BUYER BEWARE: THE HIDDEN COST OF LABOR IN AN INTERNATIONAL MERGER AND ACQUISITION

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ABSTRACT

A US investor must understand the basic difference in the principle of individual labor law in the US and how it compares with the laws of the target country in a merger and acquisition (M &A). This paper emphasizes the importance of including in the due diligence process of M &A the target country's labor laws and investigate the cost of compliance or violation.

1. INTRODUCTION

In today's global economy, corporate mergers and acquisitions (M&As) have become part of economic reality.[1] Globalization opens many U.S. companies to a broader outlook of an interconnected and interdependent world with free transfer of capital, goods, and services

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1 A. Charman, *Global Mergers and Acquisitions: The Human Resource Challenge,* 3 (1st ed., 1999).

across national frontiers.[2]The synergistic gains from M&As may result from more effective and efficient management, economies of scale, more profitable use of assets, exploitation of market power, and the use of complementary resources; yet, results of many empirical studies show that many M&As fail.[3] This article will concentrate on shedding light on important differences in international labor law between United States and specifically Germany and Italy and how failure to take those differences into consideration can compromise the success of a merger and acquisition.

2. DUE DILIGENCE: SCRUTINY OF LABOR LAW OF TARGET COUNTRIES (GERMANY AND ITALY) IN RELATION US LABOR LAWS

2.1. Distinction in Terms: "Labor Law" and "Employment Law"

"The U.S. term "labor and employment law" does not translate easily because of differences in language and usage between the United States and the multilingual European Union (EU)[4]. In the U.S., there is a distinction between "labor law," which relates to unionized workers and collective bargaining, and "employment law," which relates to equal employment issues and to employment issues of non-unionized workers[5]. This distinction does not exist in EU countries. Generally speaking, the European term "labor law" covers all laws relating to employment.[6]

2.2. Distinctions in Legal Regulations

In addition, the distinction between regulated and unregulated aspects of industrial relations and human resources cannot be drawn sharply for a supranational body such as the EU. [7] Items that are subject to legal regulation in the U.S., such as union recognition and the collective bargaining process, may not be subject to legal regulation in a particular

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2 Rick Maurer, *Why Most Mergers Fail: Global employment Law Compliance; Complex differences can cause headaches for even seasoned in-house counsel*, N.Y.L.J. (online) (2009), available at http://www.hkemploymentlaw.com/images/ps_attachment/attachment 46.pdf, last seen on 29/06/2015.

3 Ibid.

4 Bloomberg BNA, *International Labor and Employment Laws*, 1 (4th ed., 2012).

5 Ibid.

6 Ibid.

7 Ibid.

EU country[8]. Likewise, items that rarely are regulated in the United States, such as whether employers must give private sector employees time off for holidays, may be determined at a minimum level in EU legislation and in a more detailed fashion in individual Member States, where a higher standard of employment protection may be maintained or introduced.[9] The EU has acted to harmonize laws in the labor and employment "area," which should be understood to indicate that in some countries the issue may already have been the subject of legal regulation, while in other countries it might previously have been unregulated. [10] The term "harmonization" does not equate with unification.[11] It is a flexible term designed to achieve, where necessary through binding EU legislation, a greater degree of similarity between laws but not a uniform system of labor and employment regulation.[12]

2.3. Protective Legal Framework of "Social Policy"

The EU, in response to factors such as technological progress, globalization of trade, unemployment and ageing population, introduced a protective legal framework for the European citizens. [13] This protective legal framework was named "social policy". [14] The term "social policy" is used generically in the EU to encompass all forms of workplace regulation, including health and safety systems, equality laws, dismissal protection, worker involvement in decision making and, more broadly, job creation programs, education, vocational training, public health, and social welfare policies. [15] In most areas of social policy, legal authority for regulation lies with the Member States, which determine the overall structure of their social systems.[16] EU labor and employment laws are intended to be supplementary and must be sufficiently flexible to be compatible with the range of social systems operating in the Member States.[17]

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[8] Ibid.

[9] Donald C. Dowling Jr., *Global HR Topic- September 2012: Employment-Context Choice – of-Law Clauses*, White& Case LLP Publications, (September 2012).

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] George Soros, *Toward a Global Open Society*, 281 The Atlantic Monthly 20, 32 (1998).

[14] Ibid.

[15] Ibid.

[16] Supra 2.

[17] Ibid.

2.4. Definition of "Worker" and "Employee"

Another difference in terminology relates to the term "workers" which, in the United States, implies blue-collar workers, with the term "employees" having a more neutral connotation[18]. This is not the case in Europe. [19] U.S. practitioners reading the term "workers" in European materials should bear in mind that this means all employees, including casual workers.[20] The U.S. distinction between exempt and nonexempt employees is virtually unknown in Europe.[21] In the U.S., this distinction is based on classifications made in the Fair Labor Standards Act (FLSA) [22] which, as a general rule, exempts from coverage those performing managerial or creative work.[23]

2.5. Distinction between "Workers" and "Employees" in Reference to Public and Private Sector

In addition, the laws of most EU Member States and the directives of the EU make no distinction between private sector and public sector workers. [24] Thus, if a directive applies to "workers," it normally applies to persons employed in both publicly and privately owned enterprises. [25] However, where an EU directive refers only to "employees," a Member State may exclude civil servants with a public-law status who are deemed to fall outside the coverage of national employment law.

