

Session 702
European Down Sizing
[from an Anglo-Saxon Perspective]

Faculty xxx

Let's talk about

1. Front Page Stories : 2007 - 2001

2. Labor Costs an Job Reductions across countries

3. Would you have thought

4. Role of In-house Staff and Outside Counsel

1. Front Page Stories

2007

Delphi Corporation [US] announces to close Cadiz, Spain, plant, affecting 1,600 employees and subsequently files for Spanish Chapter 11 equivalent protection

2006

[Swedish] Electrolux announces to close facilities in Italy (650 employees) and Germany (1,750 employees). Italy closure fails, German closure succeeds at factor of 1,8 monthly salaries per year of seniority. Total closure cost is US \$ 289M, or US \$ 165k per employee

4 years after closure of a Valeo plant in France incl. severance payments a French court sentenced Valeo to pay an additional € 20k for 260 employees in „damages“ for wrongful termination

1. Front Page Stories - cont'd

2005

Thyssen-Krupp (Germany) announces to close a 3,000 employees plant in Italy, but after Italian Prime Minister and EU-Parliament involvement gives up

2004

Jaguar closes a 1,100 employees plant in Coventry, England

2001

British Retailer Marks & Spencer closes French, Spanish and Belgium stores which results in [successful] legal actions against M & S [lack of works council and government involvement]

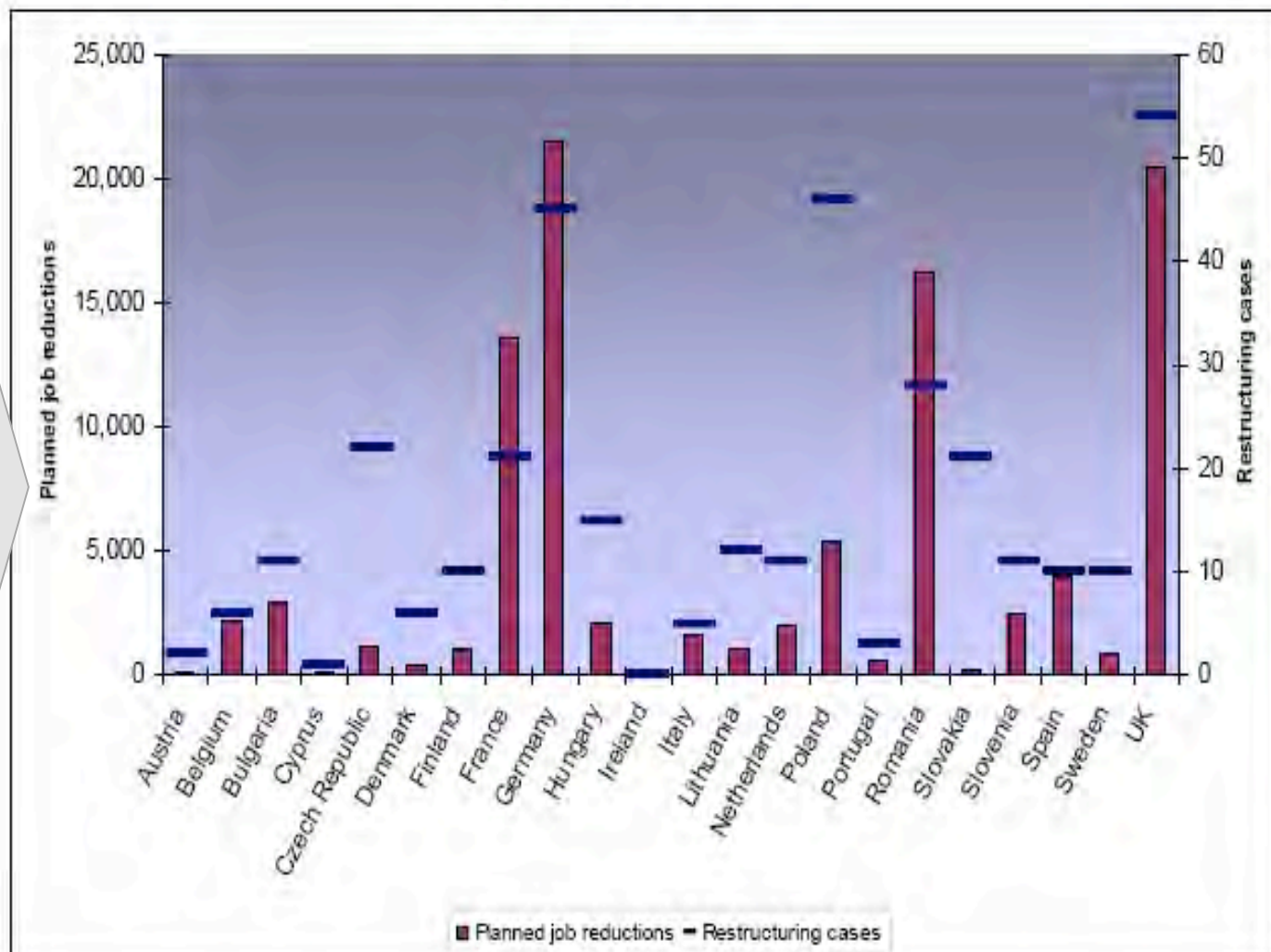
2. Labor Costs and Job Reductions across countries

