Managing employment law issues in a changing world economy

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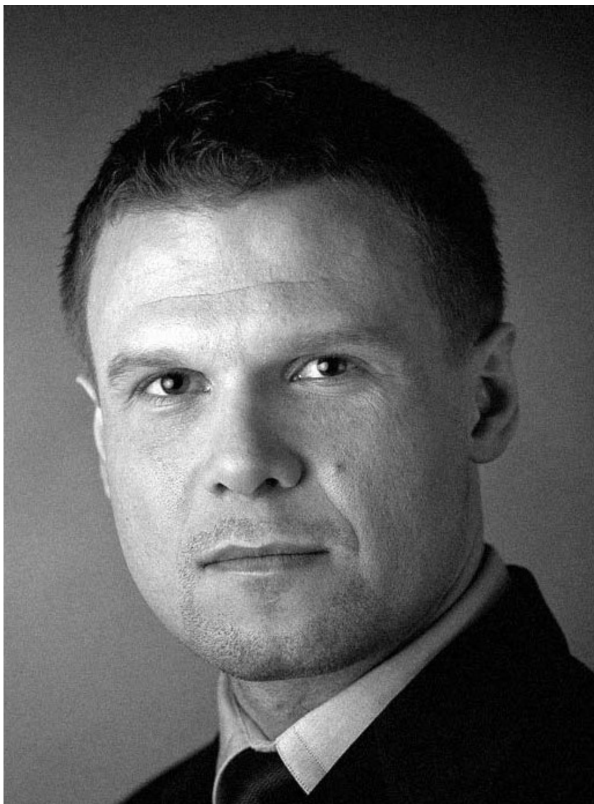

Recession, lower inflation and a sharp rise in unemployment loom—a macroeconomic crisis. Attempts by governments to soften the effects of the crisis have, as of today, delivered very little, as macroeconomic indicators continue to be bad if not very bad.

The natural consequence of all this will be corporate bankruptcies. The mergers and acquisitions will differ from those we saw in the "good old days" of a booming global economy. In the shadow of crisis, M&A activity will be driven by low share and asset prices. And in the changing world economy, the inevitable cross-border investment activities of multinational corporations will continue to have a significant impact on labour markets.

These activities bear many legal risks. Some managers will be looking to exploit the climate of the crisis to carry out drastic actions, not all of them properly thought through as to their long-term consequences—downsizing management, squeezing suppliers, forcing them to change conditions of cooperation, or even colluding illegally with business rivals. Group dismissals will also become unavoidable.

Large employers around the world have announced or already implemented plans to reduce their workforce by several hundred thousand with more job cuts to come. Reuters has forecast the impact of the crisis on the labour market. Its analysts indicated that group dismissals in companies in the manufacturing and services sector worldwide had already affected a huge number of employees. Cuts have already been made or are planned by multinational giants such as Alcatel-Lucent, ArcelorMittal, AT&T, Barclays, eBay, Telecom Italia, Dow Chemical, Sony, Hewlett-Packard, Dell Computer, BT, Wyndham Worldwide, Citibank, Bank of America, and several major car manufacturers. Employment lawyers across many countries agree that this represents the tip of the iceberg. Many firms are planning to move their activities to regions where labour costs and salary expectations are lower.

In the new economic conditions, the people likely to be laid off first are those who were kept on in companies simply because better employees were hard to find. In today's labour market, employers once again have the upper hand, and it is no longer so difficult to recruit even highly qualified people.

Subsidiaries of multinationals are increasingly having to carry out group dismissals, necessitated by their parent company's financial difficulties. In such circumstances, on the basis of the law in many jurisdictions (including Poland), two situations need to be distinguished:

- If the local branch or subsidiary is an independent employer, then, in principle, that entity independently decides on redundancies. Yet often this is illusory. In practice, the interests of entities within a global corporation mesh together so closely that the parent company's situation often imposes restructuring on the subsidiary—even if its own results have been excellent. It is natural in this situation to ask questions about potential discrimination. To avoid the risk of accusations of discrimination when selecting employees of a subsidiary for dismissal, it is important to carefully compare

individuals' situations within a given country (according to criteria set out below), and, to a lesser extent the situation of employees working for other companies belonging to the group.

- The legal situation is different if employees in a branch are employed directly by the parent company, i.e. if the branch does not have the status of an independent employer. If in such circumstances the branch is profitable and brings the parent company significant local benefits, then the risk of accusations of discrimination in the case of lay-offs is much greater. Depending on the choice of jurisdiction (the parent company's or the branch's), the risk of such accusations of discrimination would need to be assessed. Laws in most jurisdictions (and also EU law to a significant degree) prohibit discrimination on the basis of nationality. In such a scenario, it is worth taking into consideration the numbers of people employed across the individual subsidiaries or branches of the group.

An interesting case has arisen where a client, a large multinational, expecting lower demand for its products worldwide, decided pre-emptively to cut back production by around 10%. Compared to its factories in India and China, the Polish plant was relatively small (it continues to employ over 300 people). As a result, this decision meant that the Polish factory would have to close, despite its excellent financial results and current positive sales forecasts. Because it represented only around 10% of the size of the larger factories in the group, it fell within the "no-go" threshold and was earmarked for closure.

Although this article focuses primarily on labour and employment issues, in this case—from the perspective of an employment/M&A/corporate lawyer—it is impossible not to mention a significant company law issue that arises when a decision to close or limit a subsidiary's activity is made. The responsibility of management board members, who under Polish law are responsible for such decisions, is to act in the best interests of the local company. The question arises as to whether they should act also in the best interests of the parent company.

The decision of the management board to suspend or significantly reduce production of a profitable subsidiary could mean liability of board members, if such decision is to the detriment of that company's best interests. In the case of this client, because the company's main contractor (and shareholder) is considering sourcing from other companies within the group located in cheaper labour markets and terminating contracts with the subsidiary until further notice, such restructuring or even closure seems to be the only solution to protect the group from making losses. In reality, such a judgment needs to be confirmed by calculations prepared and discussed between the majority shareholder and management.

One can defend the notion that an employer has the right to carry out dismissals, including group dismissals, even in cases where a subsidiary is in first-class shape financially, because it is a sovereign economic decision within the scope of the employer's managerial duties. As long as the cause of the dismissals is real, and the selection of employees to be dismissed is not based on discriminatory criteria, then the decision will not be easy to overturn in the courts.

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