COLLECTIVE REDUNDANCIES ACROSS EUROPE: WHEN DOES THE EMPLOYER NEED TO CONSULT?

I. OVERVIEW

Employers across Europe may face the prospect of making redundancies for a variety of reasons, as economic conditions across the region remain challenging. In particular, companies engaged in strategic transactions may need to consider potential redundancies as part of their deal planning.

The law relating to collective redundancy in each of France, Germany, the Netherlands and the UK is derived from a single source, the Collective Redundancies Directive (98/59/EC) (the “Directive”). Despite this, the collective redundancy regimes in each of these jurisdictions differ in many respects, including how redundancy is defined for the purposes of the regime, and the sanctions for non-compliance.

The Directive has been implemented:

(a) in France, by law of 2 August 1989, now Article L.1233-3 of the Labour Code;

(b) in Germany, through the German Termination Protection Act (Kündigungsschutzgesetz – “KSchG”);

(c) in the Netherlands, through the Collective Redundancy Notification Act (Wet melding collectief ontslag – “WMCO”); and

(d) in the UK, by the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULR(C)A”).

This briefing focusses on the trigger point for collective redundancy consultation and how the Directive has been implemented and interpreted in each of France, Germany, the Netherlands and the UK. It considers the key legal and practical issues affecting employers planning to conduct collective redundancies in each of these jurisdictions.

Of course, companies must also consider any works council or collective bargaining agreements, and the wider importance of maintaining industrial relations, when contemplating changes to their workforces. This is considered further in section X. below.
II. MANAGING DIFFERING TRIGGER POINTS FOR COLLECTIVE REDUNDANCY CONSULTATION IN CROSS-BORDER MATTERS

The trigger point for collective redundancy consultation under the Directive and under the various national regimes differ, and the law in some jurisdictions is unhelpfully underdeveloped. This is a complex area for employers and employee representatives even in single jurisdiction matters, and it can be difficult to determine precisely when a requirement to inform and consult on potential collective redundancies has been triggered.

In cross-border matters, it is important (but often difficult) to strike the correct balance between complying with the requirements of each of the different regimes, whilst also adopting a pragmatic and (to the extent possible) co-ordinated approach. The most effective transaction planning processes survey the statutory requirements (and requirements under collective agreements) in the jurisdictions where consultation will be needed, and involve planning, before the announcement of redundancy proposals, of how the informing and consulting processes will be handled.

Under the Directive, the trigger point is when the employer is “contemplating” collective redundancies. According to the case law of the Court of Justice of the European Union this will occur once the employer has taken a strategic or commercial decision compelling it to consider or to plan for collective redundancies. The point at which such a decision is “merely contemplated” is too early, because any consultation at that stage would not satisfy the objectives of the Directive, namely, to avoid termination of employment contracts or reduce the number of workers affected and mitigate the consequences, as the relevant factors would not yet have been decided. However, the point at which the employer sets his mind on redundancies (when it can say “we will make redundancies”), would be too late to enable meaningful consultation to take place.

In France, while there are detailed rules concerning the duration of a mass consultation procedure, the law does not define a precise trigger point, and only refers to the employer beginning consultation when it contemplates (“envisages”) making employees redundant. Consultation would be too early if the employer does not have a clear view of its target organisation and of the number of impacted employees, since at that stage the employer would not have the details necessary for a social plan that would be capable of the Labour Authorities’ approval. It is in the employer’s
interests to commence consultation before any final decision is made, but only when it has a clear view of the restructuring project (rationale, impacted employees, consequences on the workforce, etc.).

**In Germany**, the information and consultation obligation is triggered once an employer intends (beabsichtigt) to implement mass redundancies. German law does not specify exactly when that trigger point occurs. However, in light of the purpose of the process, namely that employer and works council consult on ways to avoid or reduce the number of envisaged terminations, or to mitigate their consequences, the Federal Labour Court (Bundesarbeitsgericht) has ruled that the process may only commence once the employer’s redundancy concept reaches a certain stage of specificity, i.e. the employer must have formed a specific intention to issue terminations in a number meeting the mass redundancy requirements. On the other hand, the consultation process has to be completed before the employer takes a final decision on the matter. Therefore the trigger point lies between these two parameters, and it is a matter of judgment when to begin.