**Labor costs in the
automotive industry
(in euros per hour worked)**

	1998	1999	2000	2001
Germany	30.89	31.60	32.22	32.70
France	18.53	19.65	20.51	21.25
Italy	15.96	15.39	15.93	16.28
Spain	14.85	15.36	16.09	16.57
United Kingdom	19.05	20.01	23.03	23.38
Belgium	23.16	23.84	24.28	25.04
Holland	19.68	20.26	21.81	22.91
Sweden	20.40	20.95	22.77	21.50
Portugal	7.50	7.86	8.23	8.48
Austria	22.34	22.76	22.61	22.94
United States	22.65	24.69	29.73	31.57
Japan	21.62	25.87	32.03	30.83

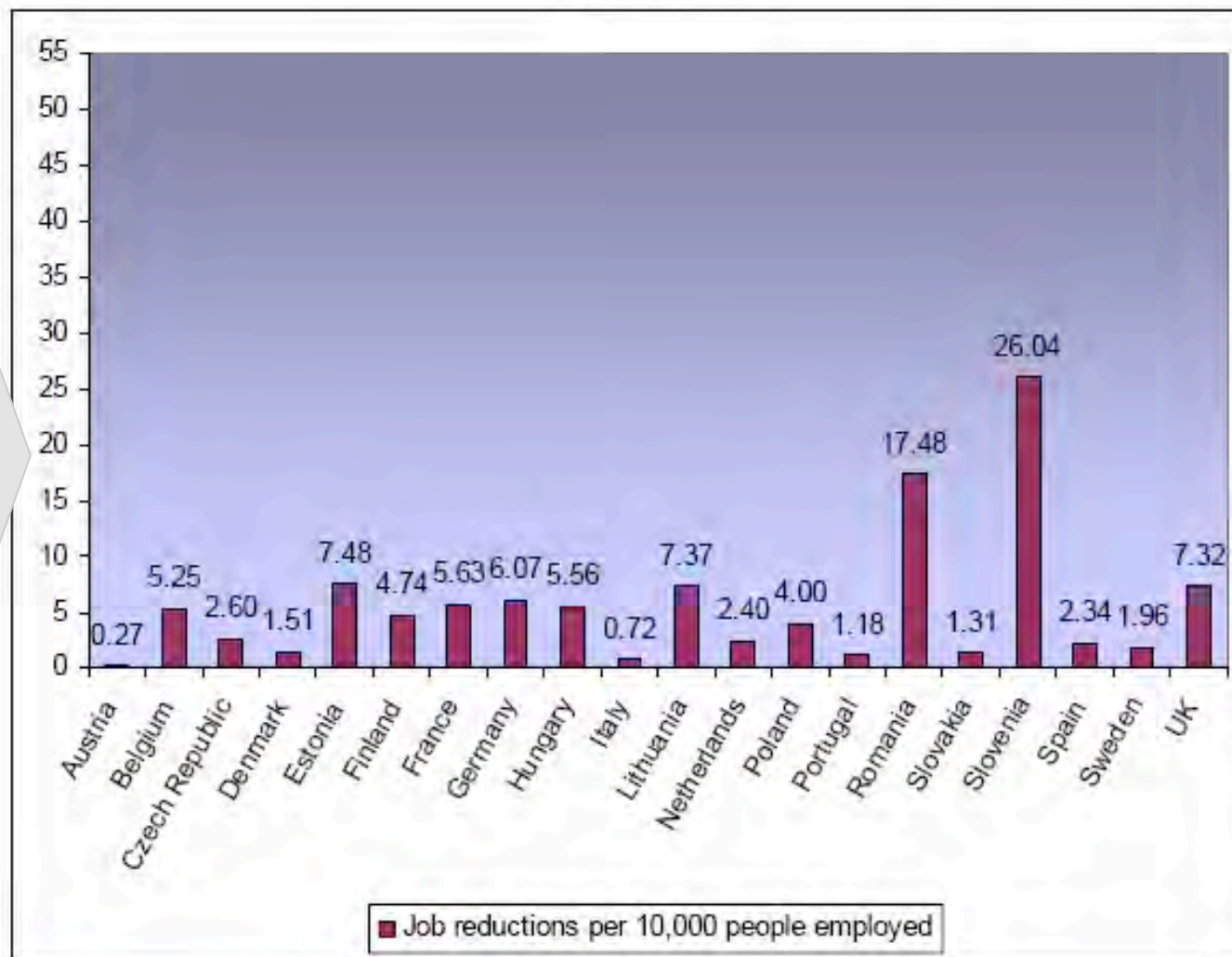
Source: VDA, quoted in El Pais, 6 October 2002