2.6. The Due Diligence Process and the Regulatory Compliance with Labor Law Provisions

When a company begins to consider M &As, the typical due diligence includes asset valuation, historical and future earnings valuation, comparative valuation, discounted tax flow, tax consequences and legal structures.[26] More companies are beginning to understand that culture plays a role in determining the success or failure of an international

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[18] Supra 6.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] 29 U.S.C. Ss. 8 *et. Seq.*
[23] Ibid.
[24] Supra 6.
[25] Ibid.
[26] Supra 15.

partnership.[27] Understanding a potential partner's corporate culture and national culture can mean the difference between success and failure of M&As.[28] While commercially sensitive information cannot be exchanged prior to a merger or acquisition, the legal and integration team of the acquirer needs to conduct the due diligence in the area of regulatory compliance and clearance, including timing issues.[29] Despite globalization of business across national frontiers, labor is not interdependent and cross border.[30] The acquirer needs to be aware of the entire employment law spectrum of the territory from the beginning of employer-employee relationships to notice of termination, mediation, arbitration and litigation, as well as termination agreements, regulations concerning industrial relations, work agreements between employers and staff representatives, and collective agreements between employers and trade unions.[31] In the event that M&As will require changes in company structure, the following information must be investigated as part of the initial due dilligence effort: the law on work committees;[32] the law concerning written cautions[33]; the law on labor leasing; regulations concerning executives; mergers, acquisitions and possible sales and shutdowns of companies and all relevant labor law consequences.[34]

2.7. The Cooparative Employer-Employee Relationship

It is important to note that in US the employer-employee relationship, as established by National Labor Relations Act (the NLRA)[35], still has an adversarial connotation[36], while in Germany and Italy, the relationship is cooperative. Three primary mechanisms of worker participation exist in Germany: (1) collective agreements negotiated by trade unions,[37] (2)

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[27] Daniel Rottig, *Successfully Managing International Mergers And Acquisitions: A Descriptive Framework*, THE J. OF THE AIB-SE (2007).

[28] Supra 2.

[29] Ibid.

[30] Ibid.

[31] Ibid.

[32] Viet D. Dinh, *Codetermination and Corporate Governance in a Multinational Business Enterprise* 24 J. Corp. L. 975 (1999).

[33] Bernd Frick; A. Miguel Malo; Pilar Garcia; Martin Schneider, *The Demand for Individual Grievance Procedures in Germany and Spain: Labour Law Changes versus Business Cycle*, 30 Estudios de Economia Aplicada 283, 310 (2012).

[34] Supra 42.

[35] 29 U.S.C. S. 151,169 (United States)

[36] Electromation, Inc. v. NLRB, Nos. 92-4129, 93, 1169 (1994, 7th Circuit).

[37] In the mid-1950s, 36% of the United States labor force was unionized. At America's union peak in the 1950s, union membership was lower in the United States than in

workshop co-determination by way of works councils, [38] and (3) supervisory board[39] co-determination.[40] Italy is a founding member of the European Union (EU), having co-signed the Treaty of Rome on March 25, 1957.[41] Italy is subject to EU directives and regulations and to the decisions of the European Court of Justice. [42] The following are the relevant EU directives implemented in Italy: (1) European Works Council,[43] (2) Collective redundancies,[44] (3) Transfers of undertakings,[45] (4) workplace safety [46] and (5) free movement of workers. [47] This information is significant to an U.S. Corporation which may be considering an M & A because the cooperative attitudes in EU and especially Germany and Italy have strong statutory underpinnings and are embedded in wider employee relations systems that recognize the interests of labor. [48] The U.S. employer must shift from the adversarial to cooperative mentality in order to secure a successful merger or acquisition.[49]

3. COMPARATIVE ANALYSIS OF AT-WILL-EMPLOYMENT CONCEPT AND DOCTRINE IN UNTIED STATES AND RELATED EMPLOYMENTS LAWS IN GERMANY AND ITALY

Many US companies due to the adversarial mentality and the influence of the at-will employment environment will be shocked to find out how

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most comparable countries. By 1989, that figure had dropped to about 16%, while in Germany and Italy, over 30% of labor force is unionized.

[38] European Works Councils were created partly as a response to increased transnational restructuring brought about by the Single European Act.

[39] Germany has a two-tier board there is an executive board (all executive directors) and a separate supervisory board (all non-executive directors) which was created to provide a monitoring role over corporate governance.

[40] Zakson, *Worker Participation: Industrial Democracy and Managerial Prerogative in the Federal Republic of Germany, Sweden and the United States*, 8 Hastings Int'l & Comp. L. Rev. 93, 114 (1984). See W. Kolvenbach, *Cooperation between Management and Labor* (1982).

[41] Supra 5.

[42] Ibid.

[43] EU Directive 94/45.

[44] EU Directives 75/129 and 92/56.

[45] EU Directives 77/187 and 98/50.