**In the Netherlands**, the notification obligation is triggered by the employer’s intention to collectively dismiss employees. Although the purpose of the WMCO is that the trade unions can still influence the decision-making process, which means that a concrete decision cannot yet have been taken, the employer must have a certain plan on the shape and form of the reorganisation in order to commence consultation.

**In the UK**, the duty to collectively consult arises where the employer is “proposing” to make collective redundancies. It is generally accepted that this is a later stage than when the employer is “contemplating” redundancies, and that therefore the Directive requires consultation to begin at an earlier stage than is required by TULR(C)A. Although the word “proposing” has received much attention in UK domestic case law, the exact point at which the duty consult under TULR(C) A arises remains unhelpfully unclear. If the employer is simply engaged in forward planning, which contemplates the possibility of redundancies, the obligation is unlikely to have been triggered. On the other hand, if a business decision has already been made which means that the employer is proposing consequential redundancies, the employer may have missed the point at which the obligation is triggered. This is because fair consultation means consultation when the employer’s business proposals are still at a formative stage.
In summary, the duty to consult will be triggered when the employer has reached a decision in principle that, if given effect, will lead to redundancies – and identifying that point is a matter of delicate judgment.

III. HOW MANY PROPOSED REDUNDANCIES ARE NEEDED TO TRIGGER COLLECTIVE CONSULTATION?

There are further differences in how many redundancies need to be proposed in order to trigger the formalities of a collective consultation process in the different regimes. This is not always as simple as applying a numerical test – there are elements of judgment involved in determining when the thresholds are met.

In France, collective redundancy is defined as the redundancy of more than one employee, so consultation is required when two or more employees are to be made redundant. However the most stringent consultation obligations only apply in companies with 50 or more employees, when ten employees or more are proposed to be made redundant over a period of 30 days. Additional timeframes are provided by the Labour Code to prevent employers from artificially spreading out the terminations to avoid triggering the consultation procedure for mass redundancies. This means that if the employer did not consult on mass redundancies, and it has made redundant:

• more than ten employees over a three month period; or
• more than 18 employees in the course of a calendar year,

then any redundancy, even of only one employee, which takes place during the following three months will require consultation on a mass redundancy plan.

To assess whether the threshold number of proposed redundancies has been reached, French law requires that:

• when a company operates several sites, it has to aggregate the number of redundancies on all sites;
• similarly, when a company is part of a “social and economic unit” (i.e. legally distinct companies which are so interconnected that they have a joint works council), all proposed...
redundancies in all companies forming part of the social and economic unit count towards the collective consultation threshold;

- however, the number of redundancies at group level (beyond the “social and economic unit”), whether in France or abroad, is irrelevant. This means that if, for example, five French sister companies that do not form part of the same social and economic unit were to propose to make redundant nine employees each, none of them would be required to consult on mass redundancies.

In Germany, mass redundancies are defined as making redundant certain threshold numbers of employees within 30 calendar days. The applicable thresholds depend on the employee numbers of the affected establishment (Betrieb):

<table>
<thead>
<tr>
<th>Regularly employed</th>
<th>Number of terminations</th>
</tr>
</thead>
<tbody>
<tr>
<td>21-59 employees</td>
<td>6</td>
</tr>
<tr>
<td>60-499 employees</td>
<td>10% or more than 25</td>
</tr>
<tr>
<td>≥ 500 employees</td>
<td>30</td>
</tr>
</tbody>
</table>

‘Redundancy’ for these purposes includes all terminations of employment at the initiative of the employer, irrespective of the method of termination. It includes ordinary terminations by the employer for overriding operational reasons (betriebsbedingt), as well as for reasons lying in the conduct or in the person of the employee (verhaltens-/personenbedingt), and terminations during a probationary period (Probezeit). It further includes terminations with an offer of alternate terms of employment (Änderungskündigung), terminations by the employee, provided the employer asked him or her to terminate, and by separation agreement (Aufhebungsvertrag) provided the initiative to terminate the employment was the employer’s.

However, the ordinary expiry of fixed-term contracts, terminations instigated by the employer for cause within the meaning of sec. 626 German Civil Code (Bürgerliches Gesetzbuch – BGB; aus wichtigem Grund), and the automatic termination of employment agreements due to fulfilment of a condition precedent (a common example being the achievement of statutory retirement age), do not count towards the mass redundancy trigger.
If redundancies are proposed at several sites that are found to legally constitute one establishment (Betrieb), the proposed redundancies across the relevant sites are aggregated, for the purposes of the thresholds.

