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Employment Newsletter

December 2007

This sixth edition of the European Newsletter to be issued by the CMS Employment Group provides an overview of Directive 2001/23 of the EC on the Transfer of Undertakings. This newsletter also gives an update on the anti-discrimination legislation and on the need for flexicurity in the European labour markets. Furthermore, we are delighted to introduce CoreShore, a unique tool that helps organisations to carefully select the right offshore or outsourcing location.

CMS is the alliance of nine major European law firms with a workforce of approximately 2,000 lawyers present in 26 jurisdictions. The CMS Practice Group Employment and Pensions consists of more than 200 partners and associates representing the labour and pension law departments of the various CMS member firms.

The labour and pension law departments of each CMS firm have a long history of close association and command strong positions, both in our respective homes and on the international market. Individually we bring a strong track record and extensive experience. Together we have created a formidable force within the world's market for professional services. The member firms operate under a common identity, CMS, and offer clients consistent and high-quality services.

Members of the Practice Group advise on labour law and social security issues affecting business across Europe. The group was created in order to meet the growing demand for integrated, multi-jurisdictional legal services.

Employment issues can be particularly complex as there is such a wide range of different laws and regulations affecting them. The integration of our firms across Europe can simplify these complexities, leaving us to concentrate on the legal issues without being hampered by additional barriers. In consequence we offer coordinated European advice through a single point of contact.

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Cross-border transfer of undertakings

Article 1 (2) of Directive 2001/23 of the EC on the Transfer of Undertakings (the "Directive") provides that it shall apply if and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the European Union. This implies that all cross-border transfers from one member state to another are subject to the Directive. Moreover, since the Directive only refers to the place of origin of the business to be transferred and not the destination, it also applies to transfers outside the territory of the European Union.

However, as the member states have a wide margin of discretion regarding the implementation of the Directive, a uniform application of national law on cross-border transfers is not guaranteed. As a result, the definition and scope of a transfer of undertaking varies per member state, as well as the level of protection of the employees. The main legal problems that may arise in that respect, will be identified hereinafter.

If – for instance – a German entity purchases the assets and liabilities from a Dutch entity, while all activities are located in the Netherlands and will remain there after the transfer, this will in itself not cause any legal complications from a cross-border perspective. Pursuant to international private law, the law of the member state in which the business is located, will apply (i.e. Dutch law) and will therefore determine whether a relevant transfer of undertaking exists and what the legal position is of the transferor, the transferee and the transferred employees. Moreover, the individual employment relationships will remain subject to Dutch law for basically the same reason.

Legal complications arise when – for instance – the German entity purchases the assets and liabilities from the Dutch entity in order to integrate the activities into its existing organisation structure in Germany right after the transfer. Just as in the previous situation, the terms and conditions of the transfer itself will be subject to Dutch law. As of the date of the transfer, however, the individual employment relationships will be subject to (at least mandatory) German law by virtue of international private law. If we would assume that German law has a considerable lower level of protection of employees than Dutch law, the transferred employees will still be considerably worse off in the new situation, regardless of the protection measures which form the basis of the Directive.

It should be noted that the situation as described in the previous paragraph does not occur very often, as the application of the Directive and the implementing national law is subject to the economic entity in question retaining its identity. A cross-border transfer leads to a change of country and generally language, as well as changes in the legal, economic and social context. Those circumstances inevitably threaten the identity of the transferred economic entity. The same applies if the activities will be materially restructured upon the transfer in order to fit within the existing organisation structure of the purchaser.

If we would assume that, in spite of the above, a cross-border transfer of undertaking takes place, an interesting new question occurs: what will this mean for the transferred employees in practical terms? On one hand, the Directive provides that they will transfer into the employment of the transferee (the German entity) by operation of law, i.e. they have no right to remain employed by the transferor (the Dutch entity). On the other hand, however, the travelling distance to the new business location abroad will in most cases – and in all reasonableness – be too long for an employee in order to claim his right of employment. If this employee decides not to continue his activities abroad, is he considered to have resigned voluntarily or is he entitled to any kind of severance payment or damage from the transferee (or the transferor)? Although it seems reasonable that the latter is the case, it is questionable how this relates to the guiding principles of the Directive.

It may therefore be concluded that, in the event of a cross-border transfer of undertaking, the transferred employees are not necessarily protected adequately by the Directive. For further information please see our entire study posted on the website of the EU Commission (link: http://ec.europa.eu/employment_social/labour_law/documentation_en.htm#21).

