

Restructuring across the EU and UK – Critical Employment Law Issues

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The Lowdown on Consultation in the UK



- What's new in the UK?
 - Established position but what about Brexit?
- Key factors
 - Individual versus collective
 - Unfair dismissal / Protective Award
 - Discrimination
 - Redundancy or restructuring

Common Challenges and Potential Pitfalls in the UK



- “Meaningful consultation” – beware of pre-judgments and pre-emptive decisions
- Threshold and timing for collective consultation – meaning of “establishment”
- Timing and content of individual consultation
- Pools and objective selection criteria
- Bumping

Severance Considerations in the UK



- Statutory redundancy pay
- Contractual/enhanced redundancy – beware ‘custom and practice’
- Notice arrangements – expectation of payment in lieu?
- Settlement agreements
- Retention payments, conditional payments and taxation

Germany

André Zimmermann



Basics: Termination of Employment



- **No employment at will**
- Specific reasons for termination required if operation > 10 employees
- **Operational** reasons (social factor test!) 
- Minimum **notice period** depending on duration of service between 1 and 7 months
- Termination with immediate effect only under rare circumstances (will not apply in restructuring scenarios)
- **Special dismissal protection** for specific groups of employees (e.g. pregnant, severely disabled, parental leave, works council members)
- Formal requirements: Notice (and POA) must be served in **wet ink** 

Basics: Severance



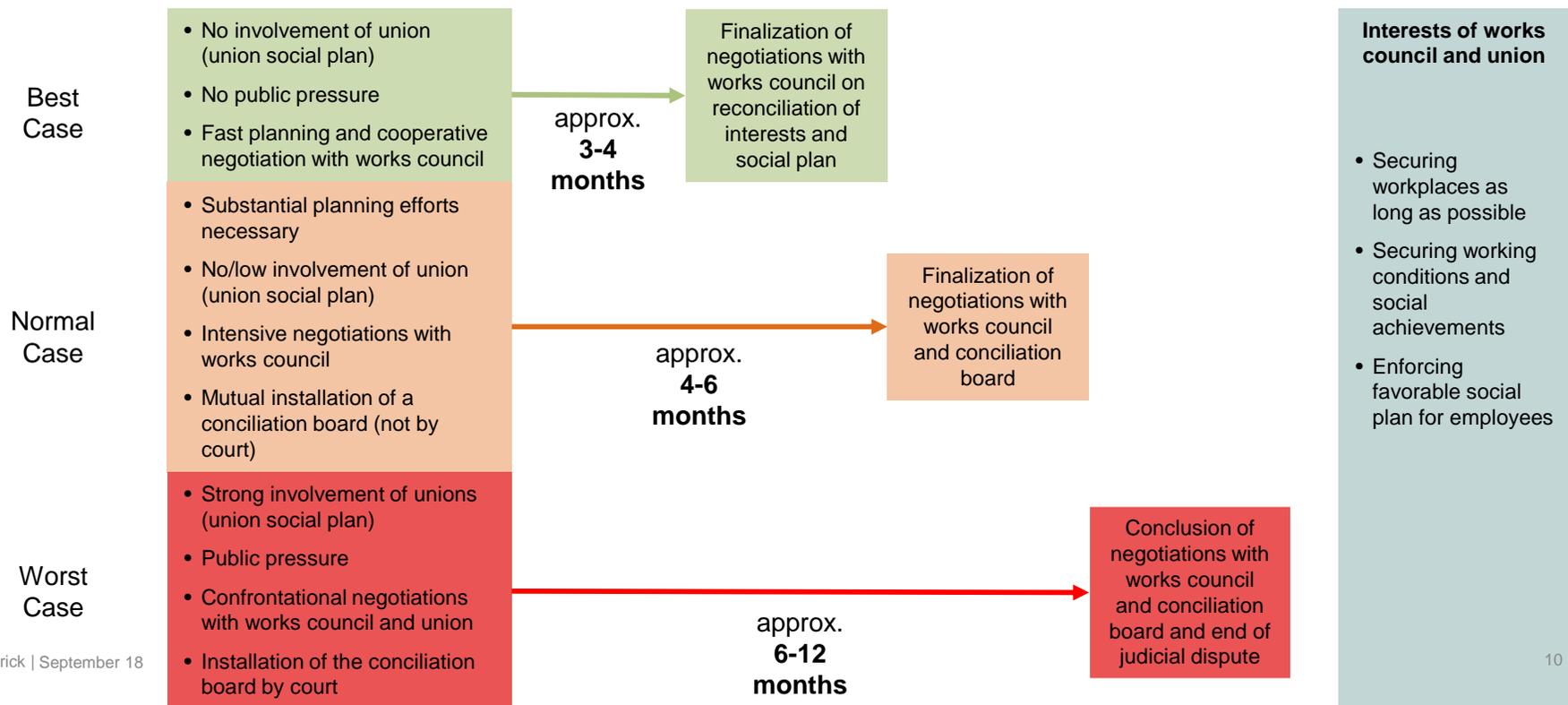
- **No entitlement** to severance payments, employee has right to be reinstated
- Exception: Severance payments under social plan
- To avoid all "or nothing" situations, severance payments are common
- Amount of the severance is to be negotiated
- Rule of thumb and accepted practice: **0.5 to 1.5 of monthly salaries** per year of service