Unlike in France, the German Federal Labour Court has decided that employers may in principle phase terminations in a way that their numbers remain below the relevant thresholds. Employers aiming to take advantage of this must take care not to fall foul of the applicable 30-day-period, which is a rolling term. If there is a chance that threshold numbers might be reached, it is crucial that an employer checks before issuing or agreeing on a new termination that, together with any redundancies issued on the same day and in the preceding 29 days, the threshold numbers are not reached. Failure to comply will result in all redundancies issued or agreed within the 30-day-period being void.

In the Netherlands, the WMCO applies in case of: (i) a contemplated dismissal of 20 employees or more; (ii) who work within one out of six operational territories of the Dutch Employee Insurance Agency (Uitvoeringsinstituut Werknemersverzekeringen – “UWV”); (iii) during a period of three consecutive months; and (iv) for reasons of reorganisation.

All intended terminations for reasons of redundancy must be taken into account, irrespective of the method of termination. Unlike in Germany, terminations on grounds other than redundancy, especially performance related terminations, are not taken into account for the calculation. The same applies to terminations during probationary periods and instant dismissals.

In the UK, collective redundancy consultation is required when the employer proposes to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less.

Redundancy for the purposes of collective consultation covers any dismissal where the “reason is not related to the individual concerned”. This is wide enough to catch (for example) dismissals as part of a reorganisation, even if there is no overall reduction in headcount. The same applies where employees are dismissed and re-engaged in order to effect changes to terms and conditions. The expiry of a fixed term contract, however, is excluded from the tally – but if an employee is dismissed before the end of the term, their dismissal will need to be counted. Where any employees have volunteered to be made redundant, the safe approach is to assume that they, too, must be included in the count.
Like in Germany, when proposing redundancies involving multiple sites, there will need to be an analysis of whether those sites constitute separate “establishments”. This will depend on the organisational structure of the business and the sites themselves, and the extent to which each site has sufficient permanence and stability to undertake specific tasks for the wider business. An establishment is likely to be the local unit or branch office to which employees are assigned (it need not be a physical unit: it may be an organisational unit in a service industry set up to provide a certain type of labour) – although it may also encompass a nationwide sales team, for example. The smaller the establishment, the less likely that the collective consultation obligation will be triggered (because there need to be 20 or more redundancies proposed “at one establishment”).

**IV. HOW SOON MUST CONSULTATION START AFTER THE OBLIGATION IS TRIGGERED?**

**In France**, there is no trigger point for the engagement of the consultation process, since the law provides that the redundancies cannot be implemented as long as consultation is not complete. Employers have therefore an interest in beginning consultation as soon as possible once they propose making redundancies.

**In Germany**, the consultation process has to be entered into “timely” (rechtzeitig). This concept is not precisely defined but, in practice, it is often not a crucial issue since it is in the employer’s interest to expedite the process. This is because mass redundancy notifications (Massenentlassungsanzeigen) can be filed no earlier than two weeks after the works council has been fully informed of the intended mass redundancies: in other words, the employer is incentivised to go ahead with the consultation.

**In the Netherlands**, the employer is obliged to notify the relevant trade unions about the contemplated collective dismissal for “timely consultation”. In light of the purpose of the WMCO, this implies that notification must take place at such a time that the trade unions can still influence the definitive decision-making.

**In the UK**, consultation must commence “in good time”. What is “good time” will depend on many factors, including the number of staff and employee representatives involved, and what
is a reasonable amount of time for them to be able to respond to proposals and make counter-
suggestions. There are also minimum periods under TULR(C)A that must elapse between the start
of consultation and the date of the first dismissal (although the consultation need not last for
the entire duration of these periods). Where between 20 and 99 redundancies are proposed, the
minimum period is at least 30 days; where 100 or more redundancies are proposed, the minimum
period is at least 45 days. Whilst there is no clear authority or guidance on this issue, in the UK it is
good practice for the employer to at least begin planning the consultation process as soon as the
duty to consult is triggered. Any delay in starting consultation would risk the employer being found
to be in breach of its obligations.

V. WHAT DOES THE EMPLOYER NEED TO CONSULT ABOUT?

In France, the purpose of the consultation is to: (i) consult on the reasons why redundancies are
necessary; and (ii) explore ways to avoid or reduce the number of envisaged terminations, or
to mitigate their consequences, through a social plan submitted to the labour authorities. The
employer needs to provide a detailed rationale for the restructuring, and indicate how many
employees are to be made redundant and will benefit from the social plan.

