Bird & Bird

When to start consultations on a prospective and potential collective lay-off in the EU?

Has the ECJ set the bar too high?

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Directive 98/59 on collective lay-offs ('**the Directive**') regularly generates case-law of the European Court of Justice ('**ECJ**'). On many occasions, the rulings are of direct relevance mainly to the Member State whose laws and regulations are being scrutinized as to their compliance with the Directive, without wider or deeper cross-EU impact (e.g., case C-134/22, 13 July 2023, MO/SM liquidator of G GmbH, under German law).

Recently, the ECJ rendered a judgment on the interpretation of the Directive which may have a more general and powerful impact for legal practice and for business: the requirement in its Article 2 (1) that consultations be commenced 'in good time with a view to reaching an agreement' when an employer is contemplating collective redundancies. The concept of *contemplating collective redundancies* was at stake in this Spanish case (ECJ, C-589/22, JLOG/Resorts Mallorca Hotels International SL).

In the context of a re-organisation in the hospitality industry in Mallorca, the exploitation of a number of hotels was stopped (6 hotels) and others shifted hands, reducing the number of managed hotels from 14 to 7 (and the employees of those 7 spun off hotels were transferred under the TUPE regime). In the central office of the transferor, employees were solicited to - and nine of them actually - voluntarily join(ed) the transferee of the hotels in order to strengthen the latter's overhead services. Sometime later, nine employees remaining at the transferor's central office were made redundant. Two of them launched proceedings claiming that their employer had wrongly omitted to initiate consultation on account of a collective lay-off.

The following question was raised before the ECJ: does the Directive require consultation to be initiated as soon as a business (as part of a restructuring process) projects a number of terminations of employment contracts which may exceed the collective redundancy threshold [10 in Spain], irrespective of the fact that ultimately the number of dismissals does not reach that threshold on account of measures taken by the employer (without prior consultation) to reduce that number?

The ECJ answers that question affirmatively. It holds that the seller took a strategic decision when deciding to commence discussions on the re-organisation of its business, which could 'compel it to contemplate or plan for a collective redundancy.' Since the seller asked employees of its central office to voluntarily join the transferee, it could envisage to face a reduction in the workload of its own central office employees after having transferred the management of the seven hotels. Also, since the decision to dismiss the nine employees was taken after transferring the operation of the seven hotels and the voluntary departures, the transferor should

have anticipated, according to the ECJ, needing to significantly reduce its own remaining central office workforce. As a consequence, the decision to transfer management and operation of seven hotels necessarily implied that the transferor should have contemplated collective redundancies. This ruling is quite surprising and unwelcome news for the business community, for a number of reasons.

First of all, it is striking that the ECJ develops a number of highly speculative and business-related arguments (the transferor should have done this or anticipated that) which do not typically fall within the remit of a court of law (i.e., to assess and sanction the viability, necessity of appropriateness of certain business decisions).

Second, in doing so, the ECJ appears not to duly take into account the dynamics of any business and business decision processes, including those which specifically affect certain industries (like the hospitality industry). More general, the ECJ appears not to appreciate the required speed of decision making in an ever changing and turbulent business environment.

Finally, more troublesome are the potential adverse effects of this ruling for the business community. To pick up on the previous point, does the ruling require that business anticipates the possible risk that any corporate transaction (re-organisation or not) may lead to redundancies? In all Member States, conducting and managing a collective redundancy procedure is a cumbersome, complex and very delicate process, both from legal and from an industrial relations perspective. There is no company or organisation which would joyfully and haphazardly engage in such a procedure, without the conviction and high probability that any such launched procedure would effectively result in a collective redundancy (even if a decision to proceed with the redundancies is only contemplated at the outset).

The ECJ's holding in this case may compel business - just to be on the safe side – to launch consultation proceedings in those instances of corporate change which may or may as well not lead to actual redundancies. Aborted or distressed M&A deals, failed mergers, stopped outsourcing transactions, suspended or postponed corporate transformations, many dynamic and *in se* positive (forward looking, growth oriented) business transactions may at all times degenerate and cease to unfold as intended. If the effect of this ECJ ruling is that for all these transactions – which obviously can all at one point result in failure and in a collective redundancy – management could be required to start the appropriate consultation procedures (for a possible collective redundancy) from the outset, then the business impact of the ruling is immense. The exact measure of impact will probably also be determined based on the legal risk *post factum* and potential liabilities at stake, and these are quite divergent among the EU Member States. In some Member States, the risks involved are quite deterring (nullity of ensuing redundancies, mandatory recommencement of the full proceedings, financial penalties, media attention, reputational damage, etc) which may lead to overly cautious behaviour from business.

Which risk is higher, that of an unwarranted announcement of a potential collective lay-off which does not materialise but creates wide unrest and commercially adverse attention in times of corporate change (when the ECJ ruling is applied to the letter) or that of financial and other sanctions if a corporate transaction eventually and unintendedly leads to a collective lay-off (when the ECJ ruling is successfully invoked against management)?

Let us hope that the ECJ soon provides further clarity and some responsible guidance on the issue.

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