

Ius Laboris Webinar

M&A and employment law, part 2 – Europe

Wednesday 23 June 2021

15:00 (CEST)











STRUCTURING THE DEAL

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DEAL STRUCTURE AS DRIVER FOR IMPLEMENTATION SUCCESS

- Share Deal: Acquires target with all rights, obligations, encumbrances / no “shaping” the target
 - Not a TUPE case (but post-deal merger/restructuring can trigger TUPE)
 - Information and consultation rights ( varies by foreign or local entities; French target > 50 employees)
 - Especially:  Consultation with works council before binding agreement! (➡ Put-option/Separate share purchase agreement)
- Asset Deal: Acquires only specific target assets / possibility to cherry-pick
 - Can be TUPE case – Especially relevant: asset-light business transfers ( Strict interpretation)
 -  /  Employees assigned correctly? [ECJ 26 Mar 2020, C-344/18 (*Govaerts*)]
 - I&C rights and obligations
 - Pension schemes (Transfer of accruals ensured? Membership in pension funds? Etc.)
- Mergers (typically trigger TUPE;  special considerations apply if employer ceases to exist)
- Cross-border measures (may trigger EWC or similar body involvement)
- Business bought out of insolvency/liquidation/administration: modified TUPE rules apply
- Take-over bids for listed companies: Specific information and consultation requirements



DUE DILIGENCE

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TRENDS AND OBSERVATIONS

- **Approach:** 'Red flag' or more; Q&A process; use of warranties to establish state of affairs/flush out further info; indemnities; consider how you might remedy issues post completion.
- **TUPE?** If there will be a TUPE transfer of rights and liabilities, may see more due diligence on what amounts to contractual entitlement e.g. query status of employee benefits or bonus scheme.
- **Key issues:** employment contracts; disguised employment and tax/social security; change of control provisions/golden parachute; dismissals/redundancies – including collective; claims/disputes and compliance with laws; bonus and share schemes; pensions; working time; union issues; health and safety; labour negotiations; and increasingly, data protection and corporate social responsibility.
- **COVID-19 impact:** initial shock then rebound for M&A; issue-spotting impacted e.g. more use of short-time working, need to check compliance with any state rescue scheme, union and works councils push for longer-term job security measures.
- **GDPR:** Use of data transfer agreement.







GETTING THE PROCESS RIGHT

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COMPLY WITH INFORMATION & CONSULTATION REQUIREMENTS

- **Transnational projects:** require close cooperation/coordination with other countries involved (communication, consultation, etc)
- **Consultation requirements prior to a transfer:**

				
Share deal	Information and consultation process with works council (French entities)	Information and consultation with economic committee / works council	None	None
Asset deal	Information and consultation process with works council	Only in the case of operational change (which can be the case e.g. in a split/merger of operations)	Consultation only required where there are 'measures' (very broadly interpreted)	Consultation with works council only if transaction might impact working conditions

- **(France)** Provide works council(s) with detailed information about the project (reasons for the project, description, provisional timeline, impact on business and organisation, consequences on employees); Arrange meetings to respond to any questions; Communicate information requested by the works council expert (if any); obtain formal opinion (not binding). Timeline: 1 month, extended to 2 months if the works council decides to hire an expert to assist it
- **(UK)** consultation with union or with existing standing body of employee reps or invitation of affected employees to choose employee reps. Timeline: must happen 'in good time' (1 month prior to transfer – between signing and closing)
- **(Germany)** If an asset deal constitutes operational change, seek agreement with works council before the transfer
- **(Spain)** In case of asset deal, information or consultation (if changes in working conditions) must be done « with adequate notice » (i.e at least 30 days before the transfer)

GETTING THE PROCESS RIGHT

CHECK LOCAL PECULIARITIES

- **Country specifics:**
 - **(France)** Additional obligation for legal entities with less than 250 employees (with some exceptions): Information of the employees of the target about the owner's intention to transfer the control of the company or the assets and the possibility for the employees to make an offer ("*Hamon Law*"). Timeline: at least 2 months before the signing, unless each employee has informed the company of his/her decision not to make an offer
 - **(France) Concentration procedure (anti-trust):** The French works council must be informed within 3 days of the publication of the press release relating to the notification of the project to the anti-trust authorities; Work council can decide to hire an expert to analyse the potential consequences of the transaction.
 - **(Germany, Spain) Mergers or demergers:** Specific information duties in given deadlines, including consultation with works council - Impact of transaction to be included in the Director's report