In Germany, the employer has to: (i) inform the works council of the reasons for and the specifics
of the envisaged redundancies (essentially, the number and professions (Berufsgruppen) of the
employees to be terminated, the criteria for their selection, the details of any intended severance
payment scheme, as well as intended timing of the redundancies); and (ii) consult with the works
council on ways to avoid or reduce the number of envisaged terminations, and/or to mitigate their
consequences. Further, consultation and negotiation obligations may apply under the German
Works Constitution Act (Betriebsverfassungsgesetz – “BetrVG”) as described further in section X.
below.

In the Netherlands, consultation with the trade unions must relate to the necessity of the proposed
collective dismissals or the possibilities to reduce the number of dismissals. It must also relate to the
possibilities to mitigate the consequences of the proposed dismissals, for instance by reassignment
or retraining of the employees the employer intends to dismiss. In practice, consultation with the
trade unions can be used to negotiate a social plan, although this is merely a best-efforts obligation.
In the UK, prescribed information must be given to the employee representatives in order to start the consultation process. Once that information has been provided, the employer must consult about ways of: (i) avoiding the dismissals; (ii) reducing the number of employees to be dismissed; and (iii) mitigating the consequences of the dismissals. This represents the statutory minimum in terms of topics for consultation. In practice the employer will usually consult about other matters, such as the method of selection for redundancy. It is for the employer to proactively raise all these matters. These topics should therefore be set out in the minutes as agenda items for the consultation meetings and should also reflect the objective of consultation as being "with a view to reaching agreement". This means the employer must actually negotiate on the consultation topics.

Although the UK legal position is not entirely clear, it is thought that, in some cases, the employer will need to consult not just about the proposed redundancies, but about the business decisions that lead to the decision to make employees redundant. This is a function both of the stage at which the obligation to consult is triggered (before that business decision is taken), and of the employer's obligation to consult about ways of avoiding the redundancies (i.e. business closure or restructuring).

VI. IF A PARENT COMPANY ENVISAGES COLLECTIVE REDUNDANCIES WITHIN THE GROUP, DO ITS SUBSIDIARIES NEED TO INFORM AND CONSULT?

In France, the consultation obligation itself applies only with respect to the employing entity, whether or not it belongs to a group. However, the assessment of the economic difficulties and the search for alternative employment for the employees at risk of redundancies should take into consideration the situation of the other group companies.

In Germany, the Netherlands and the UK, a business decision taken by a parent company, which leads to redundancies within a subsidiary, can trigger the need for collective consultation at the level of the subsidiary. In this scenario, the subsidiary employer has a legal duty to begin consulting before the parent takes a final and irrevocable decision. It is no defence that the subsidiary itself was not consulted, or even that it was wholly unaware of the decision that the parent company has taken. This means that clear intra-group communication is very important.
VII. WHAT IF THE REDUNDANCIES ARE SOME WAY OFF?

It can be difficult to determine when to begin collective redundancy consultation when a company has a relatively specific, but still provisional intention to make redundancies at some point in the future (and contingent on future developments). For example, when should collective consultation on potential redundancies begin when a broad intention to realise headcount synergies is known before a strategic corporate transaction, but the specifics of any collective redundancies depend on business developments that may be several years away?

In France, general intentions of an employer to make headcount reductions in the future do not trigger an obligation to consult on mass redundancies, but should be part of the annual consultation of the works council on the strategic orientations of the company.

In Germany, fixed, but provisional intentions regarding mass redundancies that are to be implemented in later years and that are contingent on future developments, will usually not trigger a mass redundancy consultation process, because the employer's intentions will most likely lack the required specificity. However, such provisional plans may, for example, fall within the general information rights of the works council in the context of its task to secure and further employment in an establishment, and/or within the information obligations of an employer vis-à-vis its economic committee (Wirtschaftsausschuss).

In the Netherlands, the general course of business affairs should be discussed at least twice a year in a consultation meeting with the works council. During this meeting, the employer informs the works council about possible future decisions regarding matters on which the employer has a right of advice or a right of consent. This includes general intentions of the employer regarding collective redundancies.

