Reductions in Force FAQs - EU

By Darren Isaacs and Chris Coombes - 15 July 2020

We have created a set of FAQs following our webinar on EU Reductions in Force on Thursday, 9 July. Below we set out the key points of the EU legal framework on large-scale redundancies, which employers need to think about when planning reductions in force in Europe.

This was our second webinar in our new series focusing on EU employment laws. Our first webinar, dealing with the Acquired Rights Directive, can be found here.

Important note: our webinar was intended to be a summary of the EU legal framework for making large-scale reductions in force under the European Directive on Collective Redundancies (**ECRD**). It does not constitute legal advice. The ECRD has been implemented into the local law of each EU member state and each local law differs. In some cases, the local law may be more beneficial to employees than the ECRD requires. You should check with local counsel if you need legal advice.

Q1. What is the interaction between EU law and local law?

EU law sets out minimum standards and each EU member state will have its own laws dealing with collective dismissals. It is key therefore to also consider local laws when contemplating collective redundancies. These FAQs focus on EU law only.

Q2. What is a collective redundancy?

Under the ECRD, a collective redundancy situation arises where an employer is contemplating making a number of employees (which needs to be above a certain threshold) redundant at the same "establishment", within a set period of time.

Q3. When will an employer be 'contemplating' collective redundancies?

When they are proposing to make a reduction in force but before a decision is made. Collective redundancies may be "contemplated" even if there is a chance that the decision will go the other way and no redundancies are made – there only needs to be a proposal.

Q4. How many employees need to be made redundant for it to be 'collective'?

The ECRD allows EU member states to choose from one of two different headcount thresholds in order to determine whether a collective redundancy is triggered. These thresholds are just minimum standards – some countries are more favourable to employees (such as Ireland and France) by having lower headcount thresholds. It is vital therefore to check the relevant test under local law of each relevant EU member state to see whether a collective redundancy has been triggered.

Trigger 1

Where an employer proposes making over a period of 30 days the following number of redundancies, staggered based on the size of the employer:

- If the employer has 21-99 employees: at least 10 redundancies.
- If the employer has 100-299 employees: at least 10% of its workforce being made redundant.
- If the employer has 300+ employees: at least 30 redundancies.

Trigger 2

Where an employer (of any size) proposes making at least 20 redundancies over a period of 90 days.

Q5. What is an "establishment"?

Typically, this will be one distinct workplace. Often it is a distinct site, but in some cases (such as where two buildings are in close proximity) different sites may be amalgamated to form one "establishment".

Q6. Can we avoid a redundancy being collective by spreading out redundancies?

Redundancies are normally aggregated within the relevant period so it is generally not in practice possible to easily avoid EU law. For example, in a country where the headcount threshold uses is based on Trigger 2, if the employer proposes making 15 employees redundant on Monday and 15 redundant on Friday they will be caught by EU law as they are proposing to make more than 20 redundancies in a 90 day period.

In some cases, local country implementations may allow the employer to discount redundancy rounds for which consultation has already closed, if it was genuinely the case that a new round of redundancies subsequently arises but was not previously proposed – however, this can be tricky to work with in practice.

Q7. What do we need to do if the redundancy is collective?

When an employer is contemplating a collective redundancy, the ECRD requires that they must begin consultation with the workers' representatives in good time with a view to reaching an agreement. (In redundancy cases where the local law implementing the ECRD does not strictly apply, there may also be a consultation obligation).

Q8. What does consultation have to cover?

The ECRD is not prescriptive, but consultation should generally cover ways to avoid the collective redundancies, reducing the numbers affected, and mitigating any consequences. Employers may also want to consult on social measures, such as redeployment and retraining to assist those made redundant.

Q9. Do we have to come to an agreement with representatives?

No, the obligation under the ECRD is limited to having meaningful and good faith discussions before a decision is reached. However, you do need to conduct consultation in the spirit of trying to reach an agreed solution, and you also need to double-check that local law does not impose a more onerous obligation on the employer.

Q10. Who do employers need to consult with?

The appropriate worker representatives in each country. This can be works councils (whether local or the European Works Council), the relevant union(s), or ad hoc elected employee representatives. This will vary across Europe. In the UK, for example, union/works council membership is low, so employers generally need to elect special employee representatives for this purpose.

Q11. How long should consultation last?

The purpose of the obligation to consult "in good time" is that you need to have sufficient time to have meaningful engagement with workers' representatives. Local law often sets out minimum timeframes. In the UK for example if you are proposing 20-99 redundancies within 90 days you must wait a minimum of 30 days (and 45 days if proposing 100 or more redundancies) before making the first employee redundant. In practice, employers usually consult for (at least) these minimum timeframes, unless local law stipulates otherwise or employee representatives want to finish consulting early (again, provided local law allows this).

Q12. What happens if we do not collectively consult?

Penalties can be significant and vary in each EU member state. In the UK, this can be up to 90 days' pay (which is calculated gross and not subject to a cap) for each employee who is made redundant. In other countries, the redundancies can be declared null and void, or an injunction could be issued to stop the redundancies taking place at all.

If you have any questions about the above FAQs please get in touch with your usual GQ|littler contact or email info@gqlittler.com.