GETTING THE PROCESS RIGHT

INFORM IMPACTED EMPLOYEES

- **Share deal:** no requirements, but common for Buyer and seller to put out a positive communication
- **Information on TUPE transfers :** Employees must be informed of a TUPE transfer in due time (timeline varies between countries)
- **Right to object in case of TUPE transfer:** depends on country involved
 - **(France, Spain):** automatic and mandatory transfer. No right to object.
 - **(Germany):** Employees can object within 1 month of receiving complete information; Employee remains with the previous employer who may attempt to make the employee redundant (except in case of merger)
 - **(UK):** Employees can object at any time prior to the transfer. Employment contract terminates. Right under TUPE to resign and claim constructive dismissal if transfer will involve substantial change in terms and conditions to material detriment of employee.
- **Dismissals before a TUPE transfer:** Dismissals are prohibited when they are related to the transfer. The seller and the buyer cannot agree to proceed with dismissals before the transfer, with some exceptions.
- **Protected employees: (France)** If the acquisition only concerns part of the company's assets, an authorization of labour inspection is required to transfer protected employees (works council member, labour union representatives) in order to avoid discriminatory transfers



WHAT HAPPENS AFTER IT'S DONE?

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HARMONIZATION, REORGANIZATION & INTEGRATION

- **Share deal:**
 - Does not affect restructuring/harmonization options.
 - Exceptions: indirect impact due to change in the applicable collective agreements (**Germany**), limitations derived from changes in circumstances of group (**Spain**).
- **Asset deal:**
 - General principle of respect to employment terms impacts restructuring/harmonization options.
 - Redundancies:
 - TUPE cannot be the rationale for redundancies, otherwise automatically unfair without economic, technical or organisational reason (**UK**) or null and void (**Spain, Germany and France**). Redundancies can be implemented after the transfer (pre transfer in **Germany**: Purchaser's Concept) for other sound business rationale and respecting mandatory procedures.
 - TUPE cannot be the rationale for changes in working conditions: changes post transfer can take place if there are separate economic, technical or organizational reasons; all mandatory consultations are respected; and each employee agrees (agreement not required in **Spain**). Time limitations to changes (**Germany**).
- **COVID-19: limitations to dismissals in Spain and Germany**

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Immigration & Global Mobility Update

Every 2 months, our experts from around the world put together an Update on the law on immigration & global mobility, setting out recent changes to the law. See our Update for June 2021, with new rules for 23 countries.

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Severance Pay

The rules around what must be paid when employment ends differ widely according to the country. As the rules vary so greatly, it's worth having a handle on the specifics in each of the countries in which you operate and so, in this Guide, we set out the rules worldwide and introduce you to an expert to contact if you need more help.

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Selection order for dismissals

In some countries, there are tailored rules about the order in which you are allowed to dismiss employees and these serve to protect more vulnerable employees. There are also some general rules that may apply, such as anti-discrimination law. In the map, we mark in red those countries where we have identified selection order rules of one kind or another. In the countries marked in dark grey employers are freer to make their own choices, but please check with a local Ius Laboris lawyer before proceeding. The text was last updated in December 2020.

