Proskauer

International HR Best Practices Tip of the Month

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This Month's Challenge

Multinational employers contemplating M&A transactions in Europe must not overlook the obligation to “inform and consult” with both the national works council and the European works council.

Best Practice Tip of the Month

Before any M&A deal in Europe, plan ahead. Remember that both the local works council and the European works council must be given information and consultation before the deal can be proposed.

French Appellate Court Highlights Importance of European Works Councils in Corporate M&A Transactions

Companies contemplating a merger or acquisition in Europe must satisfy two “information and consultation” obligations. Under the European “Acquired Rights” or “Transfer of Undertakings” directive, a business considering a merger or acquisition needs to confer with the local union or “works council” representing the employees within each affected EU country, provide pertinent documents and information, and consider the employees’ opinions in good faith, before deciding whether or not to proceed with the proposed transaction. (EU Council Dir. 2001/23/EC at art. 7.) This “information and consultation” obligation applies both to potential buyers and to potential sellers, and the obligation exists even if the local employer entity as yet has no existing relationship with a union or “works council.” It may be necessary to hold elections to select special employee representatives to consult about a proposed transaction.

These local-level employee consultations need to get done before a business makes a formal decision whether or not to do an M&A deal. Neglecting to “inform and consult” with local employee representatives about a proposed M&A deal will seriously jeopardize the deal itself: Local works councils and unions across Europe have successfully delayed, and sometimes even derailed, M&A deals when the employer had failed to comply with the crucial local “information and consultation” step.

In addition to local consultations with local unions and works councils within European countries, the law imposes a completely separate layer of employee representation with so-called European-level employee representatives: European Works Councils (“EWCs”). EWCs are supra-national European-level labor representatives. European businesses with at least 1,000 employees and operations in at least two EU countries are required to establish an EWC. This body must be consulted on any initiative that could potentially have a transnational impact on the workforce. Thus, in the M&A context, a company considering a merger needs to comply separately with “information and consultation” obligations on both the national level and the EWC level—even if some of members of the two bodies are the same persons. The practice of focusing on the local works council and giving cursory attention to the EWC has been sharply curtailed by recent case law, which is now putting teeth into the EWC “inform and consult” obligation in the M&A context.

The Paris Court of Appeals (the appellate court one step below France’s Supreme Court) recently sent a clear message to employers that failure to properly consult both the national and the European works council will mean postponement of the implementation of any plan requiring such consultation. While past decisions have addressed the timing of consultations (requiring the consultation with the EWC to occur before the decision at issue is made in order to give the consultation a meaningful effect and allow for the works council to discuss and analyze the issue at hand), this latest ruling focuses more on the substance of the consultation and clarifies that employers must pursue their EWC consultation obligations just as vigorously and methodically as their national works council duties.

The November 2006 decision by the Paris Court of Appeals upheld the decision of a lower court to enjoin the merger of two prominent energy corporations, Gaz de France ("GDF") and Suez, until GDF properly informed and consulted with its EWC. GDF's compliance with the obligation to inform and consult with its national works council did not suffice. The court noted that the EWC's receipt of requested information on the merger was delayed by five months, it never received any comprehensive document detailing the consequences of the merger on employment, and its members had not received answers to their questions regarding the plan. At the trial court level, the court concluded that the information and consultation procedure had not been properly conducted vis-à-vis the EWC and enjoined GDF from proceeding with the merger until the EWC had been properly informed and consulted. GDF immediately appealed.

The Court of Appeals upheld the lower court's decision in favor of the EWC, taking note of GDF's significant delay in conveying documents to the EWC—taking five months to provide the requested documents and another three days to provide translations. GDF argued that it had complied with its inform and consult obligation because some of the members of the EWC were also members of the national works council and had received some of the documents at issue. The court rejected this argument on the grounds that the obligation to inform and consult with the EWC was not satisfied just by giving some information to individuals acting in another capacity. Employers should take note that this type of tangential exposure to the information/consultation process is not sufficient in and of itself to fulfill the information/consultation obligations. Further, because GDF did not initially challenge the EWC when the council first made its decision to designate an expert to analyze the consequences of the merger, the Court refused to entertain GDF's subsequent objections to the amount of time it would take that expert to complete his analysis.

The Court concluded that it was GDF's responsibility, "as the initiator of the process … to plan a consultation schedule which complied with the legal requirements and which allowed for the implementation of all its various mandatory stages." Thus, the Court upheld the lower court's order in its entirety and ordered GDF to pay the EWC €7500, in addition to appellate costs.

Corporations conducting any business requiring consultation with national and European works councils should, therefore, heed this warning and ensure the provision of all relevant information to both councils in a timely fashion or risk postponement of planned initiatives and, by extension, exposure to the financial repercussions of such delays. The fact that the Court postponed the merger of two such prominent companies should signal to employers that it will not hesitate to do so again regardless of the stature of the companies involved.