[46] EU Directives 80–391, 89/391/EEC, 89/654/EEC, 89/655/EEC, 89/656/EEC, 90/269/EEC, 90/270/EEC, 90/394/EEC, and 90/679/EEC.

[47] Article 48, Treaty of Rome.

[48] George Strauss, *Worker participation – some under-considered issues*, 45(4) Industrial Relations Journal 778, 803 (2006).

[49] Supra 42.

much time and money will be requred to accomplish a reduction in force or an involunatry separation for cuase in Germany and Italy due to their applicable labor protections statutes, collective bargaining agreements, relations and cultural attitudes.[50]The Employment–at–Will Doctrine (EAWD)[51] provides that, absent a legal rule to the contrary, either party to an employment relationship for an unspecified term can terminate the relationship for good reason, bad reason or no reason at all, despite the employee's length of service, with or without cause or notice, and without giving any explanation or reason, unless the freedom to terminate is constrained by contract.[52] Conversely, where employment is for a definite term based on a contract, an employer can terminate only for cause.[53] Under the EAWD, the presumption is that the employee is only a supplier of labor who has no legal interest or equity stake in the business other than the right to be paid fair wages for labor performed, while the employer, as owner of the business has the sole right to determine all matters concerning the operation of the business.[54] US companies that are contemplating mergers or acquisitions of companies in the European Community (the "EC" or the "Community")[55] must take into considerations the Directive of EC as well as the strict regulations of the member states which aim to protect employee rights and increase job security.[56] In contrast to the free wheeling EAWD, the EU countries have specific statutory schemes that address terminating of employment as demonstrated in the next subsections.

3.1. The German Employment Law Provisions

German law contains a complex set of mandatory notice provisions for the termination of employment contracts and relationships. One requirement for an effective termination is the legally effective service of a notice of termination. Pursuant to Section 623 of the BGB Civil Code[57], a

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[50] Supra 5.

[51] Shane and Rosenthal, *Employment Law Deskbook*, S. 16.02 (1999).

[52] Ibid.

[53] E. Allen Farnsworth, *Contracts*, S. 8.15 (2nd ed., 1990).

[54] V.W. Katherine Stone, *Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Workplace,* Industrial Law Journal(2007).

[55] Treaty Establishing the European Economic Community, (25/03/1957), 1973 Gr. Brit. T.S. No. I (Cmd. 5179-I), 298 U.N.T.S. 3 (1958) [hereinafter EEC Treaty].

[56] Supra 6.

[57] Bürgerliches Gesetzbuch (BGB) (German Civil Code) of 18 August 1896 [RGBl. I S. 195,III 4 Nr. 400-2], as amended in the version promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*])

notice of termination must be in writing to be valid.[58] A specific recitation of the reasons for termination is usually not necessary in the notice of termination (although, as an exception, reasons are required for contracts with apprentices and other training contracts). Another formal point is that any termination notice should be issued by one or more officers or directors who are registered as company representatives in the commercial register[59] or the employee can reject the notice without undue delay if it was not accompanied by the original of a power of attorney for the signatory and the employer must give notice again.[60]

In analyzing the applicable notice period provisions, one first looks to the applicable collective bargaining agreement (if any)[61] where the collective bargaining provisions with respect to termination notices preempt any statutory termination notice provisions.[62] Section 622[63], Paragraph (4)[64], of the BGB Civil Code expressly specifies that the statutory notice periods can be superseded by the notice periods contained in a collective bargaining agreement[65], and that the notice periods in such collective bargaining agreements can be longer or shorter than the periods required by Civil Code, Section 622(1) to (3).[66] The only restriction is that it is unlawful to agree upon a longer period of termination notice for the employee than must be given by the employer.[67] Under Section 622(1) of the Civil Code[68] there is a general requirement to give notice of termination of four weeks, effective as of the fifteenth of the month or the end of the month, where more specific provisions, do not apply.[69]

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[58] Bürgerliches Gesetzbuch (BGB) (German Civil Code) of 18 August 1896 [RGBl. I S. 195, III 4 Nr. 400-2], as amendedin the version promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*] I page 42, 2909; 2003 I page 738), last amended by Article 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I page 3719) Title 8, Subtitle 1 Section 623 Termination of employment by notice of termination or separation agreement requires written form to be effective; electronic form is excluded.

[59] Supra 61.

[60] Ibid.

[61] Ibid.

[62] Ibid.

[63] S. 622, Bürgerliches Gesetzbuch (BGB) (German Civil Code) (Germany).

[64] Ibid, at S.4.

[65] When a collective bargaining agreement is involved, the method for determining the applicable notice period for termination is different.

[66] Supra 80.

[67] Ibid, at S. 5.

[68] Ibid*,* at S.1.

[69] Ibid, at S. 1-4.