Distribution of recorded restructuring cases and job reductions across the EU during the 4th quarter 2005




Source: ERM quarterly – Issue 4, Winter 2005, Page 5

Announced job reductions due to restructuring (per 10,000 people employed) during the 4th quarter 2005

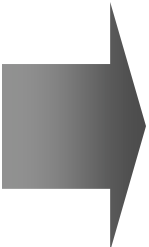


Source: ERM quarterly – Issue 4, Winter 2005, Page 6

3. Would you have thought




a) of informing a European Works Council [not only its „Select Committee“] – if applicable – prior to a restructuring ?

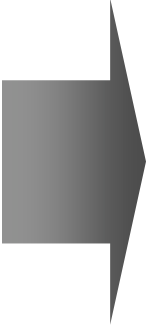


b) that, in France, for groups with more than 1,000 employees in Europe, the Group needs to provide „relocation“ and „revitalization“ support for 24 months after closure at an additional cost of 10 – 20 % of severance costs and costs are inflated further by several „soft“ factors ?

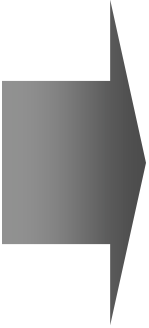
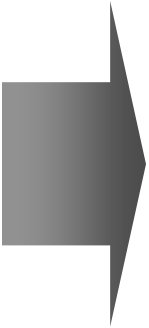
3. Would you have thought

- 
- c) *that with the exception of Germany most countries exempt redundancy related severance payments from income tax, resulting in packages to employees of 2 – 5 annual net salaries ?*
 - d) *that considerable „advisor“ fees may need to be paid although the Group has not hired the advisors ?*

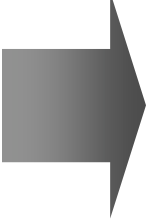
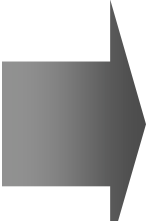
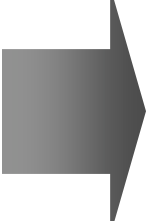
3. Would you have thought

- 
- e) *that in the emotional environment of a redundancy proceeding Case Law and „Precedent“ are no longer reliable and may be easily disregarded by local courts and authorities ?*
[The recently failed merger of German E.ON and Spanish Endesa being an obvious example in the non-Employment Law area]

3. Would you have thought

- 
- f) *that your company could still be sued [and potentially lose] by employees although an agreement with unions, works councils and employees as well as local authorities had been reached and executed ?*
- 
- g) *that in Spain local labor authorities can veto redundancies ?*

3. Would you have thought

-  *h) that announcing a collective dismissal without having previously considered the implications of a likely strike is foolish ?*
-  *i) that, irrespective of national boundaries and national legal particularities unions and works councils are becoming Pan-European and cherry pickers ?*
-  *j) That there is an increasing tendency by local/national courts to second-guess a local closure where the closing company may be profitable globally, yet not locally ?*

4. Role of In-house Staff and Outside Counsel

- *Your best managers must lead redundancy proceedings*
- *They must be “local” in culture but global in thinking*
- *Not for a minute should your managers expect any goodwill from their negotiation counter-parts*
- *Do not “default” the redundancy to outside advisors*
- *Do not assume that your legal advisors have been through this “many times” – they will not*
- *“Teach” your advisors on your experiences (inside and) outside of their jurisdiction – it will make them think out of the box*
- *Be smart on fees and put legal fees in the context of overall project costs*



