An ocean apart
US and EU employment law compared

Against the background of the proliferation of cross-border mergers and acquisitions, Chris Osman examines the fundamental differences in employment law between the US and the EU.

International reorganisations of businesses, whether in the aftermath of a merger or acquisition, or just as a reaction to the shifting sands of doing business on an international scale, are commonplace nowadays.

Many of the objectives of a company reorganising its staff, locations and terms and conditions of employment can be relatively quickly and easily secured in the US. However, it sometimes comes as a shock to discover that what can be accomplished in relatively short order in the US could take many weeks or months and, in certain circumstances, might not be achievable at all in certain European Union member states.

Many EU member states regard full employment as an objective and many employment rights, particularly in relation to potential termination of employment, are seen as a means of securing that objective and cannot be circumvented, even monetarily. For a US company, this can be both frustrating and perplexing in equal measure.
The goal of full employment is arguably no different in the US, but is achieved through a markedly less interventionist approach. Employers are encouraged to hire with materially fewer financial consequences (excluding discriminatory reasons for termination) if one or (in the event of closure) more employees have to be “let go”.

In-house counsel need to be aware of the issues employers on both continents will have to consider when planning activities on the other continent that may involve hiring, firing or at least reorganising employees. They include:

- Differences between the employment laws of the states within the US.
- Differences between the employment laws of the EU member states.
- Key employment rights and obligations that would apply in the US and the EU on a cross-border merger.
- The cross-border merger position in the US.
- The cross-border merger position in the EU.
- Harmonisation of terms and conditions of employment following a cross-border merger.
- The exchange of senior personnel following a cross-border merger.

Differences within the US

It would clearly be wrong to conclude that a unified approach to employment rights exists in the US. The employment relationship in the US is influenced by:

- Federal law.
- Laws of the state or states in which employees carry out their duties.
- Municipal ordinances.

Between them they influence:

- The contractual protection.
- The extent of statutory employee protection.
- Wrongful discharge.

Contract of employment. There is no requirement within the US that there should be a contract of employment (either written or verbal). Employment can be, and in the main is, still treated as being “at-will”, which in practice means that either the employer or the employee can terminate the relationship at any time, for any lawful reason and without notice.

Interestingly, in some states, a contract of employment can be implied, and many recognise an implied obligation that it does not give rise to a contract of employment.

Statutory protection. The extent of the statutory protection that an employee has varies from state to state:

- Federal law does not limit the number of hours employees can be required to work. Some states, however, do.
- California, for example, requires the employer to provide the employee with one day off in seven unless the nature of the work reasonably requires otherwise.
- Only some state laws (and then not in any sense uniformly) have anything to say on the subject of weekend or night work. California is one state that does regulate weekend work in respect of school employees, whose consent must be obtained if the working week is extended to include Saturday or Sunday.
- There is a Federal minimum wage and in most states also a state minimum wage.
- There are no provisions (Federal or state) in relation to the giving of advance notice of termination (except in cases of mass layoffs and plant closings (see “Notice in advance of redundancies” below)), other than whatever has been agreed between the company and the employee or union.

Wrongful discharge. Federal statutes do not prohibit dismissal, other than in relation to dismissal on grounds of race, national origin, religion, age, sex, disability, union activity and other statutorily protected grounds.

A number of states have tried to develop, with degrees of ingenuity but no consistent approach, remedies for unfair dismissal through the doctrine of wrongful discharge. New Jersey, California and New Hampshire, to name a few states, provide that an employee may not be terminated for exercising a public duty, asserting a legal right or refusing to engage in an illegal activity at the request of his employer. In those states, the courts have recognised wrongful discharge claims where an employee was terminated for attending jury duty, filing worker’s compensation claims or reporting insurance fraud to the Government.

An employee may have a degree of protection through potential tortious claims which may give rise to compensation, including:

- Breach of public policy (for example, termination for whistleblowing).
- Fraud, deceit or misrepresentation in terms of the description of the job or the terms that were to apply to it.
- Actions on the part of a former employer intended to deter a third party from taking on a former employee or interfering with any contract which may exist between an employer and its employee.
- Claims for defamation.