There is a general protection against (ordinary) termination of the employment relationship embodied in the Termination Protection Statute of August 25, 1969[70]. If an employment relationship falls within the scope of the Termination Protection Statute, then the termination is only possible under the limited terms of that law.[71]

An employment relationship falls under the Termination Protection Statute if both of the following requirements are met: (1) the employee must have worked for the same employer for more than six months without interruption;[72] and (2) the employer must, in the ordinary course, employ in an operation in Germany more than 10 employees (excluding apprentices and trainees).[73] Part-time employees with a regular weekly working time of no more than 20 hours are accounted for with a factor of 0.5, and those with a regular weekly working time of no more than 30 hours with a factor of 0.75.[74]

A U.S. company considering a merger and/or acquisition in Germany must be aware that any post merger restructuring plan that may require some lay offs will result in a lengthy and expensive process because employee wages and benefits must continue through the required notice period under the Termination Protection Statute.[75]

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[70] Termination Protection Act [Kündigungsschutzgesetz; KSchG], in the version of the Proclamation of 25 August 1969 [BGBl. I, p. 1317], most recently amended by the Act of 27 April 1978 [BGBl. I, p. 550]) but also those of collective bargaining law (cf., in particular, the Collective Bargaining Act [Tarifvertragsgesetz; TVG], in the version of 25 August 1969 [BGBl. I, p. 1323], amended by the Homework Amending Act of 29 October 1974 [BGBl. I, p. 2879]), employees' representation law or -- for public service employers -- staff representation law and finally work protection law. Occupation under an employment relationship also normally establishes a mandatory insurance relationship in the various branches of social insurance.

[71] S. 1(1) KSchG, the termination with notice of an employment relationship that has existed for more than six months is legally invalid when it is «socially unjustified» (this term is defined in detail in S. 1(2) and (3) KSchG). In order to avoid a circumvention of these mandatory provisions of termination protection, the labor courts have further placed considerable limitations on the possibility -- provided for under S. 620(1) of the Civil Code -- of establishing employment relationships of limited duration; even the one-time and, above all, the repeated limiting of employment relationships (chain employment contracts) is only valid when there is a materially justifiable reason for this.

[72] S. 1(1), Termination Protection Statute.

[73] Ibid.

[74] Termination Protection Statute, Section 23(1), Sentences 3 and 4.

[75] Supra 88.

3.2. The Italian Labor Law Provisions

Under Italian law, the dismissal of employees is subject to stringent restrictions. Employers cannot dismiss employees at will and mere labor-saving [76] dismissals are not allowed. As a matter of fact, employees can be lawfully dismissed only in the presence of a "just cause" or "justified grounds."[77]

3.2.1. Giusta causa (i.e., just cause)

It means any serious breach that renders the continuation of the employment impossible, including, for instance, theft, riot, and serious insubordination and any other employee's behavior that seriously undermines the fiduciary relationship with the employer.[78]

3.2.2. Justified grounds

It means either

i. a less serious breach by the employee (e.g., failure to follow important instructions given by the management, material damage to machinery and equipment, unjustified and repeated absences), or

ii. an objective reason relating to the employer's need to reorganize its production activities or its labor force; however in such cases case law precedents state that the employer must seek, within its organization, another job for the employee in order to avoid the dismissal if possible.[79]

The dismissal must be ordered in writing and must indicate the reasons on which it is based.[80] Moreover, whenever a dismissal is due to the employee's conduct (constituting either just cause or justified grounds, depending on the gravity), the employer must follow a specific

[76] Dismissal for economic or reorganization reasons (objective reasons, such as the suppression of job position).
[77] Supra 51.
[78] Ibid.
[79] Ibid.
[80] Ibid.

disciplinary procedure set forth by law so that the employee is given the opportunity to defend his or her position before being dismissed.[81]

Upon termination of their employment employees are entitled to: [82]

i. the payment of a severance indemnity (the so-called *"TFR,"*[83] which is accrued in the employer's financial statements during the term of employment and amounts to approximately to one month's salary for each year of seniority);

ii. the payment of some minor termination indemnities (payment in lieu of unused holidays and in lieu of unused paid leaves of absence, accrued pro-rata 13th month's salary, and so on);[84] and

iii. a notice period, the duration of which varies according to the employees' seniority and professional level and is established in the applicable national labor collective agreement. In case the employer exempts the employees from working during the notice period, the employees must receive a corresponding payment in lieu of notice, which is equal to the normal salary (plus social security charges thereon) that would have been paid during the notice period. Payment under (a) and (b) above is always due in case of dismissal, while the notice period payment outlined in (c) above is not due in case of a dismissal for "just cause.[85]

Any employee dismissed may bring a legal action if the employee deems that his or her dismissal was not properly justified.[86] An action before the labor court[87] must be preceded by an out-of-court challenge of the dismissal by means of any written document to employer (within 60 days of the dismissal) and by a mandatory attempt to reach a settlement

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[81] Ibid.

[82] Ibid.

[83] Upon dismissal for any reason, employees in Italy are entitled to the "*Trattamento di Fine Rapporto*" ("*T.F.R.*"). "*T.F.R.*" is deferred compensation that accrues year by year in favor of an employee and is paid upon termination, but is not in any way connected or subject to the circumstances regarding termination.

[84] Supra 94.

[85] Ibid.

[86] Ibid.

