainly be satisfied before any public announcement and before transfer takes place.	Criminal offence where failure to inform/consult. Fines and/or (less commonly) imprisonment for employer (or its representative).
France	Transferor/transferee must inform/consult where business transfer is proposed.	Works council (in companies with 50+employees). Employee delegates (in companies with 11+employees).	Information and consultation should be completed within a reasonable period before transfer takes place. Time taken will depend on when works council votes. In practice, a period of 6 weeks should be allowed.	Criminal offence where failure to inform/consult works council. Fines and/or (less commonly) imprisonment for employer/officers concerned. Works council may apply for court order requesting more time or information. May result in transaction being delayed by up to 4 months.
Germany	Transferor must inform/consult works council where transfer of part of business is proposed and business will be split. Economic Committee must also be informed where transfer of whole or part of business is proposed. No obligation for transferee to consult its works council unless it is	Works council (in companies with 5+ employees). Where more than one business affected, central/group works council. Economic Committee (in companies with 100+ employees).	No formal time-scale, but where works council must be consulted, employer and works council must negotiate "reconciliation of interests" agreement and social plan. Split or merger of business cannot proceed until agreement is reached. Economic Committee must be	Fines (administrative offence) where failure to inform/consult works council/Economic Committee. Case law indicates that works council may apply for injunction preventing employer from splitting, merging or otherwise changing business without undertaking

INFORMATION AND CONSULTATION ON BUSINESS TRANSFERS

Overview

Country	Obligation to inform/consult in relation to affected employee?	Inform/consult Whom?	Timing of obligations?	Penalties for failure to inform and consult?
	<p>proposed that acquired business/part be merged with existing business of transferee. Economic Committee of transferee must also be informed.</p> <p>Restructuring measures proposed by transferor/transferee may trigger additional works council consultation rights.</p> <p>Affected employees must also be informed about transfer (even where there is representation).</p>	<p>Affected employees.</p>	<p>informed early enough to enable proper consultation to take place on proposed transfer. However, this is subject to the condition that informing Economic Committee does not endanger business secrets. If this is the case, Committee can be informed at a later stage.</p> <p>Employees have 3-week period to decide whether they want to object to the transfer of their employment.</p>	<p>procedures described.</p>
<p>The Netherlands</p>	<p>Transferor/transferee must inform/consult where business transfer is proposed.</p> <p>Merger Code sets out an obligation to inform and consult trade union (where enterprise is established in the Netherlands and employs 50+ employees or belongs to a group that employs 50+ employees) in respect of a proposed "merger". Term "merger" is the acquisition or transfer of direct or indirect control over an undertaking or part thereof (whether through share or business</p>	<p>Trade union representatives.</p> <p>Works council (in companies with 50+ employees).</p> <p>Personnel representative body (10-50 employees).</p> <p>Personnel in a meeting (where no works council or personnel representative body).</p>	<p>No formal time-scale. Transferor/transferee must seek works council's advice regarding transfer in sufficient time to enable it to substantially influence decision whether to proceed with transfer or connected measures.</p> <p>Transferor/transferee must inform and consult relevant trade unions in sufficient time so that their opinion can still influence proposed decision. Works council should be informed of trade unions' opinion so that it can take this into account in consultation process.</p>	<p>If works council opposed to transfer (which would include circumstances where it has been insufficiently informed/consulted), it can apply to court on ground that management could not have reasonably reached its decision within 1 month of management's written notification of decision. During this 1-month period, company must suspend implementation of decision. If court grants appeal, it may <i>inter alia</i> issue an order requiring company to withdraw decision, in whole or in part, and to repeal specified consequences of that decision.</p>