Various states have on occasion tried to imply terms into a contract based on custom and practice, creating the concept of a contractual breach which may be actionable, including:

- The length of employment.
- Representations made to the employee.
The inclusion of long term benefits (for example, pension).

The existence of disciplinary policies.

Overall however, the protection of employees in relation to the existence of contractual rights and dismissal (other than in circumstances involving discrimination) is inconsistent and employment at will still holds sway.

Differences within the EU

There are distinct differences between the employment laws of individual member states within the EU. These are generally based on the distinction between common law and civil law jurisdictions. The UK (England, Wales and Northern Ireland) and the Republic of Ireland are common law countries whereas the remainder of the members of the EU have a civil law tradition (and to an extent so does Scotland).

Common law jurisdictions. In the common law countries the contract of employment evidencing an individual bargain between employer and employee lies at the core of the employment relationship.

The common law implies into the contract a term requiring a party to give the other reasonable notice of termination, in the absence of any agreed period of notice. Various other implied terms such as the duty of confidentiality, fidelity and good faith also became incorporated as the English courts developed contract law throughout the 19th century. Then, nearly four decades ago, came the introduction of statutory minimum periods of notice in the UK (one week’s notice for each complete year’s service, subject to a maximum of 12 weeks). This was followed by:

- A statutory right to receive a redundancy payment based on age and service on termination for reason of redundancy.
- A statutory right to be protected against unfair dismissal.
- Remedies against discrimination on grounds of sex, race and (most recently) disability.
- Statutory rights based on EU directives dealing with matters including health and safety, working time and Works Councils.

Civil law jurisdictions. The starting point for mainland EU member states is somewhat different. In France, for example, employment relationships are principally regulated by the labour code (Code du Travail), collective agreements, internal regulations and practice. Remarkably, although less than 10% of the national workforce are members of a trade union in France, around 95% of employees are covered by some form of industry sector collective agreement which provides the vast majority of terms and conditions of employment.

Belgium is another example of a country strictly regulated by complex statutory rules, regulations and collective agreements. Here, the Convention Collective de Travail is predominant and derogation is limited. On the other hand, Denmark currently has no codifying legislation and in the absence of specific statutory or contractual rules, the Danish courts will resolve a dispute in accordance with the custom and practice in that particular industry.

It can sometimes seem that the UK is, so far as employment law is concerned, still moored off mainland Eu-

<table>
<thead>
<tr>
<th>Employment rights on a cross-border merger</th>
<th>US</th>
<th>UK</th>
<th>France</th>
<th>Germany</th>
<th>Netherlands</th>
<th>Italy</th>
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<tr>
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<tr>
<td>Automatic transfer of employees with business</td>
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<tr>
<td>Employee entitlement to receive notice of termination due to redundancy</td>
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<tr>
<td>Statutory redundancy payment</td>
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<tr>
<td>No termination of employment without administrative/court consent/Works Council vote***</td>
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<td>✓</td>
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<tr>
<td>Right to claim compensation for unfair dismissal****</td>
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<td>✓</td>
<td>✓</td>
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* Length varies according to numbers involved.
** In the US, if a union is recognised, good faith negotiations should be conducted with the union.
*** In France, Germany and Italy consent only required for protected categories of employees.
**** There may be defences to such claims.
Case study: The Megacorp merger

Megacorp Inc is headquartered in New York but with subsidiaries in the UK, Italy, France, Germany and The Netherlands. It decides to acquire the shares of Old World plc headquartered in London but with businesses in the same countries, including a subsidiary in the US. The acquisition is by way of share purchase, but Megacorp Inc has plans to merge its businesses with those of Old World plc in the countries where they operate. This will involve closure of some facilities in certain countries, including one in the US. Where this is not happening, the intention is to try to reduce head count where possible to exploit the synergies they perceive as the reason for the acquisition.

For commentary, see the following sections in main text:
- “Key employment rights and obligations on a cross-border merger”.
- “Unfair dismissal”.
- “Merger announcement”.
- “The Acquired Rights Directive”.
- “Collective redundancy consultation”.
- “Harmonisation in the EU”.
- “The exchange of senior personnel”.