[87] Aldo Matteis, Accardo Paola, Mammone Giovanni, *National Labour Law Profile: Italy* (2011).

before the local Labor Office[88]. In the event that the absence of justified grounds is confirmed by the labor court, the consequences for the employer differ, according to whether that employer exceeds the "15 employees threshold." [89]

The strict compliance requirement along with indemnity payments required with a termination can lead an uninformed international partner to unintended lengthy and costly legal battle.[90]

4. COMPARATIVE ANALYSIS OF US FEDERAL WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT (WARN ACT) AND THE RELEVANT WORKFORCE PROTECTION LAWS IN GERMANY AND ITALY

Germany and Italy are subject to directives and regulations of the European Union and to the decisions of the European Court of Justice[91] and the European Court of Human Rights[92]. EC as a result of dealing with unemployment and seeing the need to address jobs security, issued a Council Directive of 17 February 1975 on the Approximation of the Laws of the Member States Relating to Collective Redundancies (lay offs) (the "Directive").[93] The Directive requires that when a company contemplates mass dismissal, the management must announce such a dismissal at least thirty days before initiating lay offs.[94] This thirty day period attempts to provide labor the opportunity to participate in decision making and collaborate with management on feasibility of avoiding the dismissal.[95] If the dismissal is deemed to be unavoidable, then labor and management will move on to discuss mitigating effects.

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88 In Italy, Law No. 628 of 1961 introduced peripheral agencies: the Immigration Offices and the Labour Office for Maximising Employment.

89 Supra 94.

90 Ibid.

91 European Court of Justice (created in in 1952 as the Court of Justice of the European Coal and Steel Communities, later named Court of Justice of the European Communities), the highest court in the EU legal system.

92 The European Court of Human Rights (ECtHR; French: *Cour européenne des droits de l'homme*) is a supra-national or international court established by the European Convention on Human Rights.

93 Council Directive No. 75/129, OJ. L 48/29 (1975).

94 Ibid.

95 Ibid.

This enhanced labor participation gives employees a voice and increases job security.[96]

4.1. The Warn Act

In 1988, the U.S. Congress enacted legislation, WARN,[97] to address mass lay-offs. WARN requires that employers notify their employees and the local government prior to implementing the dismissals. The most important difference between WARN and the European practice under the Directive is that WARN contemplates no role for employees or employee representatives in either determining the need for layoffs nor how to mitigate their impact on effected employees.[98] WARN, contrary to the Directive, does not require negotiations between labor and management in addition to notice.[99] WARN sets out the procedure that employers must follow prior to executing a mass dismissal or plant closing.[100] "The objective seems, as much as anything else, to be designed to encourage some opportunity for public pressure to be organized against an employer contemplating layoffs."[101] The three substantive sections of WARN[102] include its definitions and their scope,[103] the required notice procedure,[104] and the remedy to which affected employees are entitled.[105]

WARN applies only to those businesses that employ 100 or more employees. Excluded from this threshold are temporary employees,[106]defined as those who are either hired with the understanding that their employment is only for the duration of a particular project, or those who are hired to operate a temporary facility.[107] Thus, the definition necessarily excludes seasonal workers as well.[108] Also outside

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96 Ibid., at 29.
97 29 U.S.C., WARN Act S. 2101, 2109 (United States).
98 Michele Floyd, *The Scope of Assistance for Dislocated Workers in the United States and the European Community: Warn And Directive 75/129 Compared*, 15 Fordham Int'l L.J. 436, 450 (1992).
99 Ibid.
100 29 U.S.C. S. 2102 (1988).
101 Ibid.
102 Ibid, at S. 2105 to 2109.
103 Ibid, at S. 2101, 2103.
104 Ibid, at S. 2102.
105 Ibid, at S. 2104.
106 Ibid, at S. 2103(1)
107 Ibid.
108 20 C.F.R. S. 639.3(h) (1991).

the reach of WARN are employees out of work due to a strike or lock-out.[109] Further, employees who are permanently replaced because of participation in an economic strike are not included in compiling the threshold.[110]

Employers must dismiss a statutory number of the employees included in this threshold to have effectuated a "mass dismissal" under WARN.[111] Like the Directive, WARN defines this statutory number in terms of the number of employees dismissed over a thirty-day period in relation to the number of employees usually employed at a given site.[112]To execute a mass dismissal, an employer[113] must permanently dismiss at least fifty employees at one site.[114] In the alternative, the employer must temporarily dismiss either 500 total or 33 percent of all employees.[115] Employers are thus not required to give notice at all unless the statutory minimum number of employees will experience an "employment loss."[116]

Once employers have decided to dismiss a sufficient number of employees, the second substantive section of WARN comes into play. This section requires employers to notify their employees. Employers are also required to notify both the state dislocated worker unit[117] and local government of the pending dismissal at least sixty days prior to the execution of the plant closure or dismissal.[118]

This notice period is somewhat flexible.[119] Employers may reduce the notice period to "as much notice as is practicable" in three circumstances.[120] Under the faltering company exception,[121] employers who actively seek capital to avoid a closing or lay-off may shorten the period if they have a good faith belief that giving notice would frustrate