In the UK, a pragmatic balance will need to be struck, and practical engagement with employee representatives may be needed to manage industrial relations. If feasible, the employer may seek to enter into some preliminary consultations at this stage, and these consultations may then inform how the process develops over the period leading up to the potential redundancies. In these cases, the employer will need to monitor the evaluation of its business planning, so that it can
begin informing and consulting at the right point in time. On strategic transactions, this can require proactive coordination of strategy and M&A teams with HR and industrial relations heads.

**VIII. WHEN DOES CONSULTATION FINISH?**

**In France**, the consultation is deemed to be complete when the works council has issued an opinion – not an agreement – or when a specified period of time has elapsed since the start date of the consultation (the duration of which depends on the size of the company and on the number of redundancies that are envisaged).

**In Germany**, the works council and employer do not have to reach agreement regarding potential collective redundancies, but they do have to consult in earnest on ways to avoid or reduce the envisaged redundancies or to mitigate their effects. Such information and consultation process must end before the mass redundancy notification is served.

The process will end once the works council issues a written opinion on the envisaged redundancies for provision to the Federal Labour Agency (Agentur für Arbeit), or states that it does not intend to provide an opinion. If, however, the employer determines that the consultation process is not leading anywhere, it can (after the expiry of two weeks following the provision of information to the works council, as described in more detail in section V. above), end the consultation process by filing a mass redundancy notification with the Federal Labour Agency. In these circumstances, the employer must also file a statement setting out the status of the consultation process (including the opinions held by the parties and the reasons why the employer has taken the view that the process is no longer viable).

However, if the intended measure also constitutes an operational change (Betriebsänderung), which it commonly will, the employer and works council must further attempt to agree:

- a compromise of interests (Interessenausgleich). This is a document setting out the intended measures; and
- a social plan (Sozialplan). This is an agreement on means alleviating the negative effects of such measures on the affected employees (e.g. changes in timing, severance payments, etc.).
If the works council and the employer cannot come to terms, mediation by the Federal Labour Agency can be applied for, and/or a conciliation board (Einigungsstelle) may be installed at the request of either party, which may decide on the terms of a social plan with binding effect for both parties.

**In the Netherlands**, the consultation process is finished when the trade unions have been consulted on the necessity and the scale of the collective redundancies, including the redundancy package for the employees. As in Germany, ‘consultation’ does not imply that the employer and the trade unions must reach an agreement. The employment agreements with the relevant affected employees can only be terminated after observing a one month waiting period after the notification has been submitted to the trade unions and the UWV. Requests for dismissal permits submitted to the UWV will not be dealt with during this waiting period, unless the trade unions declare that they have been consulted and they agree with the termination of the employment agreements.

**In the UK**, if the parties reach agreement on the required subjects, the point of completion will be easy to identify. However, it is far more common that there is no agreement on at least one of the consultation issues. This makes it more difficult to determine when consultation is complete. There is no general rule; the answer depends on the particular circumstances. They key question is whether the employer has made a *bona fide* effort (and genuinely sought) to achieve an agreed solution. If however, despite the employer’s best efforts, agreement still has not been reached, the employer should then be able to treat consultation as being at an end and proceed to implement his plan. This is subject, of course, to the employer having complied with the minimum periods prescribed by TULR(C)A (described in more detail in section IV. above).

### IX. ARE THERE ANY FILING OBLIGATIONS WITH A PUBLIC AUTHORITY?

**In France**, the Labour Authorities are to be provided with the intended redundancy plan as from the beginning of the redundancy process, and with the social plan – which they have to approve – once its content is determined. They have also to be informed at the time of the sending of the redundancy letters, and receive monthly updates on the headcount variations in the company.
In Germany, the employer has to file a mass redundancy notification (Massenentlassungsanzeige) with the Federal Labour Agency together with a statement by the works council on the envisaged redundancies. Federal Labour Court precedent suggests that such statement needs to indicate that the works council considers its information and consultation rights complied with, and that the statement constitutes the works council’s final statement on the envisaged redundancies. However, a works council’s unequivocal statement that it does not want to take a stand on the envisaged redundancies has also been found sufficient. Only in the event that the works council does not react to mass redundancy information by the employer or fails to provide the required statement, may the employer file its mass redundancy notification in any case, subject to the employer proving that the works council was properly informed at least two weeks prior to issuing the notification, as well as a statement on the status of the consultation process. Mass redundancy terminations will be void if they are issued without the employer having complied with the process.