These differences can be illustrated by considering the issues that would arise in a hypothetical merger (see box “Case study: The Megacorp merger”). The key employment rights and obligations which would apply in the EU and the US in this type of transaction fall into three categories (for a checklist of which of these rights apply in the US, UK, France, Germany, The Netherlands and Italy, see table “Employment rights on a cross-border merger”). The three categories are:

- Those which arise by virtue of the transfer of an undertaking:
  - consultation in advance of a business transfer;
  - automatic transfer of employees with business.
- Those which apply in relation to proposed redundancies:
  - consultation in advance of redundancies;
  - notification in advance of redundancies;
  - employee entitlement to receive notice of termination due to redundancy;
  - statutory redundancy payment.
- Individual rights in relation to unfair dismissal:
  - no termination for employment without administrative or court consent or Works Council vote;
  - right to claim compensation for unfair dismissal.

Cross-border merger: US position

In practice in the US, there are very limited rights for individual employees in this type of merger:
- Limited consultation rights.
- Notice rights in advance of redundancies in certain circumstances.
- Limited protection of employee benefits.

Consultation in advance of merger

Where a union is recognised, the National Labor Relations Act 1935 obliges the employer to engage in good faith negotiations with that union about the effect of the disposal or transfer (which would typically include severance pay, continuation of medical insurance arrangements, and outplacement assistance). Where there is no union, there is no obligation to inform or consult with the employees except in specific circumstances of mass layoffs or plant closings.

Notice in advance of redundancies

After the share acquisition and at the time of any transfer of business between the parties’ respective subsidiaries in the US, certain Federal legislation may apply.

The Federal Worker Adjustment And Retraining Notification Act 1988 (WARN) makes provision for 60 days’ written notice of a plant closing or mass layoff by an employer with at
least 100 employees and which will result in the loss of:

- 50 or more full time employees in the case of a plant closing.
- 50 or more full time employees in the case of a mass layoff at a single place of work, so long as that represents 33% of the employee workforce at that workplace.
- 500 or more employees irrespective of the percentage of the workforce.

Where there is union representation, the notice is given to the representative of the employees. Where there is no union, it is given directly to the employee. The requirement is simply to give notice (with payment of a sum in respect of benefits to the extent this is not complied with). It is not a consultation process.

**Continuation of benefits.** The Federal Consolidated Omnibus Budget Reconciliation Act 1985 (COBRA) stipulates that employers must allow employees who have lost employer-provided medical benefits the right to have those benefits continued at the employers’ expense for up to 18 months (with additional periods applying to disabled persons and surviving spouses). There are also provisions within COBRA that protect, to an extent, the transfer of health insurance coverage by limiting pre-existing con-

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**Timelines for consultation in respect of a transfer of a business and termination of employment for redundancy (assuming 99 dismissals)**

| WEEKS | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | 23 | 24 | 25 | 26 |
|-------|---|---|---|---|---|---|---|---|---|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|
|       |   |   |   |   |   |   |   |   |   | Notice to employee representatives of mass lay-offs. But can be avoided by payment |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
|       |   |   |   |   |   |   |   |   |   | Employee representative notification of business transfer | 1| 90 days redundancy collective consultation | 90 days prior notification to DTI |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
|       |   |   |   |   |   |   |   |   |   | Works Council notification of business transfer | 2|   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
|       |   |   |   |   |   |   |   |   |   | Works Council notification of business transfer | 3| Min. 60 day information/consultation of Works Council/notification to authorities |   |   |   |   |   |   |   |   |   |   |   |   |   |
|       |   |   |   |   |   |   |   |   |   | Works Council notification of business transfer | 4| 30 day delay before transfer can occur |   |   |   |   |   |   |   |   |   |   |   |   |   |
|       |   |   |   |   |   |   |   |   |   | Works Council/Trade Union notification of business transfer | 5| 75 day notification/mediation with Union/local Labour Office |   |   |   |   |   |   |   |   |   |   |   |   |   |

1 No fixed timetable, information and consultation must take place in “good time”.
2 No fixed timetable but consultation must take place before there is a final commitment to the proposed transfer.
3 Three meetings with Works Council with set intervals between each meeting - simultaneous notification of labour authorities with minimum period (45 days) before redundancies can be notified.
4 Notification to authorities at same time. 30 day delay from date of notification to Works Council before transfer can take place.
5 Notice at least 25 days prior to transfer plus up to 10 days consultation.