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[109] 29 U.S.C. S. 2103(2) (1988).
[110] Ibid.
[111] Supra 110, at S. 2101 (a)(3).
[112] Ibid, at S. 2101.
[113] Ibid, at S. 2101(1)(a).
[114] Ibid, at S. 2101(a)(2).
[115] Ibid, at S. 2101(a)(3)(i)-(ii).
[116] Ibid, at S. 2101 (a)(6).
[117] The Economic Dislocation and Worker Adjustment Assistance Act (EDWAA) amended Title III of the Job Training Partnership Act (JTPA).
[118] Supra 110, at S.2102(a)(1988).
[119] Ibid, at S. 2102(b).
[120] Ibid.
[121] Ibid, at S. 2102(b)(1).

their efforts.[122] Employers may also reduce the notice period when confronted with unforeseen business circumstances at the time notice would normally have been required.[123] Finally, employers need not give any notice if the mass dismissal or plant closing is due to a natural disaster and the giving of notice is impracticable.[124]

Where the employer fails to give adequate notice, the third section of WARN provides a remedy for those employees who have been wrongfully discharged.[125] In essence, employers are liable for back pay for each day of the violation.[126] In addition, employers are liable for the value of any benefits to which the employees were entitled while on the job.[127] Employers must also pay a civil fine for failure to notify local officials.[128]

Employers may mitigate their liability in four ways. First, they may pay the employees their wages during the period of the violation.[129] Second, they may deduct from the initial calculation of sixty days wages, any voluntary and unconditional payments made to the employees.[130] Third, they may deduct any payment made to a third party on behalf of the employee during the period of the violation.[131] Fourth, they may mitigate their liability by demonstrating good faith beliefs that their actions would not violate WARN.[132]

4.2. The European Directive

The European Court of Justice, on the other hand, has consistently interpreted the Directive in conformity with its policy objectives to protect the worker. The result of this construction demonstrates that the Court of Justice will not allow the Member States to derogate from the language of the Directive in fashioning their implementing legislation to assure worker protection.[133] The Directive has broader

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[122] Ibid.
[123] Ibid, at S. 2102(b)(2)(A).
[124] Ibid, at S. 2102(b)(2)(B).
[125] Supra 110.
[126] Ibid, at S. 2104(a)(1)(A).
[127] Ibid, at S. 2104(a)(l)(B).
[128] Ibid, at S. 2104(a)(3) (1988).
[129] Ibid, at S. 2104(a)(2)(A).
[130] Ibid, at S. 2104(a)(2)(B).
[131] Ibid, at S. 2104(a)(2)(C).
[132] Ibid, at S. 2104(a)(4).
[133] Case 215/83, Commission v. Belgium, [1985] E.C.R. 1039, [1985] 3 C.M.L.R. 624.

coverage and lower thresholds thus covering a much greater segment of the employee population than does the WARN.

The Directive consists of three substantive sections. The first section defines the terms and the scope of the Directive,[134] while the second section establishes the procedure for consultation between management and labor, and notification of the government labor authority.[135] When the management-labor consultations fail to avoid a collective redundancy, the last section of the Directive sets forth the method by which an employer may effectuate the dismissal.[136] The Directive's first section defines a collective redundancy in terms of the number of employees dismissed in relation to the number of employees normally employed at a given site. The Directive allows each Member State to choose one of two thresholds.[137] The first threshold operates over a thirty day period. Under this option, businesses that employ between twenty and 100 employees must dismiss at least ten employees to trigger the Directive.[138] Those that maintain a workforce of 100 to 300 employees must dismiss at least 10 percent of the employees to trigger the Directive.[139] Businesses that employ at least 300 workers trigger the Directive by dismissing at least thirty workers.[140] The second, less stringent, option operates over a ninety-day period. Under this option, businesses that dismiss twenty employees, regardless of the size of their labor force, trigger the Directive.[141] In addition to setting up the two thresholds, the first section of the Directive excludes four classes of employees from its scope.[142] First, the Directive excludes those employees hired to complete a specific contract and those hired specifically for a limited period.[143] These employees, however, remain within the scope of the Directive if the dismissal occurs before the task is completed or before the limited period elapses.[144] Second, the Directive excludes employees of public administrative bodies or establishments governed by public law.[145] The

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134 Supra 54, at 29.
135 Ibid.
136 Ibid, at A. 3, 4, at 30.
137 Ibid, at A.1.
138 Ibid, at A. l(a)(l).
139 Ibid, at A. l(a)(2).
140 Ibid, at A. l(a)(3).
141 Ibid.
142 Ibid, at A.1(2).
143 Ibid, at A.1(2)(a).
144 Ibid.
145 Ibid, at A. 1(2)(b).

third exclusion encompasses the crews of sea-going vessels.[146] Fourth, the Directive excludes those employees who lose their jobs due to the closing of the business as the result of a judicial decision.[147] Once the employer decides to dismiss a sufficient number of employees to trigger the Directive, the second section of the Directive requires management and labor to embark on a detailed consultative process.[148] Article 2 requires the employer to provide the representatives of the employees with all relevant information, such as the number of employees that will be dismissed, the number of workers normally employed, and the period over which the redundancies will be affected.[149] The employer must also supply the representative of the employeeswith the reasons, in writing, for the redundancies.[150] The reason for this transfer of information is to aid the representatives of the employees in making constructive proposals.[151] In addition to providing this information, employers must simultaneously notify the government labor authority and meet with the representative of their employees.[152] During the meeting, labor and management discuss the possibility of avoiding the dismissal.[153] If they determine that a dismissal is the only viable solution, they propose and discuss methods to minimize the effect of the dismissal on workers.[154] The employers must first submit a detailed written report to the public employment authority.[155]