Redundancy notices may be issued immediately after the employer serves the mass redundancy notification to the Federal Labour Agency. However, unless ordered otherwise by the Federal Labour Agency, terminations of employment forming part of the notified mass redundancy may not take effect for a further period of one month after notice of redundancy is given (this is known as the waiting period - Sperrfrist). If the applicable notice period in an individual case is shorter than the one month waiting period, the termination may only take effect after the expiry of the waiting period, which takes precedence.

However, once a proposed termination is notified to the Federal Labour Agency, notice of termination must be given to the affected employees within 90 days - otherwise a new mass redundancy notification may be needed.

In the Netherlands, the employer is obliged to notify the relevant trade unions and the UWV in writing about the contemplated collective dismissal. In this notification, the employer must include the reasons that have led him to the proposed mass redundancy, with proper substantiation. The employer is also obliged to issue factual information in accordance with the Directive, such as the number of redundancies, the date of the termination of the employment agreements, etc. The employer is further obliged to send a copy of the notification that he sent to the relevant trade unions to the UWV and vice versa. The UWV must also be informed about the timing of the consultation procedure with the works council.
In the UK, an employer must notify the Secretary of State ("SoS"), in writing if it is proposing to make redundant 20 or more employees at one establishment. The timing of the notification must be within the same minimum periods prescribed by the legislation (i.e. between 20 and 99 redundancies, at least 30 days; and 100 or more redundancies, at least 45 days, before the dismissals take effect). Notice of dismissal can be given during this minimum period, as long as it expires after that period has elapsed. However, the employer cannot issue notice of dismissal before notifying the SoS. Failure to notify the SoS is a criminal offence attracting a potential unlimited fine and/or disqualification of up to 15 years for directors.

X. HOW DOES THE STATUTORY COLLECTIVE REDUNDANCY REGIME INTERACT WITH OTHER COLLECTIVE CONSULTATION OBLIGATIONS?

Although this briefing focuses on the statutory collective redundancy regimes in the relevant jurisdictions, it is also essential for employers to review and comply with other laws, collective bargaining requirements, agreements and practices in each jurisdiction (both local and national). There may also be transnational bodies such as European works councils to consider. This makes it challenging for employers to manage multiple overlapping regimes within each jurisdiction, as well as across jurisdictions.

In France, it is possible for the employer to avoid the consultation of the works council if it enters into a detailed agreement on the number of redundancies and on the measures to mitigate their consequences with the trade unions (the works council will in this case only be consulted on the issues where no agreement was found with the unions). It is also possible, through an agreement with the union, to adapt the consultation procedure with the works council, usually to simplify/shorten it. In most cases, mass redundancy procedures are combined and an agreement is reached with the unions on the measures to be offered to the impacted employees.

In Germany, additional, separate information, consultation and/or negotiation obligations vis-à-vis competent works councils or other employee representative bodies may arise under other legal regimes and arrangements.
One example is the consultation duty with the economic committee (Wirtschaftsausschuss), a body staffed with works council members at company level with the purpose of consulting on economic issues affecting the employer. There is a duty to consult on economic matters that may materially affect the interests of the employees of the company (sec. 106 BetrVG). This includes changes to the organisation or rationalisation plans, but may also be triggered by plans for mass redundancies.

Another example is the employer’s duty to inform and consult with the works council, to attempt to agree a compromise of interests and to agree on a social plan, if a contemplated measure (also) constitutes an operational change (Betriebsänderung).

Finally, the works council has to be informed and heard on every individual termination at least one week before it is issued. The works council can object to, but ultimately cannot block a termination. However, terminations issued without a prior works council hearing will be void.

These obligations apply cumulatively, and compliance with one regime is not enough. However, in so far as the acting parties and the requirements under the relevant obligations are identical, information, consultation or negotiation proceedings applicable under different legal norms may be combined. If this is intended, the employer has to communicate clearly to the works council the intention to combine proceedings and which information and consultation obligations shall be fulfilled thereby.

In the Netherlands, the intended dismissals will most likely trigger a consultation obligation with the works council, as the works council has a right of advice in case of ‘a significant change in the organisation of the undertaking’. Intended collective dismissals will generally qualify as such a significant organisational change. The works council’s advice must be requested at such a time that the advice can still substantially influence the intended decision. In the request for advice, the employer must set out the reasons for the proposed decision and the anticipated consequences for the employees. The proposed decision should be the subject of discussion in at least one consultation meeting between the works council and the employer.