These timelines provide a general overview only of the likely maximum time limits. Individual variables will inevitably impact on timing and advice should always be sought.
tion restrictions which might apply in the employment of a new employer.

In the context of an asset transfer, if the transferee terminates a pension plan, a degree of protection is afforded by the Employee Retirement Income Security Act 1974 (ERISA) which effectively protects accrued vested benefits. All employees participating in the pension plan will receive an accelerated vesting of their pension account benefits. The accrued vesting obligations remain with the asset seller unless an agreement to the contrary is reached.

If the pension plan is a defined contribution one, as long as it is fully funded at the time of transfer, there is little risk to the purchaser of assuming the seller’s obligations (see www.lawdepartment.net/global “Rewarding JV employees”, GC, 2000, V(1), 55).

Cross-border merger: EU position

It is necessary to consider which employment law provisions in the two merging groups’ various EU countries of operation will be relevant to their proposed re-organisation. The following aspects need to be considered and addressed:

- The effects of a merger announcement on consultation requirements (see “Merger announcement” below).
- The Acquired Rights Directive, the provisions of which have been incorporated into the domestic legislation of all EU member states (see “The Acquired Rights Directive” below).
- The collective redundancy consultation procedures that apply in EU member states, compliance with which is necessary in some states to secure dismissal at all and in others to at least minimise the cost of dismissal (see “Collective redundancy consultation” below).
- Negotiating severance terms in some EU member states (others provide for specific payments which can more accurately be calculated) (see “Negotiating severance terms” below).
- The legislative unfair dismissal protection which may be relevant in the affected countries (see “Unfair dismissal” below).

Merger announcement. Given the emphasis in the EU on the importance of providing information about any proposal to transfer a business, the differences between the US and the EU begin early in the transfer process. In some of the more sensitive EU jurisdictions (France for example) the announcement of the proposed merger itself may give rise to consultation requirements.

In France, it is a criminal offence to fail to inform and consult the Works Council in advance of drawing up and implementing the type of plan that Megacorp Inc has in mind (see box “Case study: the Megacorp merger”). In the UK, merger announcements that have focused on the need to reduce numbers of employees have led to unions which are recognised by an employer seeking to argue that there has been non-compliance with the collective redundancy consultation procedures (see “Collective redundancy consultation” below). The consequence is that announcements:

- Need to be relatively non-commital as to how the parties propose to extract value from the proposed merger to the extent that this is to be achieved by closures or a reduction in numbers of personnel employed.
- Should not be specific in identifying the countries where redundancies will be effected.

The Acquired Rights Directive. The Directive has been implemented in all EU member states. It applies when one undertaking is transferred to another (for this purpose an undertaking is, in essence, an economic activity - the assets relating to that activity are not necessarily included). The high water mark of what constitutes an undertaking was a single cleaner working in the branch of a bank in Germany who transferred (without bucket or mop) to a contractor when the bank decided to contract out its cleaning requirements (Schmidt v Spar-und Leihkasse Der Früheren Ämter Bördesholm, Kiell und Cronshagen: C-392/92 [1994] IRLR 302).

The Directive does not apply to Megacorp Inc’s acquisition of the shares in Old World plc (see box “Case study: the Megacorp merger”). The acquisition involves no change of employer for the time being. However, it will apply when Megacorp Inc and Old World plc transfer assets and business between their subsidiaries.

Where there is a transfer of an undertaking, domestic employment law in EU member states, which is based on the Directive, broadly provides that:

- Employee representatives are to be informed and consulted in advance about the proposed transfer of the undertaking,
- The contracts of employment of those employed in the undertaking transfer automatically to the transferee entity. Provisions relating to occupational pension schemes do not transfer, which is significant in the UK (where employer pension schemes are common) but less so in the other EU member states (where there is currently much more emphasis on state pensions that are unaffected by the transfer of an undertaking).
- Any dismissal for a reason connected with the transfer of an undertaking is automatically unfair (with the result that it may be ineffective, or at the very least entitle the employee to compensation). The Directive allows changes to the workforce for economic, technical or organisational reasons, but the collective redundancy consultation requirement will apply (see “Collective redundancy consultation” below).
- Detrimental changes to terms and conditions of employment for a reason connected with the transfer of the undertaking are void (even if the employee agrees to them and even if there are corresponding improvements to other terms and conditions). This moratorium is more acutely felt in the UK and the Republic of Ireland than amongst mainland EU member states.