Anti-discrimination legislation

The European Union has adopted legislation setting minimum requirements on improving labour standards and strengthened employee's rights. An important part is the anti-discrimination legislation. The legislation prohibits discrimination in employment and training on the grounds of racial or ethnic origin, sexual orientation, religion or belief, age and disability. The rules on racial discrimination also cover other areas such as education, social security and healthcare, access to goods and services and housing. Due to the limited scope of this article, we will only discuss the discriminatory characteristics as set out in the EU Directives. Please note, however, that some national laws offer protection beyond these discrimination grounds, including, for example, trade union membership or part-time employment.

(In)direct discrimination

Since discrimination often takes subtle forms, both direct and indirect discrimination are covered by the European anti-discrimination rules. Direct discrimination occurs when a person is treated less favourably than another in a comparable situation because of their racial or ethnic origin, religion or belief, disability, age or sexual orientation. Indirect discrimination occurs when an apparently neutral provision, criterion or practice would disadvantage people on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation unless the practice can be objectively justified by a legitimate aim.

Anti-Discrimination Directives and the European Court of Justice

For many years the focus of EU action in the field of non-discrimination was on preventing discrimination on the grounds of nationality and sex. In 1997, however, the EU Member States approved unanimously the Treaty of Amsterdam (which entered into force on 1 May 1999).

Pursuant to Article 13 of the Treaty of Amsterdam, the European Union is granted the power to take action to combat discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation. Ever since the Treaty of Amsterdam, new EU Directives have been enacted in the area of anti-discrimination, such as; Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, and Council Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions.

The EU Directives are of present interest as the European Court of Justice has by now assessed against the EU Directives in quite a number of cases. Most recently, the European Court of Justice has declared that dismissal of a female employee due to her pregnancy and/or birth of a child is in violation of Council Directive 76/207/EEC[1].

What do the anti-discrimination rules imply for employers?

The new rules apply to all private and public sector employers including self-employment, such as the conditions applying to the practice of certain trades or professions.

All employers must review their employment practices to make sure that they are not discriminating directly or indirectly for example in recruitment procedures, selection criteria, pay and promotions, dismissals or access to vocational training. The anti-discrimination rules apply to all stages of the employment contract from recruitment through to termination. Furthermore, the employer will be prohibited from instructing others to discriminate on the prohibited grounds.

Employers will have a duty of "reasonable accommodation" in respect of candidates or employees with a disability. Employers are required to take appropriate measures to enable a person with a disability to have access to employment and training unless doing so would impose a disproportionate burden on the employer. "Reasonable accommodation" may include, for example, providing

1 European Court of Justice, 11 October 2007, C-460/06, Nadine Paquay against Société d'architectes Hoet + Minne SPRL.

wheelchair access, adjusting working hours, adapting office equipment or simply redistributing tasks between members of a team. To determine the disproportionate burden, the financial and other costs entailed, the scale and financial resources of the reorganisation and the possibility of obtaining public funding or any other assistance should be taken into account.

Harassment

The definition of harassment is taken from the European Commission Code of Practice in relation to sexual harassment. Council Directive 2002/73/EC introduced a definition of sexual harassment into EU law. The Directive sets out two definitions: (1) Harassment is where unwanted conduct related to a person's sex occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment; (2) Sexual harassment is where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Help for victims of discrimination

EU Member States must provide for a certain minimum standard ensuring protection against discrimination for reasons relating to racial or ethnic origin, sex, religion or belief, disability, age or sexual orientation. The EU Directives require that EU Member States give victims of discrimination the right to make a complaint through a judicial or administrative procedure and that appropriate penalties are imposed on those who have discriminated. The rules also provide for sharing the burden of proof in civil and administrative cases. This will make it easier for people who have experienced discrimination to prove it.

In addition, the legislation on racial discrimination requires EU Member States to designate bodies for the promotion of equal treatment which will provide independent assistance to the victims of discrimination, conduct surveys and studies and publish independent reports and recommendations. Victims of discrimination may also be supported by a non-governmental organisation like the European Anti-Discrimination Council or a trade union who have a legitimate interest. The EU Member states must promote equal treatment through national organisations.

Conclusion

The implementation of the European anti-discrimination legislation has an impact on Europe. Apart from the UK, the Netherlands and Ireland, most of the European countries do not (yet) have sophisticated anti-discrimination legislation in place. Now that the European Union has adopted legislation setting minimum requirements on anti-discrimination, hopefully the influence hereof will affect the European countries to implement anti-discrimination legislation providing sufficient protection for employees.