INFORMATION AND CONSULTATION ON BUSINESS TRANSFERS

Overview

Country	Obligation to inform/consult in relation to affected employee?	Inform/consult Whom?	Timing of obligations?	Penalties for failure to inform and consult?
	sale). Where target business has less than 10 employees the rules do not apply.		If there is no works council and transfer affects at least 25% of workforce, transferor/transferee must consult personnel representative bodies at same time it would have consulted works council.	Sanction for failing to comply with Merger Code is that SEC can issue a public statement concerning non-observance of Code. Infringement of Code may also give rise to tortious claims although no case law as yet on this point.
UK	<p>Transferor/transferee must inform where business transfer is proposed and consult where measures are envisaged.</p> <p>Transferee must provide information to transferor in respect of envisaged measures.</p>	<p>Trade union representatives.</p> <p>Where no trade union recognised, elected employee representatives or other body appropriate for consultation.</p>	<p>No formal time-scale. Employer must inform early enough to enable consultation on envisaged measures to take place.</p> <p>Consultation must be with a view to reaching agreement on envisaged measures. Consultation should be undertaken prior to transfer over appropriate period (depending on the significance of the measures).</p>	<p>Compensation to each affected employee of up to 13 weeks' pay.</p> <p>Under proposed revisions to TUPE, transferor/transferee will be jointly and severally liable for any compensation award made by a tribunal for a failure to comply with the information and consultation requirements.</p>

Notes:

- Most jurisdictions provide for employee representatives to be informed and/or consulted directly where there is no employee representation.
- Procedures for information and consultation will vary according to national law.
- There may be additional obligations to consult any European Works Council.

INFORMATION AND CONSULTATION OBLIGATIONS ON COLLECTIVE DISMISSALS Overview

Country	Total Workforce	Number of dismissals	Period of dismissals	Minimum consultation period	Obligation to inform authorities	Penalties for failure to inform/consult
Belgium	21-99	10+	60 days	No formal timescale, but must properly inform/consult with works council (or in absence of works council, trade union representatives, employees themselves). In practice, consultation period may vary from 1 to 4 months.	Inform certain authorities such as National Employment, Federal Ministry of Employment, etc. Cannot dismiss for minimum 30-day period (extendable by National Employment Agency to 60 days).	Suspension of notice period, reinstatement or payment of compensation or reinstatement can be ordered. Criminal offence where failure to inform/consult. Fines and/or (less commonly) imprisonment for employer/directors concerned. If authorities not informed, cannot proceed with dismissals and increased exposure to penalties described above.
	101-299	10%+	60 days			
	301+	30+	60 days			
Germany	21-59	6+	None specified. Dismissals must be related to the same employer decision (which must involve a considerable	No formal timescale, but “reconciliation of interests” agreement must be reached with works council. If no agreement reached, reconciliation	Inform Unemployment Authorities where prescribed number of dismissals within 30 days (based on dates of expiry of individual notice	If works council’s rights not observed, it may apply for injunction preventing dismissals. Compensation may also be payable.
	60-499	10%+ or 25+				
	500 -599	30+				

INFORMATION AND CONSULTATION OBLIGATIONS ON COLLECTIVE DISMISSALS Overview

Country	Total Workforce	Number of dismissals	Period of dismissals	Minimum consultation period	Obligation to inform authorities	Penalties for failure to inform/consult
	600+	5%	change in business).	<p>board must be convened. If there is still no agreement, employer may proceed with its plans.</p> <p>Employer and works council must also agree on social plan. If no agreement reached, reconciliation board must decide provisions of social plan.</p>	<p>periods). Caution: Due to a recent ECJ ruling it is unclear whether this date is still correct or whether the relevant date is the date when notices of termination are issued (see Notes below).</p> <p>Opinion of works council must be presented to Unemployment Authorities or employer must show that works council has been informed at least 2 weeks prior to notification of Authorities.</p> <p>Termination of employment cannot occur until at least 1 month after notification of Authorities.</p>	Failure to inform authorities renders dismissals ineffective.
Italy	15+	5+	120 days (extendable by agreement with	Employer must provide information to trade unions and within 7 days,	Inform National Social Security Agency and Provincial/Regional	Dismissals ineffective. Reinstatement may be ordered and