In the mainland EU member states, as terms and conditions of employment tend to be set collectively, there will be no real scope for changing them on the transfer of an undertaking in any event (see “Harmonising terms and conditions of employment” below).

The practical application of the Directive has given rise to considerable complexity, not to say uncertainty, in relation to the way in which it operates (see www.lawdepartment.net/global “Practical aspects of employee transfer”, GC, 2000, V(2), 41). There has been indecision about what constitutes an undertaking and what constitutes a relevant transfer. In particular, there is no
fixed timeline in the Directive for the consultation process but the penalties for failing to inform and consult are significant (for example, up to 13 weeks' pay for each affected employee in the UK and the risk that the transfer itself is of no effect (for example, in France and Germany)).

Collective redundancy consultation. The consultation requirements in respect of redundancies are different for each EU member state (see www.lawdepartment.net/global “Managing a cross-border redundancy exercise”, GC, 1997, II(8), 21) (for typical timelines in the US, UK, France, Germany, The Netherlands and Italy, see table “Timelines for consultation in respect of a transfer of a business and termination of employment for redundancy” in this article).

In the UK, if there were to be redundancies arising from Megacorp Inc’s proposals which resulted in more than 20 employees in an undertaking being made redundant over a 90 day period (see box “Case study: The Megacorp merger”), there would be a consultation period of 90 days (where more than 100 were affected) or 30 days (where less than 100 were affected) (Trade Union and Labour Relations (Consolidation) Act 1992 (as amended)). If there is a recognised trade union, that would be the party with whom to consult. If there is not, it is incumbent on the employer to arrange for the election of employee representatives. A failure to inform or consult would expose the employer to liability for up to 90 days' pay for each affected employee as well as almost certainly resulting in the dismissals being unfair under the UK unfair dismissal legislation (with consequent additional financial exposure in the form of unfair dismissal compensation for those made redundant) (The Employment Relations Act 1996).

In France, collective consultation obligations begin with a proposal to dismiss 2 to 9 employees over 30 days, with a different time line for consultation where at least 10 employees within companies employing more than 50 employees are proposed to be dismissed over a 30 day period (Code de Travail).

In Italy, collective consultation obligations apply where it is proposed to dismiss 5 or more employees over a 120 day period (Law 223/91).

In The Netherlands, notification to the trade unions and the director of the District Employment Services is required where more than 20 employees are proposed to be made redundant over three months (Redundancy Act 1976). Notification (to the local employment office) is again the requirement in relation to Germany with the trigger number varying from 5 (where the undertaking employs more than 20 but less than 60 employees) to 30 employees (in undertakings with more than 500 employees) to be dismissed over 30 days (The Notification of Redundancy Act 1976). Where notification is required, the real consultation is with the relevant Works Council which will follow its own time line. In Germany, for example, consultation must take place with the Works Council and agreement reached on the reconciliation of the interests of the affected employees, and on a social plan setting out the compensation to be paid. Planned collective dismissals have to be notified to the Labour Authority. With the exception of the Labour Authority requirement which, if not complied with could invalidate dismissals, dismissals in breach of these requirements may be effective but the employees could seek damages for a period of up to 12 months.

In France, The Netherlands and Italy, the collective redundancy procedures have to be completed in order to effect a valid termination of employment.

Negotiating severance terms. Disconcertingly for US (and UK) companies, redundancy does not only involve costing the timeline and accepting that, in some jurisdictions, there is no, or limited, scope for a financially based shortcut (by buying out rights as would be feasible under WARN in the US). In addition, the actual redundancy packages are not calculated by reference to legislation in Germany, France and The Netherlands, but are largely a matter of negotiation with the Works Council. Co-operation and approval have a price attached and the yardstick against which to predict likely costs will either be collective agreements (where they contain redundancy terms, as in France for example) or a general feel for what may be regarded as the going rate in a particular industry sector (for example in The Netherlands). Without an agreed redundancy policy, a complex interplay of notification, consultation and unfair dismissal rights effectively preserves employment (and income) and ensures that substantial severance terms are usually agreed. These can be well in excess of the UK statutory fixed payment, which is calculated by reference to age and length of service. Italy has a statutory termination payment (which applies on redundancy and other no-fault terminations) which equates to approximately one month's pay per year of service.

