EMPLOYMENT LAW AND HR ISSUES IN M&A

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Christopher Fisher (Partner) and Michelle Last (Senior Associate) are members of Mayer Brown's Employment and benefits Group (EBG), which advises clients on all aspects of the employment relationship. This includes the employment aspects of international M&A deals, from outsourcings in a handful of European countries, to substantial acquisitions and disposals across the globe. Recent transactions include advising on a business sale impacting numerous European jurisdictions and co-ordinating legal advice in over 40 jurisdictions on the hive-off of part of a global business.

Mayer Brown's Global EBG covers the world with a combination of its own offices and a carefully nurtured selection of internationally experienced law firms in other countries with whom our Firm's lawyers have worked closely for many years. Our EBG helps businesses address the full range of employment law issues, both contentious and non-contentious, with over 100 employment law specialists practising across Europe, Asia and the Americas on national and cross-border employment law matters.

WHAT ARE SOME OF THE TYPICAL EMPLOYMENT LAW/HR ISSUES WHICH CAN ARISE IN CORPORATE TRANSACTIONS?

Identifying which employees are employed in the target business can be a difficult and time-consuming task, particularly where the business is of a substantial size and/or there are contractors and/or international secondments. It is important to deal with this at the outset by liaising with local personnel who are assigned responsibility for identifying impacted employees in each location. This helps to ensure there are no last minute surprises, which can cause delay and further add to cost.

Likewise, it is important to take steps to retain key employees and protect the business going forward. Particular care needs to be taken, for example, to ensure that any non-compete provisions contained in employment contracts will be relevant to the business after the transaction completes.

WHAT ARE SOME OF THE MAJOR CHALLENGES WHICH CAN ARISE IN ACQUIRING AND MERGING WORKFORCES?

One common concern for purchasers is the ability to harmonise terms and conditions of employment. This can be difficult to do, particularly in Europe if the transaction is one to which the Acquired Rights Directive (ARD) applies, because part of the protection given by the ARD is to prevent such changes taking place. There are, however, strategies which can be deployed to overcome such issues and we have worked with a number of employers to effect changes to terms and conditions of employment, even where the ARD applies.

CROSS-BORDER TRANSACTIONS CAN PROVE TO BE MORE COMPLEX WHEN IT COMES TO HR AND EMPLOYMENT ISSUES. CAN YOU DRAW UPON YOUR OWN EXPERIENCES OF ADVISING ON HR ISSUES IN CROSS-BORDER DEALS? WHAT CHALLENGES DID YOU FACE AND HOW WERE THESE OVERCOME?

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In Europe, the ARD will normally apply in asset sales and will bring with it various legal obligations designed to protect employees affected by the transaction. The ARD may also apply in share sale scenarios if there is to be a hive-up, hive-down, or outsourcing before or after the transaction. However because each Member State is responsible for introducing its own legislation to implement the ARD, there can be local differences. For example, on a recent pan-European outsourcing, the transaction was deemed to fall squarely within the UK's ARD legislation, but the same transaction in France fell outside of the equivalent French law. It is important to take advice on the structure of the deal at an early stage as this will invariably impact on the timeline. Failure to factor in sufficient time to comply with local obligations can be costly and delay the transaction. For example, in France, a breach of local consultation provisions can entail criminal sanctions and potentially court action to prevent the transaction proceeding.

HOW ARE YOU ABLE TO ASSIST PROSPECTIVE PURCHASERS IN ADDRESSING PENSIONS & BENEFITS OBLIGATIONS AND CULTURAL CONSIDERATIONS?

We have specialist benefits lawyers within the EBG who advise on various different legal obligations, in particular the impact of M&A transactions on pension and share-based incentives. These can be high-value features in many cases, either because the purchaser is obliged to replicate them or wishes to remove or replace them.

DO YOU HAVE ANY PREDICTIONS FOR EMPLOYMENT LAW OVER THE NEXT 12 MONTHS?

The UK Government is contemplating amending TUPE in an effort to reduce the burden on employers. It is concerned that more transactions are caught by the legislation than is strictly required by the ARD, notably in cases of outsourcing. However if the scope of TUPE is reduced, it will not necessarily simplify things as there will simply be greater debate between the parties in terms of whether the ARD is invoked or not.

ON A LIGHTER NOTE, WHAT IS THE BEST PIECE OF ADVICE EVER GIVEN TO YOU?

Take the time to understand the other side's point of view ... even if you then insist on your own!

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In the aftermaths of the global financial crisis, The Netherlands is experiencing a rapidly changing economic and legal landscape which will have a significant impact on the HR aspects of corporate transactions in the coming years. Not only has there been an unprecedented volume of new legislation as regards e.g. corporate governance and executive remuneration, but also has the crisis affected the financial possibilities and business operations of the parties involved in M&A deals.

A striking example is the way corporates and private equity look at pensions when considering the acquisition of a company. Prior to the financial crisis, pension schemes caused less of a debate between the parties involved. Nowadays, with half of the Dutch pension funds experiencing falling funding ratios as a consequence of which pension funds are under close scrutiny of the relevant regulator and the Dutch government considering to change the legal framework for pension providers, pensions is often a concern. Instead of, by rule of thumb, including the applicable scheme in a transaction, parties tend to look for alternative solutions such as closing the applicable pension scheme prior to completion and offering new arrangements (for instance via PPIs, the Dutch IORP-vehicle) or splitting pension liabilities between seller and buyer as per the date of completion of the transaction. Such solutions may, however, be met with restraint by e.g. employees and their representatives and require in depth knowledge of, and close collaboration between, relevant M&A advisors.
As this 'sea of change' is all but passed, planning ahead on the HR aspects of M&A transactions - both prior to as well as during transactions - is currently even more key than in the past.

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In a cross-border transaction, employment/HR issues can wreak havoc. In the due diligence process, the acquirer may learn that the benefits programs are excessive or that the pension is underfunded to the extent that it can kill a deal. Consultation requirements with works councils and employee representatives can be very challenging for US-based multi-nationals who are unaccustomed to having to communicate anticipated M&A transactions to employees ahead of signing the deal.

WHAT ARE SOME OF THE MAJOR CHALLENGES WHICH CAN ARISE IN ACQUIRING AND MERGING WORKFORCES?

One of the major challenges with merging workforces is trying to synthesize the benefits between two groups of employees. Additionally, if the transaction has triggered "business transfer laws" (TUPE type laws) in an asset deal, then the acquirer's planned restructuring may seriously be hindered due to the fact that any dismissal will be automatically unfair.

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One very challenging transaction involved the acquisition of very high level executives in more than 20 countries. Preparing the executive employment agreements was very challenging as the law differed in how certain equity plans and benefits could be administered. Another challenge is educating acquirers about the consultation and notice requirements which can be completely counter-intuitive to US-based executives. Designing and implementing a communication strategy that works in all jurisdictions can be very difficult—sometimes we have had to carve out the France piece of the transaction in order to keep the deal moving. Putting France on a separate track can sometimes be the only practical answer!

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