Restructuring – Typical Procedures and Co-Determination (1/2)



- **Information** of employee representations (works council, economic committee) regarding intended restructuring
- Restructuring may trigger **co-determination rights of works council**
- Change to the operation (*Betriebsänderung*) requires company to negotiate a reconciliation of interests (*Interessenausgleich*) and social plan (*Sozialplan*) with works council
- **No statutory maximum period** for negotiations with works council
- If works council intends to block the redundancies, negotiations of between 6-12 months might be necessary

Restructuring – Typical Procedures and Co-Determination (2/2)



Voluntary Leaver Program (1/2)



- In order to quickly reduce employee capacities, it is advisable and best practice to offer a voluntary leaver program (*Freiwilligenprogramm*)
- **Two approaches possible**
 - General offer to the **whole staff**, providing severance payments if the employee concludes a mutual termination agreement
 - Advantage: Addressing more employees, quicker reduction of headcount possible
 - Disadvantage: Attracting high performers, high potentials and key-employees (Solution: double voluntariness (*doppelte Freiwilligkeit*))
 - Offer to **selected employees** only
 - Advantage: Employees can be targeted more individually (e.g. low performers)
 - Disadvantages: Resistance of the works council, scenario of stigmatization and pressure, more difficult and time consuming due to individual negotiations

Voluntary Leaver Program (2/2)



- **General advantages**
 - Higher acceptance of headcount reduction within workforce and public
 - Quick and legally **watertight realization** of headcount reduction
 - Even possible if terminations for operational reasons are prohibited
 - **No social factor test**
 - **No risk of claims** to challenge the validity of termination
 - Tailor-made agreements to regulate the termination conditions
- **Implementation of voluntary leaver program** through
 - Shop agreement; or
 - Non-binding invitation letter to the employees (*invitatio ad offerendum*)

Early Leaver Bonus



- In order to quickly reduce employee capacities, it is advisable and **best practice** to offer an early leaver bonus (*Sprinterprämie*)
- Early leaver bonus is paid in addition to the severance payment
 - If the employee does not challenge the dismissal before the labor court; or
 - If the employee signs a termination agreement within a fixed period of time.
- The early leaver bonus could be paid
 - On the basis of the last monthly salary in a lump sum; or
 - Scaled, depending on the time the employee needs to make a decision.
- Generally, an early leaver bonus is
 - Concluded within a works council agreement; or
 - Granted by overall or individual promise (no works council co-determination)
- Early leaver bonuses are **not allowed to be part of the social plan** 