**ACC Europe 2007 Annual Conference: The Growing Role of In-house
Counsel: Lawyers as Business Partners**

**3-5 June 2007 Bayerischer Hof Hotel
Munich, Germany**

Session 702

**Comparative Employment
Law Review**

Russell Brimelow

Josef Hermes

Andrew Holmes

Christel Van Peteghem

Discrimination Law in the UK, USA and Europe

**Russell Brimelow
Lewis Silkin & Ius Laboris**

**ACC Europe 2007 Annual Conference: The Growing Role of In-house Counsel:
Lawyers as Business Partners**

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Large numbers of discrimination claims in “Anglo Saxon” Jurisdictions



41,000 claims in 2005/06



76,000 claims in 2006

High awards



Largest award in 2005/6 =
€1.4 million

Largest award in 2006 =
\$61 million (reduced to
\$12 million on appeal)

Some reasons for the volume of cases in the UK

- Limited “unfair dismissal” rights – this is the biggest differentiator
- No “bullying” claims
- Limited co-determination/works councils
- Cultural

UK Claims

- Before employment tribunals
- Claims against individuals as well as employers
- Can last several days or even several weeks
- Significant management time/legal costs
- Reputational concerns

UK Media interest



Topical issues in the UK

Religion – dress codes

THE TIMES Saturday November 25 2006 zwc

BA responds to backlash by lifting ban on small crosses

► Uniform policy to be put under review

► Archbishop hails 'common sense'

Anthony Browne, Sam Coates and Ruth Gledhill

British Airways is to lift its ban on workers openly wearing

an Williams, told *The Times*: "This is a most welcome development and a victory for common sense."

Miss Eweida, who has begun a second appeal, issued a statement saying that she hoped that it would help her to win her case. "If they are going to review the policy and allow Christians their place in the workforce, it is a big relief."

The ban on Miss Eweida caused outrage because mem-

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zwc THE TIMES Saturday November 25 2006

School helper who refused to remove her veil is sacked

Andrew Norfolk

A teaching assistant who refused to remove her Muslim veil in the classroom has lost her job.

Aishah Azmi's dismissal from a Church of England primary school in Dewsbury, West Yorkshire, came after a lengthy period of suspension over her insistence on wearing the niqab in lessons led by a male teacher.

She had already failed to persuade an employment tribunal that she was a victim of religious discrimination and

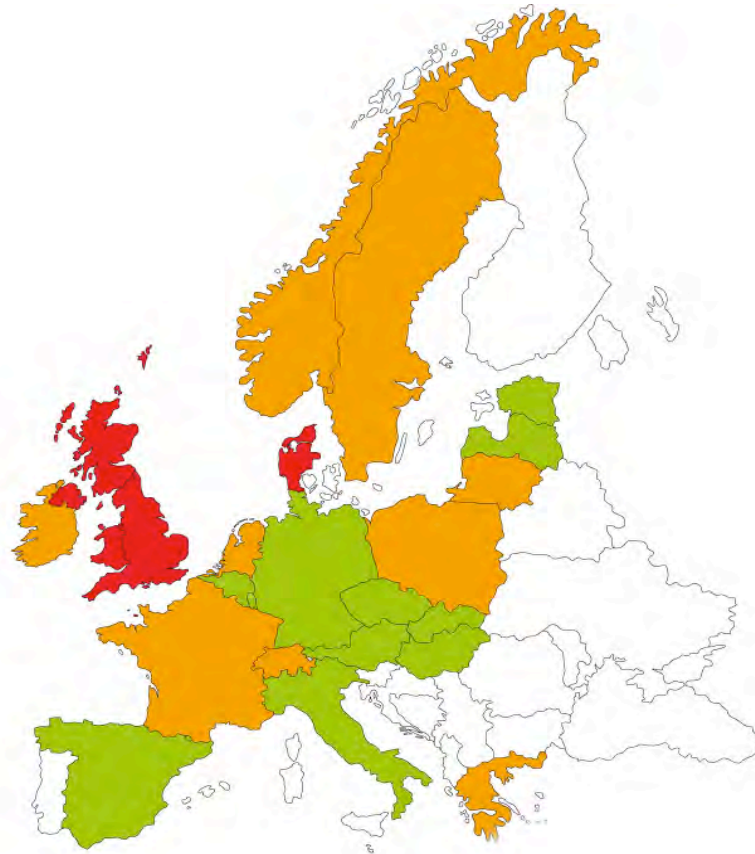
Cause célèbre



● October 5: Jack Straw says that he asks Muslim women to remove their veils

● October 13: It is revealed that Aishah Azmi has taken a Dewsbury primary school