The employer is free to decide whether or not to comply with the works council’s advice. However, if his decision deviates from the works council’s advice, the employer must explain to the works
council in writing why he has deviated from the advice. Moreover, the employer must observe a suspension period of one month during which period he may not implement the decision. The works council can make use of the suspension period to appeal the employer’s decision with the Enterprise Chamber of the Amsterdam Court of Appeal.

The WMCO requires that the UWV is also informed about the timing of the consultation procedure with the works council.

In the UK, a separate duty to inform and consult might arise under the terms of any relevant information and consultation agreements that apply in respect of affected employees. The standard information and consultation provisions (“SICP”) under the Information and Consultation of Employee Regulations 2004, for example, require the employer to inform and consult with a view to reaching agreement over “decisions likely to lead to substantial changes in work organisation or in contractual relations”. This would include business decisions that could potentially lead to redundancies.

Similarly, under a default European works council agreement, there must be an exceptional meeting with the works council where there are “exceptional circumstances affecting the employees’ interests to a considerable extent, particularly in the event of relocations, closure of establishments or undertakings, or collective redundancies”.

Collective redundancy consultation may also overlap with the obligation to inform and consult under TUPE, if the redundancies are proposed as part of a transaction which involves a TUPE transfer.

Finally, the employer may have another form of legally binding collective agreement, or an agreement with a recognised trade union, which requires consultation on proposed redundancies.

Employers should therefore be aware that these arrangements may trigger consultation duties (relating to potential redundancies as well as other matters related to the business), and potentially at an earlier stage than TULR(C)A or the Directive.
XI. CONCLUSION: PRACTICAL TIPS FOR EMPLOYERS

Given the multiple overlapping regimes within jurisdictions and across borders, we recommend that companies seek legal advice at an early stage when they foresee a potential need to consolidate or restructure their businesses. The trigger for collective consultation can be difficult to identify, and is very fact specific. When the proposals have the potential to affect employees located across various jurisdictions, the obligations to collectively consult may also be triggered at slightly different times.

It is important to be aware that the actions of a parent company can trigger consultation obligations in a subsidiary company, even in a separate jurisdiction. This means that clear intra-group communication and coordination will be very important.

Similarly, it is vital to establish good communications between the strategy/M&A teams on the one hand and the HR/industrial relations teams on the other hand. Good information sharing within and between the teams will ensure that triggers are spotted and the process remains within the employer’s control, rather than becoming reactive.

Planning is key. There will be a significant amount of work to do before any proposed mass redundancies can be announced or before consultation can begin. It is important to be clear about what information needs to be provided, and what topics need to be consulted upon. While it goes without saying that the applicable requirements of each jurisdiction must be complied with separately, a pragmatic and coordinated multi-jurisdictional approach is also likely to be required. This may result in a need to “level up” compliance to the most stringent regime, for instance. Employee representatives are likely to discuss and coordinate, so it may help from an industrial relations perspective to have a coordinated multi-jurisdictional approach. Employers should be aware of any overlap between members of employee representative bodies, for instance, and how this may point to a need to ensure consistency of information flows (both as to content and timing) between all employee representatives.

It will usually be helpful to put together an indicative timetable for the consultation process, taking into account the various requirements, both as to content and timing, under all applicable regimes. Employers should not shy away from forming a view on how long it could reasonably be expected
to negotiate an agreement covering at least the required subjects – this should not be seen as pre-judging the process, provided the timetable is clearly described as indicative, and the employer remains open to consulting for longer if necessary.

Consultation with the employee representatives should always be approached with an open mind. The employee representatives should have the opportunity to express their views, and have their points suitably addressed. Employers should be prepared to change their proposals as a result of the consultation process, and in light of other changes in circumstances, and should think seriously about the areas where they would be able and/or willing to take a different approach. However, being able to present a clear structure to employee representatives at the outset will help to keep the processes within the employer’s control and should also help take away uncertainties that could result in challenge and worsened employee relations.