France

Nadège Owen



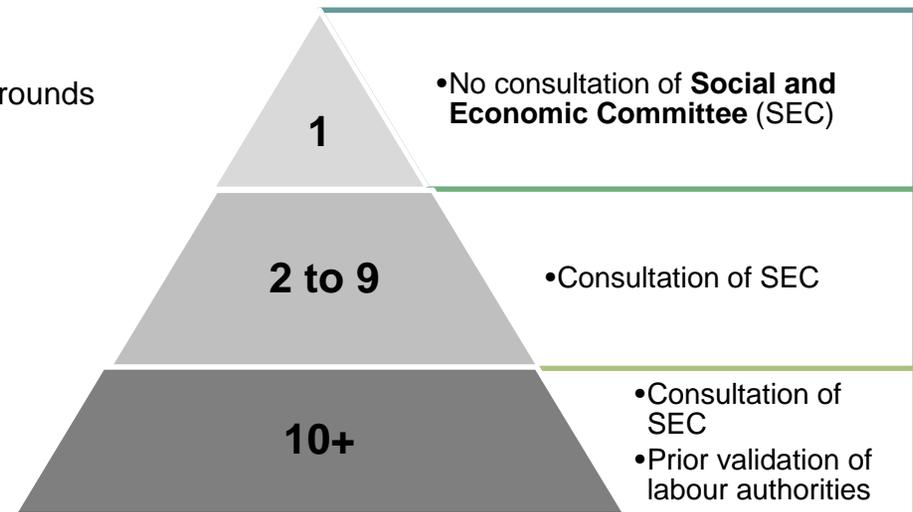
Key Points on Redundancies in France



Common features

- **Economic grounds** ≠ personal
 - New reduced scope for assessment of economic grounds
- **Selection criteria**
- **Internal redeployment obligation**
 - New reduced scope and simplified process for the redeployment obligation
- **Redeployment leave (or CSP)**

Different procedures



Navigating through the Consultation Process



Whom to consult?	The company's SEC must be informed & consulted simple v. complex structures
Scope of the consultation	The SEC must be consulted on both the contemplated restructuring project (« <i>book 2</i> ») and the redundancies project (« <i>book 1</i> »)
Timing of the consultation	When the project is defined Before any final decision and/or implementation is made with respect to the restructuring
Aim of the consultation	Obtain the opinion of the SEC, whether positive or negative, no power of veto
Assistance of an outside expert ?	<ul style="list-style-type: none"> • Small collective redundancies: if funded by the SEC • Large collective redundancies: expert paid by the company
Duration of the consultation	(New) legal maximum deadlines : <ul style="list-style-type: none"> • Small collective redundancies : 1 month • Large collective redundancies (social plan): 2 to 4 months (depending on number of dismissals envisaged)



In **large collective redundancies**: negotiation of the social plan in parallel with the trade unions

Increased Role of Labour Administration



<p>Small collective redundancies :</p> <p>Information a posteriori only</p>	<ul style="list-style-type: none">• Information of labour administration (v/ prior notification or control)• After notification of dismissals
<p>Large collective redundancies :</p> <p>Control of labour administration</p>	<ul style="list-style-type: none">• Control of the labour administration during the whole information-consultation procedure• Necessary validation once the consultation is completed to implement the social plan (15 days if negotiated social plan, 21 days if unilateral social plan).• Control more thorough if no agreement with the unions.

Main Risks



Main risks	Sanction
Criminal offence of obstruction	Fine : 7,500 € (legal representative) or 37,500 € (company)
Refusal by Labour authorities to validate social plan	Dismissals cannot be implemented
Cancellation of validation of social plan	Null and void social plan and subsequent dismissals = reinstatement or damages (6 months minimum)
Unfair dismissal claim (invalid economic grounds, breach of redeployment obligation)	Damages : new cap on based on length of service (0 to 20 months)
Non compliance with selection criteria	Damages (based on the prejudice suffered)

Preparing to Face the Challenges and Pitfalls in France



Key points in the preparation of a restructuring:

1. Characterize the **economic grounds**
2. Define the **target organisation**
3. Identify the **occupational categories**
 - groups of employees having **positions of the same nature** within the company and implying a **common professional training**
4. Define the **selection criteria**
 - **criteria** used to determine the order in which employees will be made redundant (e. g. number of dependents, length of service, professional skills). These criteria apply to all the employees of a given **occupational category**.
5. Define the redeployment and financial measures proposed and related costs entailed :
 - incl. **internal and/or external redeployment**, actions helping employees **to set up their own business, training** of employees, **outplacement**.
 - Severance indemnity (on top of the legal or CBA indemnity – market practice or precedents)

A New Alternative to Collective Redundancies: Collective Mutual Termination Agreements (“RCC”)



The RCC scheme allows companies to propose, by collective agreement approved by the administration, **voluntary departures excluding any redundancy**

Key features :

- The SEC must be **informed** on the planned RCC **and its content must be determined by collective agreement**
- **Prior validation by the labour administration** required
- Information and consultation of the **SEC** with respect to the **implementation** of the RCC

Pros	Cons
No economic ground is required	Duration of negotiation on RCC not limited
Definition of social category and selection criteria more flexible	Difficult to reach envisaged target organisation