Discrimination laws around Europe [to be amended]



Claims in Europe

- **Some:** Denmark, Netherlands, Sweden, Russia, Belgium, Czech Republic, Ireland, Greece, Poland
- **Minimal:** Finland, Slovakian Republic, Italy, Germany, France, Cyprus, Portugal, Spain

Other European Quirks...

- Hearings can be really short – Switzerland, Poland, Belgium and France are usually less than one day
- Fees and management time can be minimal
- Average awards are often low....
- Media attention can be scant... but is growing
- Settlement figures vary widely

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"You're not so bad for
someone who's different."



THANK YOU

Session 702

**Comparative Employment
Law Review**

Russell Brimelow

Josef Hermes

Andrew Holmes

Christel Van Peteghem

The impact of the EU Acquired Rights Directive

Christel Van Peteghem

Agenda

1. In theory : Refresh on the principles

1.1 Legislative purpose

1.2 Current implementation status

1.3 Consequences

2. In practice

2.1 Some complexities

2.2 Some scenarios

2.3 Acquisition coming up ? Some tips ...

1. In Theory : Refresh of principles

1.1 Legislative purpose

- *EU Directive on Transfer of Business (Acquired Rights Directive = hereafter ARD)*
- *Directive's aim : Address in a harmonised way across EU countries the employment consequences of mergers, acquisitions, splits, transfers of activity. Idea is to protect legal interests of employees when their employer changes due to a transfer of undertaking.*

1. Theory Refresh – cont'd

1.2. Current status of implementation of ARD :

- *UK : TUPE (Transfer of Undertaking Protection of Employment Regulations)*
- *Netherlands : 7:662-7:665 of the Civil Code*
- *Spain : Article 44 of the Workers Statute*
- *France : L122/12 Labour Code*
- *Germany : § 613a BGB*
- *Belgium : CAO 32bis*
- *etc.*

1. Theory Refresh – cont'd

1.3. Consequences of ARD :

- Obligation on transferee AND transferor to timely inform and consult with employee representatives – European Works Council, country Works Councils, union delegates ...
- Transferee has to honor the individual terms and conditions of transferring employees
- Transferee inherits Collective Bargaining Agreements.

1. Theory Refresh – cont'd

1.3. Consequences of ARD -cont'd :

- Restrictions on termination of employment
- Moratorium on changing terms and conditions
– complicates the harmonisation of
employment terms
- Inherit protected Works Council members

2. In Practice

2.1. Complexities

- What is an ARD relevant transfer of (part of) an undertaking ? Unclear : Lots of case law up to ECJ level (Süzen, Spijkers, Schmidt, Oy Liikenne, Hidalgo etc.)
- Despite Directive and ECJ case law, assessment whether ARD applies differs by country (a global project governed by TUPE in UK may not be governed by L122.12 in France based on local factual circumstances)

2. In Practice

2.1. Complexities- cont'd

If ARD applies : Impact differs by country -examples

- An employee refuses to transfer : Equals resignation (B,UK), termination by employer (PL) or obligation to reinstate (G,SW)?
- An employee is terminated within 3 months after transfer : Sanctions ? Indemnities (UK)? Reinstatement (G)? Possible justifications ?
- What liabilities transfer ? Only liabilities as of moment of transfer ? All existing ones ? Mix ?
- Length of moratorium on changing t's & c's ?

2. In Practice

2.1 Complexities- cont'd

- The Directive contains no provisions on international transfers. What if a service is outsourced from UK to Poland. Does the Polish transferee have to offer employment to affected employees and under which t's & c's ? What if there are conflicting laws ?