Labour law in the European Union

In November 2006 the Commission of the European communities started a public debate in the EU on how labour law can evolve to support the objective of achieving sustainable growth with more and better jobs. The modernisation of labour law constitutes a key element for the success of the adaptability of workers and enterprises. This objective needs to be pursuit in the light of the communities' objectives of full employment, labour productivity and social cohesion. The European Counsel has called for mobilising all appropriate national and community resources to promote a skilled, trained and adaptable workforce and labour markets responsive to the challenges stemming from the combined impact of globalisation and of the ageing of European societies. It emphasises that the responsiveness of European labour markets should be increased to promote economic activity and high productivity.

The drive for flexibility in the labour market has given rise to increasingly diverse contractual forms of employment which can differ significantly from the standard contractual model in terms of the degree of employment and income security and the relative stability of associated working and living conditions. Next to the drive for flexibility employment security and reducing labour market segmentation is crucial. Therefore the new wording "flexicurity" has been used.

1. The EC is of the opinion that labour law should be modernised making labour and social security laws more sufficient to assist workers in making transitions from one status to another, whether in the case of involuntary discontinuities (e.g. dismissal and unemployment) or voluntary discontinuities (e.g. in the case of education and training leave, caring responsibilities, career breaks and parental leave). The problems of female workers who are disproportionately represented in new forms of work arrangements and who still face obstacles in seeking access to full rise and social benefits, also need to be addressed.

2. Another issue is the growing incidence of temporary agency work leading to changes in labour law. Types of temporary agency work is regulated in most member states through a mix of legislation, collective labour agreements and self regulation. The commission's proposal for a directive on temporary agency workers seeks to establish the non-discrimination principle to insure that agency workers are treated no less favourably than the regular workers.

3. Next to these issues the organisation of working time is a hot topic. The commission is reviewing the situation in order to provide greater flexibility for both employers and employees, while ensuring a high standard of protection of workers health and safety.

4. Fourth issue is the mobility of workers as most EU labour law legislation has left the definition of worker to the member states. It has been argued that member states should retain discretion in deciding the scope of definitions of worker used in different directives. Freedom of movement is an increasing point of discussion in respect to national law versus community law. Difficulties associated with the different definitions of worker have emerged particularly in connection with the implementation of directives on posting of workers and transfer of undertakings.

The EC has initiated the public consultation during the first quarter of 2007 and a follow up Commission communication was recently published. In this EC communication EC states that it is appropriate to reach a consensus at EU level on a series of common principles of flexicurity. These common principles could be a useful reference in achieving more open and responsive labour markets and more productive work places. This should help member states / in the establishment and implementation of flexicurity strategies which fully take into account their own respective specific challenges, opportunities and circumstances, with the active involvement of social partners.

In the paper a list of common principles is summarised and it has been set out a pathway for carefully planning and negotiating combinations and sequences of policies and measures. These pathways have been developed on the bases of the member states situations and of the report of the Flexicurity Expert Group. The member states, taking account of their

own particular situation and institutional background should study their specific challenges and the typical pathways that can help to address them in order to design their own comprehensive pathway towards better combinations of flexibility and security.

Issues to be further discussed are about contractual arrangements, lifelong learning, active labour market policies, social security systems, trust between social partners and sequencing and financing of those measures.

So, there is a huge discussion going on for the years coming. We will follow the progress and outcome and we will inform you consequently.

CoreShore

CMS is pleased to introduce you to CoreShore, a unique assessment tool able to help you define the optimal location to set up a business process outsourcing centre for your corporation. CoreShore will help you to pinpoint the most favourable location based on your specific management requirements and the objectives the new facility will have to meet. Next to looking for a new location, it is a tool to find out if you are still on the right location.

The CoreShore tool delivers a ranking of cities and countries in scope, thus providing precious input for your corporate decision making. We believe that today's explosion of jobs moving to near and offshore sites a companies' decision on sourcing locations should only be taken after a careful assessment of its needs and a detailed analyses of prospective cases. As said before, this could include a reconsideration of your current location.

CoreShore provides a process that enables company management to express its needs precisely and defines and prioritises detailed criteria that must be met by the locations in scope. The ranking methodology is based on triple A data, such as cost of labour, cost of living, productivity, inflation, infrastructure, language capabilities, schooling, labour market, taxes, labour legislation flexibility, criminal/bureaucracy indexes, etc. This ranking will be shown with a detailed description of the methodology including in-dept findings.

If you are interested, please contact CMS at coreshore@cmslegal.com.


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