Upon receiving the report, the public employment authority has thirty days to evaluate the severity of the dismissal and to prepare the Community for the sudden flood of unemployed.[156] While waiting for this thirty-day period to expire, employers may not dismiss any employees.[157] The thirty-day notice period is somewhat flexible. In some circumstances, the Member States may permit the public employment authority to lengthen the period.[158] In these cases, the public employment authority may extend the period to a maximum of sixty

146 Ibid, at A. 1(2)(c).
147 Ibid, at A.1(2)(d).
148 Supra 54, at 30.
149 Ibid, at A. 2(3).
150 Ibid.
151 Ibid.
152 Ibid, at A.2(1),
153 Ibid, at A.2(2), at 30.
154 Ibid.
155 Ibid, at A.3(i).
156 Ibid, at A.4(2).
157 Ibid, at A.4(1).
158 Ibid, at A.4(l),(3).

days. [159] The provisions of the Directive represent the minimum standards required by the EC. In implementing the Directive, the Member States are free to impose standards that are more severe than those required by the Directive.[160]

4.3. German Labor Law Framework

The German constitution was adopted on 23 May 1949 and is referred to as the Basic Law. With its amendment by the Unification Treaty of 31 August 1990 and the Federal Statute of 23 September 1990, the Basic Law has become the Constitution of the unified West and East Germany (former Federal Republic of Germany and German Democratic Republic). The Basic Law guarantees freedom of association[161] as well as free choice of occupation and prohibition of forced labor. [162] It also establishes the principle of equal treatment and in particular obliges the state to support the effective realization of gender equality. [163] The major sources of labor law are Federal legislation, collective agreements, works agreements and case law. There is not one consolidated Labor Code; minimum labor standards are laid down in separate Acts[164] on various labor related issues, which are supplemented by the government's ordinances.[165]

Because most German companies are "unionized", the different unions concentrate negotiating individual terms that are much better and more employee favorable than the basic labor law.

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[159] Ibid, at A.4(3).

[160] Ibid.

[161] Basic Law -Article 9 Paragraph 3.

[162] Ibid, at A. 12.

[163] Ibid, at A. 3.

[164] The Civil Code adopted on 18.08.1896 and last amended on 02.11.2000 defines the employment relationship.

[165] Labor Legislation: *Employment relationships:* Federal Paid Leave Act; Employment Promotion Act; Employment Protection Act, Act regulating the Payment of Wages and Salaries on Public Holidays and in case of sickness; Protection against Dismissal Act; Act on the Commercial Transfer of Employees;
Occupational training: Occupational Training Act; Act on Part-Time and Fixed-term
Occupational safety and health, and conditions of work: Maternity Protection Act; Ordinance on Maternity Protection at the Workplace; Young Workers Protection Act; Working Time Act; Act on the Payment of Child Raising Benefit and Child Raising Leave; Insolvency Ordinance
Individual Dispute settlement: Labour Court Act; Code of Civil Procedure.

Labor legislation is interpreted by labor courts.[166] Some matters, especially strike regulation, are partly or even totally left to case law.[167] Collective agreements (Tarifverträge) are legally binding as long as they keep in line with the statutory minimum standards.[168] In practice, the *establishment* (Betrieb) also plays an important role.[169] The establishment is the organizational unit where particular working objectives are pursued.[170] At this level, conditions of work such as those determined in the Works Constitution Act may be or in certain cases must be laid down in *works agreements* (Betriebsvereinbarung).[171] These are written agreements concluded between the employer and the works council (a body representing the employees of the establishment).[172]

Workers' representation in the enterprise is governed by the Works Constitution Act.[173] This Act is decisively based on the term *establishment.*[174] In an establishment regularly employing five or more employees, its employees may decide to elect a works council, of which the period of office is four years.[175] The works council has rights of participation as well as of co-determination.[176] The right of participation includes the right to be informed and to make recommendations.[177] The right of co-determination is by far of much more practical consequence, because it entails the possibility of blocking a decision of the employer which is dependant on the works council's agreement.[178]

Any dispute must be settled by legal proceedings either leading to a court order or resulting in a decision of a conciliation committee.[179] The conciliation committee is set up in case of disagreements in matters of

166 Supra 220.
167 Ibid.
168 Supra 226.
169 Supra 233.
170 Ibid.
171 Ibid.
172 Ibid.
173 Works Constitution Act (Betriebsverfassungsgesetz) of 1972.
174 Ibid.
175 Supra 240, at Sec. 21
176 Ibid.
177 Ibid.
178 Ibid.
179 Supra 243.

co-determination.[180] It is composed of an independent chairperson and an equal number of employer's and employees' representatives.[181]