Statutory selection order rules

No rules

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SCROLL

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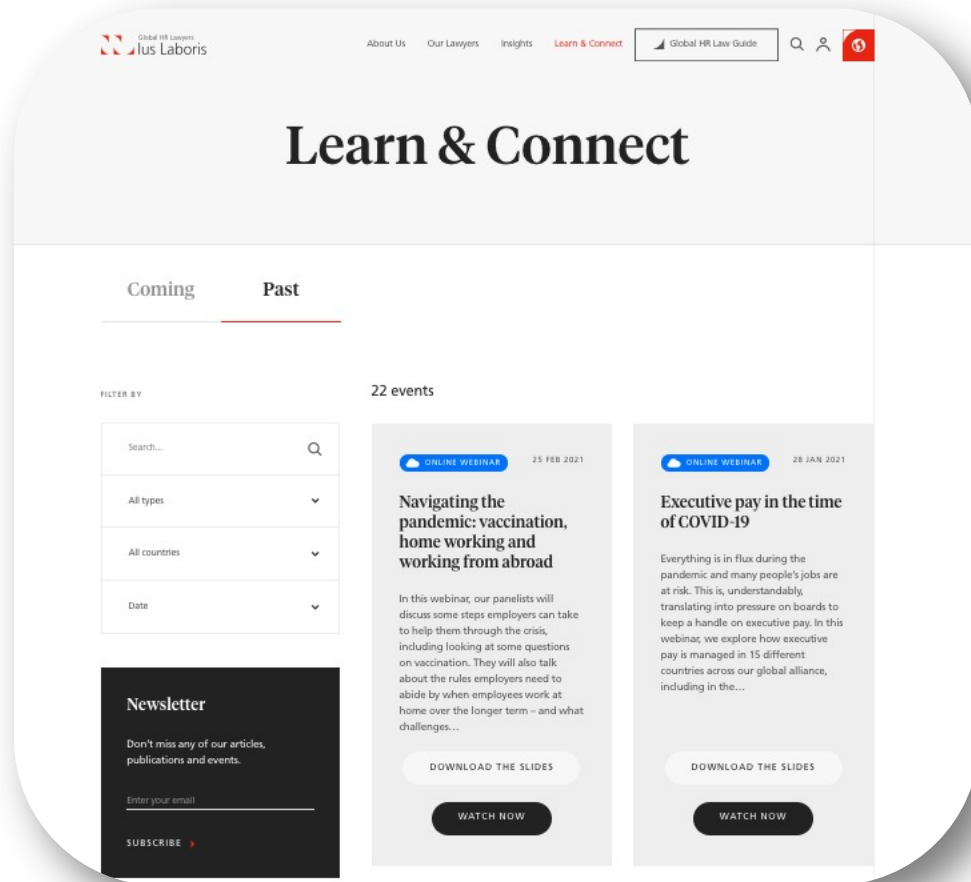
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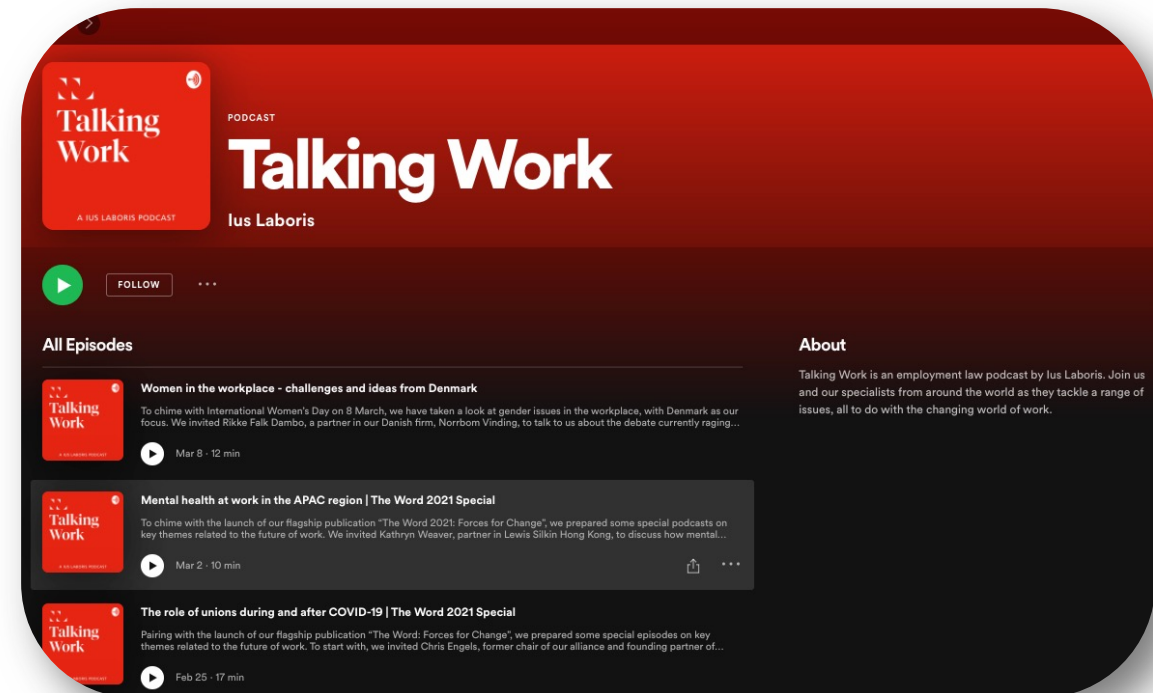
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Webinars: <https://iuslaboris.com/learn-connect/>



Podcast series – Talking Work:
https://open.spotify.com/show/0NpiCVfvpZrjPiVJLeEXmv?si=Xe5nbn2hToWe9uR4pK_Jjg





North America: Canada - Mexico - United States

Central & South America: Argentina - Brazil - Chile - Colombia - Panama - Peru - Venezuela

Western Europe: Austria - Belgium - Cyprus - Denmark - Finland - France - Germany - Greece - Ireland - Italy
Luxembourg - Malta - Netherlands - Norway - Portugal - Spain - Sweden - Switzerland - United Kingdom

Eastern Europe: Belarus - Bulgaria - Croatia - Czech Republic - Estonia - Hungary - Latvia - Lithuania - Poland - Romania - Russia - Serbia - Slovakia - Slovenia -
Turkey - Ukraine

Middle East & Asia Pacific: Australia - Bahrain - China - Hong Kong - India - Israel - Japan - Kazakhstan - New Zealand - Papua New Guinea - Saudi Arabia -
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