2. In Practice

2.2 Some scenarios

- Most typical showcase :
 - Mergers & Acquisitions
- But also :
 - Divestments, Outsourcing, Change in Service Providers, Insourcing

2. In Practice

2.2 Some real life scenarios

- **Business Situation (1):**

Company A sells IT services to a customer through a subcontractor. The customer expects that by transferring his IT infrastructure management to A, his IT staff who were performing the services inhouse – will transfer to A

A

Customer

Delivery

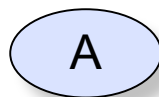
Personnel

A's
Delivery
Partner

2. In Practice

2.2 Some real life scenarios

- **Business Situation (1):**
if the transfer of activity from the customer to A is a straight forward ARD transfer and if the transfer of that same activity to A's services provider constitutes a consecutive ARD transfer, then the affected staff can transfer directly to A's services provider.



Delivery



Personnel?

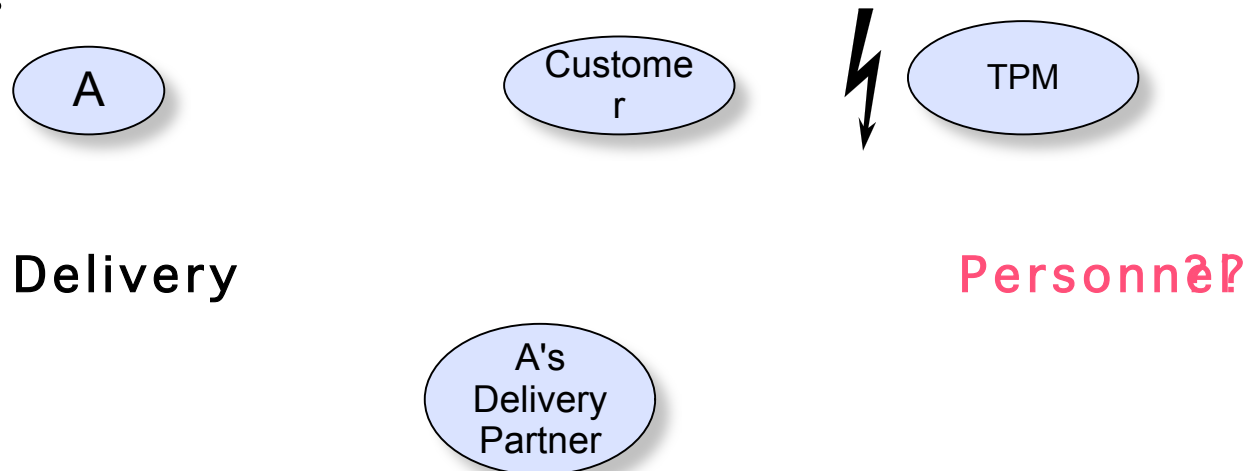


2. In Practice

2.2 Some real life scenarios

- **Business Situation (2):**

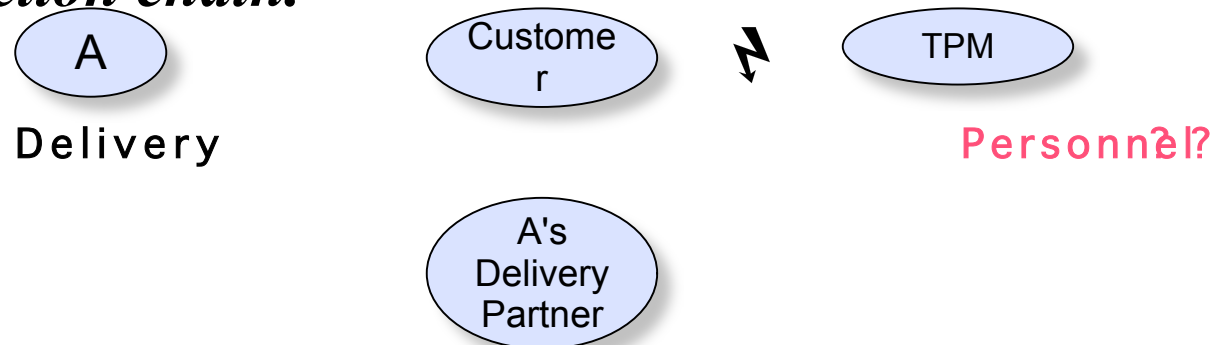
Company A wins a contract from a Third Party Maintenance Cy (TPM). The customer has no staff in house to deliver the services. The TPM had dedicated staff on site.