Another essential duty of the works council and the employer is to supervise the equal treatment of all employees in the establishment.[182] This includes the prohibition against discrimination against the works council members, who are furthermore safeguarded against dismissal by special provisions.[183]

4.4. Italian Labor Law Framework

The Italian Constitution was approved by the Parliament in December 1947 and came into effect on 1st January, 1948.[184] The Country is organized as a centralized State, divided into Regions, Provinces and Municipalities. Sicily, Sardinia, Alto Adige (German-speaking region) Valle d'Aosta (French-speaking region) and Friuli (a region with Slavic minorities) have special statutes.[185] Article 39 of the Italian Constitution[186] guarantees freedom to organize, join a trade union and engage in trade union activity in the workplace. The unions joining the biggest federations have a very important function in collective bargaining in public employment and receive protection in view of trade union activity at the plant level.[187] The Workers' Statute, 1970, regulates plant level union activity.[188] The Statute has been an important means of support of the unions at plant level.[189] The Workers' Statute of 1970 gives the workers the right to organize a plant-level union representation structure (Rappresentanza sindacale aziendale, RSA).[190] The tripartite agreement of July 1993 introduced, in addition to the RSA, a so-called unitary workplace union structure (Rappresentanza sindacale unitaria, RSU).[191] This body is elected by all employees, but representatives are

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[180] Ibid.
[181] Ibid.
[182] Ibid.
[183] Ibid.
[184] Ibid.
[185] Ibid.
[186] The freedom of association (Libertà sindacale) is based on Article 39 of the Italian Constitution.
[187] Ibid.
[188] Ibid.
[189] Ibid.
[190] Ibid.
[191] Ibid.

usually elected through trade union lists. [192] Therefore, it includes features of both works councils (the broad active electorate) and trade union bodies (the almost exclusive inclusion of trade union representatives).[193] The establishment of RSUs confirms the traditional system of single-channel representation in Italy, whereby union and employee representation are entrusted to a single body, as opposed to dual-channel systems where union delegates operate alongside works councils.[194]

In researching this paper, I consulted with Elena Ghigo of Jonson and Johnson Italy who summarized the acquisition process in clear and concise terms: "In Italy, when an acquisition occurs (i.e. a company absorbs another or part of Italian Company) Italian law provides that all the absorbed employees are transferred to the new/acquiring company maintaining their previous contracts with all relevant benefits and they also maintain seniority. In this case the passage from one company to the other is automatic and the consent of the employee is not required. So the employment relationship continues seamlessly, and the employee maintains all rights accrued up to the date of the transfer. In order to be able to renegotiate the previous contract, the new/acquiring company has to achieve the consent of the employee.

In case of redundancies, Italian law prescribes that three aspects must be taken into consideration when operating towards redundancy and they have to be taken into account when identifying the workers which will be dismissed. The above mentioned aspects are: technical and organizational requirements of the company, seniority and family burdens of the employee. If a company employs more than 15 people and is contemplating to dismiss more than 5 employees in a 120 days period, it is forced to draw upon redundancy and not simple summon dismissals due to economical issues. The collective dismissal implies a particular procedure that combines labor union participation, governmental authorities and the company in a dialogue that, through various steps, strives to reach a shared solution.[195]

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[192] Ibid.
[193] Ibid.
[194] Ibid.
[195] Consultation with Elena Ghigo, Jonson and Johnson, Italy.

5. CONCLUSION- INADEQUATE CONSIDERATION OF EC DOCTRINE AND THE RELEVANT LABOR LAWS IN ITALY AND GERMANY CAN LEAD TO A FAILED M&A

Pre merger due diligence in the area of labor law can have a direct impact on the success or failure of M &A. The due diligence involving the target country labor laws can help qualify and budget for the necessary severance packages, legal work, and potential fines. A US company must be prepared for a lengthy collaboration with the work counsel prior obtaining an approval for M &A and post M&A in a restructuring phase. Strict notice guidelines, compensation packages, legal fees can run into six even figures in a scenario involving high level or long term employees. Being unaware and unprepared to deal with these costs can compromise a successful merger or acquisition.

The following is a suggested checklist for the legal and hr team to implement when contemplating a merger or acquisition in eu with specific attention given to Italy and Germany.

1. Include HR in the deal from the beginning of M&A contemplation.

2. Coordinate between various integration teams.

3. Address works council, employee representatives and union requirements.

4. Analyze and plan the employee transfer method

5. Analyze and understand limitations and cost of redundancies.

6. Understand terms and conditions of employment and how their significance in an m&a.

7. Understand employee classifications and the regulations pertaining to wage, hours, and benefits.

8. Plan in time for benefit transfer.s

9. Understand labor market regulations.

10. Understand the laws and regulations behind agreement enforceability.

11. Immigration compliance.
12. Retain local representation.
13. Know the appropriate labor governing bodies.
14. Research discrimination laws.
15. Research privacy laws.

Although currently outside the US there is a strikingly different, more rigid and employee-protective approach to employment relationships that labor and employment practitioners need to recognize, as the economy grows increasingly global international labor laws will continue to change and transform and hopefully merge international labor and employment law. For now, buyers beware and do your homework.