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The Key To Managing Staff Representatives' Consultations In M&A Transactions In France

Viviane Stulz and Philippe Chapuis, July 2012

An M&A transaction that involves a French company will require the prior information and consultation of the French staff representatives even though the decision may have been taken by the parent company situated outside of France. Not complying with such consultation obligations may have dire consequences for the French management: for instance, when Marks & Spencer's UK management decided to close all its French stores, it did not inform and consult the French Works Council before this was announced publicly, on the reasonable consideration that the decision was not in the hands of the French company. As a result, nonetheless, the President of the French company was sued by the Works Council for not having respected its obligations and criminally sanctioned. When, however, a company complies with such obligations, the deal may not be prevented by the French staff representatives.

Under French law, the Works Council must be informed and consulted inter alia not only when the French company decides to sell whole or part of its business but also when the parent company decides to sell whole or part of its participation in the share capital resulting in a change of the company's control. Furthermore, considering that the transaction may impact the conditions of work and will in any event be a source of stress for the employees, the Health & Safety Committee also needs to be informed and consulted. These consultations are separate from the possible need to consult the European Works Council.

Both the Works Council and the H&SC must first receive a written detailed information memorandum on the contemplated deal, its cause, purpose and consequences on the company's organisation and for the staff; this information will include financial data on the company's situation, at present and after the deal, and possibly on the deal itself. The staff representatives may refuse to render their opinion if they are insufficiently informed on the deal and its consequences; it is therefore essential to take the necessary time to prepare a complete presentation of the envisaged transaction before launching the consultation process with either of the two institutions.

The timing of the consultation process is a key issue: the Works Council and the H&SC must have rendered their opinion prior to the decision being made. It is, however, sometimes difficult to determine at what time the decision is taken. Is it when the deal is signed? Is it upon closing? Is it when the shareholders ratify the decision to make the deal? Is it when the board of directors makes the first decision? In essence the Works Council and the H&S Committee's opinions must have been requested at a time when their views can still have a 'useful effect' and be taken into consideration by the employer and therefore before the decision can no longer be overturned or amended. It is thus essential that when the parent company contemplates a transaction, it does not keep it secret from the French management but on the contrary involves it at an early stage so that the latter may prepare for the consultation process. It is also absolutely crucial for foreign parent companies to refrain from making the proposed deal public before the consultation process in France is over, even if the deal concerns several countries. The French employees often discover the transaction in the press, or from a worldwide email sent to all employees throughout the group, even though their representatives have not yet even been informed. The main difficulty arises when the parent company is quoted on a stock exchange, meaning that the primacy of the information must be reserved for the stock market. There is no solution to these conflicting rules since there is no way of ensuring the total confidentiality of the information disclosed to staff representatives whatever precautions may be used. In practice, therefore, the stock market rules will often take precedence over those relating to prior consultation of French representatives.

The purpose of the consultation of the Works Council is for it to understand the deal and have the employer take account of the employees' views before finalising its decision, particularly if it is to have drastic consequences for staff. More complex is the role of the H&S Committee. Legally speaking the H&SC is consulted before any major organisation decision that modifies health, safety or security conditions, especially before a major transformation of work stations, a modification of the rhythms of work or of technology. The role of the H&SC remains relatively vague in the texts but case law has extended it widely in recent years; although one may consider that a decision to merge or sell a company or its share capital does not modify health, safety or security conditions, it is now considered that the repercussions on employees is a source of stress that requires the prior consultation of the H&SC. The difficulty lies in the time schedule for such consultation: the H&SC is convened with a 15-day notice and, like the Works Council, may appoint an expert who may take up to 45 days to give its report, delaying the consultation.

Thus the issue is one of timing; it is essential that the parent company informs the French management as early as possible when it contemplates a project for the latter to start the consultation process with the relevant representatives early enough in order not to delay the transaction in France. At the same time, the consultation may not be commenced too early. It cannot be entertained until the employer has sufficiently complete information to give to staff representatives for the consultation to be effective and come to its end; failing the availability of full information, there is

a risk that representatives may refuse to give their opinion.

The most difficult situation nevertheless remains the decision to close the company or make a mass redundancy in the French company when the group is profitable. Redundancies may only be carried out in a French company provided that it – and the group to which it belongs – is not profitable or can demonstrate the absolute need to restructure to protect against competition.

Redundancies in profitable groups constitute unfair dismissals so that, in the global economic downturn, the consultation procedure is often protracted and costly. The new government in France may take measures to make redundancies even more difficult in the future, although it is unlikely that redundancies will be made subject to prior administrative authorisation (as was previously the case) or prevented altogether in profitable groups.

From experience, the difficulty in France is not in obtaining the representatives' opinion, as it will generally always be given, but rather that one cannot determine in advance when the consultation will be closed. Even if 'time is money', the key factor of success is taking time to deal with the consultation process, taking into account the views of the representatives, working with them rather than opposing them. The staff representatives should not be fought upfront in M&A transactions but rather used as a tool to reassure staff and gain their cooperation, whilst in mass redundancy procedures the key element is to ensure that employees find new employment quickly.

France is not such a difficult country in terms of labour law, but one must accept the need to 'play the game' properly.

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