2. In Practice

Business Situation (2):

- *Q = Does staff of the 'exiting' TPM transfer to A or to A's services provider ?*
- *A = If there is ARD transfer from customer to A and from A to its delivery partner: personnel of TPM could transfer to the delivery partner. However, likelihood of ARD transfer diminishes with every additional step in the transaction chain.*



2. In Practice

2.3 Acquisition coming up ? Some tips ...

- Do NOT presume that non-european project teams understand the extent of ARD impact and obligations– Ensure participation in worldwide communications early on
- Align communications between both parties to the transaction
- Set expectations right with project teams : if consultation and local mergers are not well prepared, delays are inevitable

2. In Practice

2.3 Acquisition coming up ? Some tips ...

- Timely (!) and meaningful consultation is critical to avoid administrative sanctions, fines, criminal liability of General Managers (F), invalidity of the transfer (S), works council and/or union friction, resulting in delays and low employee moral, strikes ...

2. In Practice

2.3 Acquisition coming up ? Some tips ...

- To make consultation meaningful in European countries, joint input from many departments is required (Tax, Legal, HR, Workplace Facilities) EARLY and in coordinated way (e.g. ROI info, which legal entities will acquire the workforce, where will employees be located ? What with bonus plans prior to actual acquisition? What if acquisition times differ by country ? What with duplicate roles ?)

2. In Practice

2.3 Acquisition coming up ? Some tips ...

- Are 'virtual' new organisations between not-yet-merged companies allowed prior to actual merger ?
Can new cross country reporting structures already be put in place prior to actual merger ?

RUSSELL BRIMELOW – LEWIS SILKIN

DISCRIMINATION – A EUROPEAN OVERVIEW

SHEET ONE

	Slovakia	Finland	Russia (non EU)	Switzerland (non EU)	Poland	Italy	Germany	Belgium
All 9 discrimination stands? (age, sex, disability, race, equal pay, religious belief, sex orientation, fixed term (FT) and part time (PT))	Yes	All but FT & PT	All but sex orientation	Only sex discrimination specifically, but general principles may cover others	Yes	Yes	Yes (equal pay only if institutional)	Yes
Are there any other discrimination stands?	-	-	-	-	Possibly yes	-	-	Yes – anything which can't be objectively justified. New law includes birth, wealth, genetic features, etc
% of claims discrimination	1%	1%	10% (mostly FT & PT)	0-1%	? Not many	1%	Less than 1%	1-5%
Average length of claim from filing to hearing	2-6 months	12 months	4-5 weeks	4-12 weeks	12 months	2 weeks	6 weeks	1 – 2 years

	Slovakia	Finland	Russia (non EU)	Switzerland (non EU)	Poland	Italy	Germany	Belgium
Hearing length (average)	3 days	1 day	10-15 days	½ day	3 hours	1 day	2 days	1-2 hours
Average fees for employer	3,000€	20,000€+	1,500-2,000€	2,000-20,000SF	50 to 250€	10,000€	1,000€+	6,000-10,000€
Management time required	Not much	Lots	Lots	Some	Some	Some	Not much	Lots
% settle	50%	85%	70%	90%	50%	90%	Don't know as there are hardly any	50%
Average award	1,000-5,000€	Capped at 15,000€	Varies a lot	2 months salary	1,000-20,000	?	3 months salary	1,000€ (but new law says 6 months salary)
Can managers be personally liable?	Yes but never happens	Yes but rare	No	No	No	?	No	Yes but rare
Legal obligations to monitor? Does it happen	No/none	Yes/some	No/none	No/none	Yes/none	Yes/some	Yes/some	Yes/some
Legal obligation to train on diversity? Does it happen?	No/none	No/none	No/some	No/some	No/none	No/some	Yes/some	No/none
Do cases get a lot of media attention?	None	Some do	None	Some do	Some do	Some do	Some do (eg Lufthansa pilots)	Yes lots

	Slovakia	Finland	Russia (non EU)	Switzerland (non EU)	Poland	Italy	Germany	Belgium
Is there an uncapped unfair dismissal remedy (or similar?)	Yes - although strong mitigation presumption when Claimant seeks over 9 months' salary	No (but maximum 2 years' salary plus fines of up to 20 months' salary for any breach of co-determination procedure)		No - cap exists	No - cap exists	Yes - no cap	Yes - no cap - plus real risk of reinstatement plus full reimbursement of wages	Yes - no cap

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DISCRIMINATION – A EUROPEAN OVERVIEW

