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Mapping a Route About Potential Storms - What To Consider From an Employment Perspective Before Starting Business in Europe

Mapping a route about potential storms - What to consider from an employment perspective before starting business in Europe

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TOPICS

- ◎ General Overview on European Law
- ◎ Type of hire
- ◎ Payroll/Benefits
- ◎ Employment Agreements/Employer Policies
- ◎ Exit Strategy
- ◎ Exit strategy – Dismissal
- ◎ Exit Strategy – Individual Redundancy
- ◎ Exit strategy – Collective Redundancy

General Overview on European Law

- ◎ EU Legislation:
 - Regulations, Directives and other acts

- ◎ Application of EU law
 - EU legislation and case law of the European Court of Justice

- ◎ Example:
 - Claims for Vacation due to Judgments of the ECJ

Type of Hire

Germany

- ⊙ Employee: remains at the disposal of his employer, follows the instructions and is subject to disciplinary rules (link of subordination). He/She is paid a salary.
- ⊙ Independent contractor: not subject to employment law or working time, free to determine the means necessary to achieve the set targets.
- ⊙ Risk of fictitious self-employment, distinction depending on facts nor words of the contract!
- ⊙ Temporary Employees: employed either through an Agency or by the company (fixed term contracts) under very strict conditions (limited and specific grounds and duration, impossible with pre-employed employees)
- ⊙ Expatriate Employees: necessity to justify of a work permit and contributions to the German social security scheme. 183-day-rule to be applied

France

- ⊙ Employee: remains at the disposal of his employer, follows the instructions and is subject to disciplinary rules (link of subordination). He/She is paid a salary.
- ⊙ Independent contractor: not subject to employment law or working time, free to determine the means necessary to achieve the set targets.
- ⊙ Temporary Employees: employed either through an Agency or by the company (fixed term contracts) under very strict conditions (limited and specific grounds and duration)
- ⊙ Expatriate Employees: necessity to justify of a work permit and contributions to the French social security scheme.

Italy

- ⦿ Employee: remains at the disposal of the employer, follows the instructions and is subject to disciplinary rules (link of subordination). He/She is paid a salary (which can be: fixed amount, commissions or benefits in kind).
- ⦿ Independent contractor: not subject to employment law or working time, free to determine the means necessary to achieve the agreed targets.
- ⦿ Risk of fictitious self-employment: words of the contract must not conflict with the actual operating methods.
- ⦿ Temporary Employees: employed either through an Agency or by the company (fixed term contracts) under conditions (duration is limited: 36 months). Not necessary specific grounds (since 2013).
- ⦿ Expatriate Employees: necessity to justify of a work permit and contributions to the Italian national social security scheme. For most non-EU citizens hiring there is a ceiling (quota) fixed yearly by the Government.

Payroll/Benefits

Germany

- ◎ Custom working hours in Germany: 35-40 hours per week.
- ◎ Working hours cannot exceed 8 hours per shift, 10 hours as an exemption with compensation in a period of 24 weeks.
- ◎ Working hours cannot exceed 48 hours per week.
- ◎ Minimum resting time of:
 - 11 consecutive hours per day.
 - Exemptions for specific industries (minimum 10 consecutive hours, though)
- ◎ Legal consequence of failure to comply: Fines and imprisonment

France

- ⦿ Legal working time duration in France: 35 hours per week
- ⦿ Overtime (every hour beyond 35 hours per week): cannot exceed 44 hours per week
- ⦿ Annual overtime limit: 220 hours (can be expended through a collective agreement)
- ⦿ Alternative working time arrangements: possible through the employment contract or a collective agreement (for instance a working time scheme in hours per month/in days per year)
- ⦿ Minimum resting time of:
 - 11 consecutive hours per day
 - 35 consecutive hours per week

Italy

- ⊙ Custom working hours in Italy: **40 hours** per week.
- ⊙ Working hours cannot exceed **13 hours** per day (including breaks).
- ⊙ Working hours cannot exceed **48 hours** (including overtime) per week, calculated as an average in a period no longer than 4 months.
- ⊙ Overtime cannot exceed **250 hours** per year (deviation through a collective agreement is possible and usual).
- ⊙ Minimum resting time of:
 - **11 consecutive hours** per day.
 - **24 consecutive hours** per consecutive period of 7 days (with some specific exceptions and possibility of deviation by collective agreements).