Unfair dismissal. In all of the EU member states, the question of redundancy does not stop at satisfying the requirements to inform and consult and, where possible, negotiating agreed severance terms or applying those which the member state stipulates. All the member states have a further level of protection or eligibility to compensation if the dismissal is unfair in some way.

In perhaps its most acute form, this may take the form of a simple prohibition against dismissal (for example in The Netherlands where a contract of employment for an indefinite period cannot be terminated without the approval of the Director of the Regional Labour Office or by means of a court decision). In other member states, for example Italy and the UK, an employee who is described as redundant but, for example, has been unfairly selected for redundancy will have protection against the resulting unfair dismissal. In both jurisdictions the relevant tribunals have the power to order reinstatement or significant compensation (in the UK the principal compensatory award is up to £50,000 (US$74,929), in Italy up to 15 months’ salary). In France, compensation of up to 18 months’ salary is possible in certain circumstances and consent is required from the Labour Inspector to dismiss certain employees falling within a special class of protection. In Germany compensation is usually up to 12 months’ remuneration.

In The Netherlands the issue does not arise in the same way. An employer needs permission to dismiss, which renders the need for a financial remedy for unfair dismissal somewhat unnecessary. However, in determin-
ing whether to permit dismissal, the court will, if it gives consent, apply a complex formula in determining compensation. In Germany generally no specific consent need be obtained to render a dismissal valid, although it may be unfair (exceptions exist in relation to certain protected categories of employee which varies regionally). The position is similar in Italy where formal consent to dismiss is not required (except in relation to pregnant employees and trade union representatives), procedural failings can, however, lead to reinstatement.

**Harmonisation in the US**
In the US, it is quite likely that pressure stemming from the need to harmonise terms and conditions of employment will be felt soon after the merger and more acutely when the merged group is integrating its business in each country. Harmonisation will help realise anticipated economies, replace redundant or no longer relevant terms and conditions (for example, bonus schemes and share option arrangements) and attend to morale-damaging differences between terms and conditions of merged work forces where employees are working alongside each other. Again, this is more easily accomplished in the US than in the EU.

**Harmonisation in the EU**
In the UK, employment at will tends to prevail without any requirement to give notice to terminate (see “Contract of employment” above). This may be supplemented by severance arrangements or written employment agreements, as well as by Federal laws such as WARN. Consequently, if new terms cannot be agreed, termination is an option. This type of arrangement is, in effect, wholly susceptible to change at the unilateral decision of the employer.

In the rest of the EU terms and conditions are, by and large, established by collective agreements, referable to industry sectors. These may then be supplemented by additional terms stipulated by employers. In practice, this type of contract is fairly insulated from change save to the extent that national negotiations in the relevant countries result in amendment.

One of the consequences for Megacorp Inc (see box “Case study: The Megacorp merger”) is that while agreement on changes may be possible in the UK and Ireland (although difficult if there are any detrimental changes), this is not really practicable to any material extent in the rest of the EU.

In some areas, particularly in relation to holidays and hours of work, terms and conditions of employment are protected by legislation and may not be changed if change means circumvention of established minimal requirements. The Working Time Directive (Directive 93/104/EC, available at http://www.europa.eu.int/eur-lex) imposes restrictions on working in excess of 48 hours a week and entitles all employees to four weeks holiday a year as a minimum.

In other areas (for example, private medical insurance), the type of benefit which might be a common provision in, say, a US employment agreement and a UK employment agreement, would appear odd in a contract in another EU member state (for example, in a German contract where state facilities are not usually supplemented). Similarly a precondition of employment in the US that the individual undergoes health and drug screening would not work particularly well in some EU member states. For example in Germany, the most one could expect, and indeed require, from any medical examination is confirmation that the individual was fit to undertake the duties for which he or she was being employed.