Italy

Mario Scofferi



Reduction of the Number of Employees: Options



RESTRUCTURING

Outsourcing of part of the Company business jointly with the relevant employees (TUPE Regulation)

Outsourcing of some Company activities and dismissal of employees appointed to such activities (reduction-in-force)

Cross collective dismissal (reduction-in-force)

Collective Dismissal Procedure (Reduction-in-force)



- Notification to the relevant Union representatives within the Company and to the regional/national Unions of a communication containing: *a)* the reasons which caused the redundancy; *b)* the technical and organizational reasons for which it is not possible to avoid the reduction-in-force; *c)* the number and professional level of the redundant employees (including executives) as well as the whole number of people usually employed by the Company; *d)* the timing of the reduction-in-force program; and *e)* the measures the Company is available to grant the redundant employees with in order to reduce the social impact of the collective dismissal;
- Within 7 days from the receipt of such communication, Unions could call a joint examination and consultation about the collective dismissal (this consultation must be completed within 45 days);
- In case an agreement with the Unions is not reached, the employer shall notify it to the regional or national office of the Labour Ministry (depending on the location of Company business units), which has to convene the parties in order to have a further examination of the matter (this further examination has to be completed within 30 days);
- In case an agreement is not reached, the employer can dismiss the redundant employees.

Collective Dismissal Procedure (Reduction-in-force)



- The choice of redundant employees must comply with the criteria provided by the Law (i.e. *(i)* family loads; *(ii)* length of service; and *(iii)* technical and organizational needs of the employer).
- Only in case an agreement with the Unions is reached, these latter and the Company can identify the redundant employees according to different criteria (e.g. voluntary dismissals; imminence of the retirement; etc.) **—————> It is quite rare that Unions agree with a criteria different from the voluntary one**
- Unlike than the individual dismissal, in the context of a reduction-in-force a control on the reasons that caused the dismissal is not allowed by the law: the only causes which could affect the collective dismissal regards *(i)* the written form of the communications; *(ii)* the proper fulfilment of the procedure; and *(iii)* the proper application of the criteria (those provided by the law or agreed with the Unions) to choose the redundant employees.

Special protections for disabled employees and female employees are provided (especially those women whose children are younger than 1 year)

Costs Faced by the Company



- The Company will have to pay to the Social Security Body a so-called «*dismissal ticket*» whose cost is equal, for each redundant employee, to Euro 990,68 per each year of employment in the last three years (such amount is tripled in case an agreement with the Unions is not reached);
- Furthermore the Company will have to pay to the dismissed employees:
 - the normal salary they accrued during the consultation process with the Unions;
 - the indemnity in lieu of notice period;
 - the severance payments (i.e. indemnity in lieu of supplementary monthly instalments, set forth by the NCBA; the indemnity in lieu of untaken holidays and paid leaves); and
 - the end-of-service allowance (so-called «*TFR*»), which consists in a deferred amount equal to 7,4% of the salary the employee earned during his/her whole employment

Unfair Dismissal: Sanctions

(not applicable to the executives)



KIND OF BREACH	HIRED BEFORE MARCH 7, 2015	HIRED AFTER MARCH 7, 2015
(WRITTEN) FORMAL DEFECT	reinstatement in the workplace plus a damages compensation equal to the salary the dismissed employee would have earned from the dismissal until his/her reinstatement	reinstatement in the workplace plus a damages compensation equal to the salary the dismissed employee would have earned from the dismissal until his/her reinstatement
OTHER BREACH OF THE PROCEDURE	damages compensation included between a minimum of 12 up to a maximum of 24 months salary	2 months salary for each year of service, with a minimum of 6 up to a maximum of 36 months salary
BREACH OF THE SELECTION CRITERIA	reinstatement in the workplace plus a damages compensation up to a maximum of 12 months salary	2 months salary for each year of service, with a minimum of 6 up to a maximum of 36 months salary

How to Retain Key Employees



- Bonus schemes which, *inter alia*, reward employee loyalty (e.g. LTIP, stock option plans, etc.);
- Extension of the notice period for the case of resignation (the relevant agreement, according to the case law: (a) must have a temporary effect; and (b) it must be adequately compensated);
- So-called «stability clause»: by which the employee undertakes not to resign from his/her employment from a predetermined time;
- Non competition covenant.

The logo features a stylized green 'O' composed of two overlapping, curved lines that create a sense of motion or a circular path. It is positioned above the word 'orrick' and is vertically aligned with the letter 'r'.

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