INFORMATION AND CONSULTATION OBLIGATIONS ON COLLECTIVE DISMISSALS

Overview

Country	Total Workforce	Number of dismissals	Period of dismissals	Minimum consultation period	Obligation to inform authorities	Penalties for failure to inform/consult
			trade union).	<p>meet trade union to review reasons for dismissals, how they can be avoided etc. If unions do not seek consultation within this 7-day period, employer can proceed with dismissals. If they do, consultation must be completed over a minimum 45-day period. However, this can be extended by a further 30-day period, on request by Labour Office, if agreement is not reached.</p> <p>Minimum consultation period is therefore up to 75 (45 + 30) days.</p>	Labour Office. Latter will mediate in negotiations if no agreement reached.	<p>compensation payable. If reinstatement refused by employee, entitlement to additional 15 months' compensation.</p> <p>Risk of finding of antiunion behaviour where failure to inform authorities.</p>
The Netherlands	20+	20+	3 months	No formal timescale, but Centre for Work and Income (CWI) will expect proper negotiations to take place with unions/works	Inform CWI of proposed dismissals and apply for permission to dismiss. Minimum 1 month waiting period before application considered.	If no information provided to CWI, 2-month waiting period (from when information is properly provided) before application to

INFORMATION AND CONSULTATION OBLIGATIONS ON COLLECTIVE DISMISSALS Overview

Country	Total Workforce	Number of dismissals	Period of dismissals	Minimum consultation period	Obligation to inform authorities	Penalties for failure to inform/consult
				<p>councils before it gives permission to dismiss.</p> <p>Employer must inform trade unions at same time as informs CWI of proposed dismissals (see next column).</p>		dismiss considered.
UK	-	<p>20-99</p> <p>100+</p>	<p>90 days</p> <p>90 days</p>	<p>30 days</p> <p>90 days</p> <p>Note that these are minimum periods. Employer must consult trade unions (or elected employee representatives) “with a view to reaching agreement”, so that a longer period may be necessary for process to be completed.</p>	Inform Department of Trade and Industry within minimum consultation time-scale (see previous column).	<p>Compensation to each affected employee of up to 90 days' pay (plus exposure to unfair dismissal compensation).</p> <p>Prosecution/fine for failure to inform authorities.</p>

Notes:

- This table highlights when collective consultation obligations arise in the event of collective dismissals, prescribed timing obligations and penalties for non-compliance.
- The consultation procedure will vary according to national law. There is, for example, a requirement in certain jurisdictions to prepare and negotiate a social plan dealing with matters such as retraining, re-employment and compensation payments.
- The recent European Court of Justice ruling in *Junk v Kühnel* (C-188/03) confirms that notices of redundancy cannot be given until after the consultation process is completed and the public authorities have been notified. In practice, this means completing the required consultation/notifications and then giving notice of termination (or making a payment in lieu of notice).
- Additional rights may arise under laws on individual dismissals.
- There may be additional obligations to consult any European Works Council.

SNAPSHOT: COMPARATIVE CHALLENGES OF LABOUR LAW REGULATION

COUNTRY	GENERALLY	HIRING	COLLECTIVE REGULATION	INDIVIDUAL DISMISSALS	COLLECTIVE DISMISSALS
Belgium	Yellow	Yellow	Yellow	Yellow	Yellow
France	Red	Yellow	Red	Red	Red
Germany	Red	Yellow	Red	Red	Red
Italy	Yellow	Yellow	Yellow	Yellow	Yellow
The Netherlands	Red	Yellow	Red	Red	Red
Spain	Yellow	Yellow	Yellow	Yellow	Yellow
Switzerland	Green	Green	Green	Green	Yellow
United Kingdom	Yellow	Yellow	Yellow	Yellow	Yellow
United States	Green	Yellow	Green	Green	Yellow

Key:

Red = Difficult

Yellow = Some challenges

Green = Generally less restrictive

Hiring refers to the recruitment process and minimum terms and conditions of employment

Collective regulation refers to the rights and powers of trade unions, works councils and other employee representative bodies

Individual dismissals refers to the process for effecting the lawful dismissal of an individual employee

Collective dismissals refers to the process for effecting the lawful dismissals of a group of employees