The appendix sets out a high level comparison of the key features employers need to know about the collective redundancy consultation regimes in the four jurisdictions covered by this note.
### OVERVIEW OF REQUIREMENTS IN FRANCE, GERMANY, THE NETHERLANDS AND THE UK

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<tr>
<th>Issues</th>
<th>France</th>
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<th>The Netherlands</th>
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<td><strong>What is the definition of “collective redundancy”?</strong></td>
<td>The redundancy of more than one employee (although the most stringent consultation obligation only applies in companies of 50 more, when ten or more employees are to be made redundant within a 30 day period).</td>
<td>Where a certain minimum number of redundancies (between six and 30, depending on the number of employees in the business) take effect over a (rolling) 30 calendar day period.</td>
<td>Where 20 employees or more within one operational area are dismissed for redundancy within a three month period.</td>
<td>Where the employer proposes to dismiss as redundant 20 or more employees at one establishment within a 90 day period.</td>
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<td><strong>Are there any bodies which an employer must inform and consult in the event of a collective redundancy?</strong></td>
<td>The works council (comité d'entreprise) or the future conseil social d'entreprise (Betriebsänderung) constitute the recognition trade union or an elected body of representatives.</td>
<td>The works council of the establishment, and – as the redundancy will usually constitute an operational change (Betriebsänderung) – the economic committee (Wirtschaftsausschuss) of the company, if any.</td>
<td>Relevant trade unions and the UWV, plus typically the works council.</td>
<td>A recognised trade union or an elected body of representatives.</td>
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<td><strong>Key elements of the information and consultation process</strong></td>
<td>Consultation is required on (i) the economic rationale supporting the redundancies and the social plan, i.e. the measures taken to reduce the number of employees to be dismissed or to mitigate the consequences of the dismissals.</td>
<td>Consultation with the recognised trade unions must at least relate to: (i) the necessity of the collective dismissal or the possibilities to reduce the number of dismissals; and (ii) the possibilities to mitigate the consequences of the intended dismissals.</td>
<td>Consultation must also cover at least the three mandatory topics (i.e. ways of: (i) avoiding the dismissals; (ii) reducing the number of employees to be dismissed; and (iii) mitigating the consequences of the dismissals).</td>
<td>Certain information must be provided to the representatives. Consultation must also cover at least the three mandatory topics (i.e. ways of: (i) avoiding the dismissals; (ii) reducing the number of dismissals; and (iii) mitigating the consequences of the dismissals).</td>
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<td><strong>If a parent company envisages collective redundancies within the group, do its subsidiaries need to inform and consult?</strong></td>
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| Prescribed timescales for informing and consulting                    | The consultation process must be completed before any redundancy can be implemented. The duration of the consultation procedure depends on the size of the company and on the number of contemplated dismissals, and typically ranges from two to four months. | The consultation process has to be entered into "timely" and generally has to be completed before mass redundancy notification is made to the Federal Labour Agency and before terminations may be issued to or agreed with employees. | Consultation must begin "in good time". This implies that notification must take place at such a time that the trade unions can still influence the definitive decision-making. | Consultation must begin "in good time" and:  
• where 100 or more redundancies are proposed, at least 45 days before the first dismissal takes effect;  
and  
• for 20 to 99 proposed redundancies, at least 30 days before the first dismissal takes effect. |
| Are there any notification requirements?                               | The employer must provide the Labour Authorities (DIRECCTE) with the intended restructuring plan, the minutes of the works council meetings and any agreement reached with the unions. | The employer has to provide the relevant mass redundancy notification (Massenlöschungsanzeige) to the Federal Labour Agency. | The trade unions and the UWV must be notified in writing.                                                                                                 | The Secretary of State must be notified in writing.                                         |
## Issues France Germany The Netherlands The UK

### What are the sanctions for non-compliance?

- **France**: Any dismissal notified without approval from the Labour Authorities, which cannot be obtained if consultation has not been properly carried out, is null and void.
  
  In addition, not consulting when required is a criminal offence which can be sanctioned by a fine of up to €7,500.

- **Germany**: Terminations issued without adherence to the requirements will be void.
  
  Violation of the legal requirements may also constitute an administrative offense that can be sanctioned with a fine of up to €10,000.

- **The Netherlands**: A notice of termination from the employer and a termination agreement concluded at the initiative of the employer may be subject to annulment.
  
  The employee can also claim an equitable compensation (billijke vergoeding) instead of invoking the nullity.

- **The UK**: A protective award of up to 90 days’ uncapped pay per affected employee.
  
  Failure to notify the Secretary of State is a criminal offence attracting a potential unlimited fine and/or disqualification of up to 15 years for directors.
Further information

If you would like to find out more about any of the issues raised in this briefing, or require advice in relation to a specific matter, please contact:

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