SHEET TWO

	England & Wales	Czech Republic	France	Denmark	Netherlands	Cyprus	Sweden	Portugal
All 9 discrimination stands? (age, sex, disability, race, equal pay, religious belief, sex orientation, fixed term (FT) and part time (PT))	Yes	Yes	Yes	Yes	Yes (except equal pay directly)	Yes	All but age (coming?)	Yes
Are there any other discrimination stands?	-	Yes – descent, family obligations, etc	Yes – life style, appearance etc	Yes – social origin and political opinion	Yes – political opinion	-	-	-
% of claims discrimination	20%	5% ?	Rare – no data	20%	5-10%	2%	Less than 10%	Less than 10%
Average length of claim from filing to hearing	9 months	1-6 weeks	3 months	12 months	6 months	6 months to 2 years	6-9 months	Up to 18 months
Hearing length (average)	5 days	3 days	30 minutes to 2 hours	1-1 ½ days	1 – 2 hours	5 – 6 days	1 – 2 days	Depends on number of witnesses

	England & Wales	Czech Republic	France	Denmark	Netherlands	Cyprus	Sweden	Portugal
Average fees for employer	£25,000-£40,000	4,000€?	3,000€	7-10,000€	4-5,000€	2-2,500€	250-350€	variable
Management time required	Lots	Not much	Not much	Some	Some	Some	Not much	Not much
% settle	90%	50%?	50%	75%	90%	60%	90%	50% (no statistics)
Average award	£16,000	1,000-5,000€?	50,000€	6-9 months pay	5-10,000€	So few cases that average would be misleading	High – up to 32 months salary	No statistics
Can managers be personally liable?	Yes – fairly common	Yes but rare	Yes but rare	Yes but rare	Yes but rare	Yes but rare	No	Yes
Legal obligations to monitor? Does it happen	Nearly/some	No/very few	No/rare	No/some	Yes/some	Yes/some	Yes/some	No/some
Legal obligation to train on diversity? Does it happen?	Yes/lots	No/rarely	No/some	No/some	No/some	No/none	No/some	No/none
Do cases get a lot of media attention?	Yes lots	Some do but not many	Not much but growing	Yes lots	Some do	Some do	None	None (but may do in future)

	England & Wales	Czech Republic	France	Denmark	Netherlands	Cyprus	Sweden	Portugal
Is there an uncapped unfair dismissal remedy (or similar?)	No – cap exists	Yes – no cap		No – cap exists	Yes – no cap	No (but maximum is 2 years' wages)	No – cap exists	No – but it's ½ to 1½ months per year of service plus the likelihood of reinstatement and full reimbursement of wages

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DISCRIMINATION – A EUROPEAN OVERVIEW

SHEET THREE

	Estonia	Greece	Spain	Ireland	Hungary	Norway	Austria
All 9 discrimination stands? (age, sex, disability, race, equal pay, religious belief, sex orientation, fixed term (FT) and part time (PT))	Yes	Yes	Yes	Yes		Yes	Yes
Are there any other discrimination stands?	Social status, language skills, duty to serve in armed forces, family duties, politic views, citizenship and statelessness	Non-gender equal pay for equal value rights, also non- gender equal treatment rights	-	Family status, marital status, membership of traveller community		Yes. Social origin, political opinion, membership of trade union, language, etc	-
% of claims discrimination	Less than 1%	[very few]	30%	20%	Almost none ever heard of	Less than 10%	Less than 1%
Average length of claim from filing to hearing	No data as almost no cases – none ye successful	7-8 months	4 months	Up to 2 years		6 months	2 to 3 months
Hearing length (average)	“	1 day	1 day	½ day		2-3 days	Up to 1 day
Average fees for employer	“	300€+	6- 10,000€	5-10,000€		8-10,000€	Varies widely
Management time required	“	Some	Lots	Some		Uncertain	Some
% settle	“	No data	60%	80%		Uncertain	80-90%

	Estonia	Greece	Spain	Ireland	Hungary	Norway	Austria
Average award	"	No data	2 months salary	8000€		6-9 months salary	Varies widely
Can managers be personally liable?		Yes but rare	Yes but rare	Yes/sometimes		Yes but never happens	Yes but rare
Legal obligations to monitor? Does it happen	Yes/none	No/some	No/some	No/some		Yes/some	Yes/some
Legal obligation to train on diversity? Does it happen?	Yes/none	No/some	No/some	No/some		No/some	No/some
Do cases get a lot of media attention?	Some do	Some do	Some do	Some do		Some do	Some do
Is there an uncapped unfair dismissal remedy (or similar?)	No (maximum 6 months' remuneration)						