As a result, even within the EU, let alone between the EU and the US, the idea of standard terms and conditions of employment which could apply throughout the merged companies’ various countries of operation remains an employer’s and an employment lawyer’s Holy Grail.

**The exchange of senior personnel**
With any transaction of the sort undertaken by Megacorp Inc and Old World plc (see box “Case study: The Megacorp merger”), the exchange of senior personnel will often be an important aspect of the planned and actual consolidation of the new merged enterprise.

There is a degree of similarity in the basic principles in the US and EU member states in the regulation of workers from outside the US and EU respectively. However, the procedures and evidence required to obtain authorisation does vary significantly, not only between the US and EU, but also between individual EU member states.

The emphasis in both the US and the EU is to ensure that priority is given to local resident workers before admis-

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**Glossary**

**Collective agreement**
Agreement made between an employer and trade union.

**Just cause**
For a reason fair and acceptable in law.

**Works Council**
sion of workers from outside the respective territories. It is usually necessary to show that it is not possible to recruit a local worker. This requirement, however, in both the US and EU, favours senior executives, professionals and technically skilled individuals.

Entry to the US. In the US the entry of individuals providing professional services is quota limited each year and subject to obtaining US Department of Labor certification (H1 visa). Professionals (including IT professionals) may however enter the country on a temporary basis (B1 visa), provided that they will not be paid from a US source and have a permanent position with an overseas based employer, without obtaining US Department of Labor certification.

Similarly, entry of intra-company transferees is facilitated into the US (L1 visa), particularly for established multi-nationals who have an office in the US, in that blanket approval is available, providing the company and the individuals meet specific minimum criteria (Immigration Reform and Control Act, 8 U.S.C.).

Entry into the EU. While nationals of EU member states are free to work within any other member state, each member state operates its own individual system with varying degrees of restriction. Generally, a non-EU national requires specific permission to work in the EU, normally a work permit (see www.lawdepartment.net/global "Sending executives to work abroad", GC, 1999, IV(4), 27). A work permit issued by one member state is not valid for employment in another, although non-EU workers legally employed in one member state who are temporarily sent on a contract to another member state may not require additional permits.

In the EU, a number of countries have introduced special measures to address specific skills shortages, particularly in the IT sector. In Germany for example, the government is facilitating the entry of up to 20,000 IT specialists from outside the EU by streamlining visa and work permit procedures to make sure that everything possible is done to make the procedures as unbureaucratic, rapid and transparent as possible.

In the UK the labour market test, where it is necessary to demonstrate that a resident worker cannot be recruited for a position, does not apply to occupations which are considered a recognised skills shortage, currently including most IT related positions and a new “innovator” category. The innovator category is specifically aimed at the science, technology and e-commerce sectors to encourage entrepreneurial individuals to establish new businesses in the UK. Applications are assessed on a points based system which assesses the individual’s experience and proven entrepreneurial ability, together with the viability and general economic benefits of the business plan.

The Irish Republic has relaxed immigration controls even more significantly in order to attract key individuals in a booming economic climate. To facilitate the recruitment of suitably qualified people from non-EU countries in designated employment sectors where skills shortages are particularly acute, a Working Visa and Work Authorisation scheme has been introduced (available at http://www.entemp.ie/lfd/working.pdf). This new scheme does not replace, but is a faster alternative to, the normal work permit procedure. It enables individuals with job offers from employers in Ireland in one of the designated categories to obtain immigration and employment authorisation in advance from Irish Embassies and Consulates, without the need to submit work permit applications.

Movement within the EU. There is guaranteed free movement of labour between the EU member states for EU nationals, although the Posted Workers Directive (Directive 96/71/EC, available at http://www.europa.eu.int/eur-lex/) ensures that an employee transferring from, say, the UK to Germany, may become eligible for employment rights in Germany where these are better than those in the other country in which he or she was originally employed (see www.lawdepartment.net/global “Transferring employees to Germany”, GC, 2000, V(10), 25). In a sense this curtails to an extent social dumping (when an employer recruits employees in a country with less generous employment protection to work in a second EU state with more generous, and usually more expensive, statutory protection).

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