Employment Agreements / Employer Policies

Germany

- ⊙ Individual employment agreement: agreement concluded between employer and employee. Contains conditions of employment such as salary and working hours.
- ⊙ National collective bargaining agreements : agreements entered into between trade union (employees and employers). Mandatory for the entire concerned industry if employer and employee are member of the respective unions. Define conditions of employment, probationary and notice periods, severance indemnities, working conditions, social benefits granted to the employees.
- ⊙ Company-wide agreements: signed by a company's representative on behalf of the employer and by the works council in the. No agreement on salaries admissible
- ⊙ Unilateral decisions of the employer: decisions made in writing by the employer for the benefit of employees.
- ⊙ Customary practices ("usages"): These are the general, fixed and constant practices of the employer. Have to be granted at least three times and unconditional

France

- National collective bargaining agreements (“CBA”): agreements entered into between trade union (employees and employers). Mandatory for the entire concerned industry. Define: conditions of employment, probationary and notice periods, severance indemnities, working conditions, social benefits granted to the employees.
- Company-wide agreements: signed by a company’s representative on behalf of the employer and by the union representatives present in the company (not by any other kind of staff representative such as the works council). Company-wide agreements can provide for provisions less favourable for employees than CBA (except for specifics topics such as salaries)
- Unilateral decisions of the employer: decisions made in writing by the employer for the benefit of employees.
- Customary practices (“usages”): These are the general, fixed and constant practices of the employer. Concern, in particular, the benefits granted to the employees and some details regarding the operation of the staff representative bodies.

Italy

- ◎ Individual employment agreement: agreement concluded between employer and employee. It must contain certain terms and conditions, i.e.: job title; salary; working time; place of work; duration (permanent or fixed term); probationary period (if applicable); paid holidays; length of notice period in case of termination.
- ◎ National collective bargaining agreements: agreements entered into between Trade Unions (employees and employers). Not statutory sources of law but only private contracts. Mandatory only if the employer is a member of the respective Trade Union, if reference is made in the individual contract or if the employer implicitly apply their terms. They define conditions of employment, probationary and notice periods, working conditions, social benefits granted to the employees.

Italy

- ◎ Plant-level agreements: collective agreements executed by the employer and the Works Council of the company. They can provide for rules less favourable for employees than NCBA (except for specific topics such as salaries).
- ◎ Unilateral decisions of the employer: decisions made in writing by the employer, in general, for the benefit of employees, but they can affect also the conditions of the employment relationship, e.g. change of task and duties or change of the place of work, under certain conditions (so called “*ius variandi*”).
- ◎ Customary practices (“usages”): these are the general, fixed and constant practices of the employer. They concern, in particular, benefits granted to the employees.

Exit Strategy

Germany

- ◎ Several kinds of termination:
 - Termination Agreement
 - Termination by giving notice:
 - Has to be made in writing
 - Has to obtain statutory/contractual notice periods
 - General dismissal protection (see below)
 - Particular dismissal protection for protected employees
 - Lapse of time (limited-term contracts)
- ◎ Legal Consequences of an unfair dismissal:
 - Employee to be re-employed
 - Payment of any outstanding salaries between termination notice and final decision of the Labour Court

France

- ◎ Several kind of terminations:
 - Dismissal
 - Dismissal for gross misconduct
 - Individual redundancy
 - Mutual termination agreement
 - Collective redundancies: implementation of a social plan through negotiation with trade unions, consultation of staff representatives (works council)
- ◎ Specific procedure for protected employees that requires to obtain the authorization of the Labor Administration

Italy

- Several kinds of termination:
 - mutual termination agreement (without notice; useful in the case of settlement);
 - resignation by the employee: **(i)** for just cause (without notice) or **(ii)** ordinary (with notice, usually shorter than for dismissal; a validation procedure must be followed);
 - dismissal by the employer: **(i)** for just cause (i.e. without notice; a disciplinary procedure must be followed) or **(ii)** for objective or subjective reason (i.e. with notice; a procedure before the Employment Local Office may be followed);
 - lapse of time (for fixed-term contracts);
 - death of the employee (mandatory payments to heirs).

Dismissal Individual

Germany

- ◎ Termination of the employment agreement must be based on a specific ground. Three grounds available by law:
 - Operational Reasons
 - Economic difficulties, loss of customers etc.;
 - Elimination of the job;
 - No other adequate job available;
 - Social Selection
 - Behavioural Reason
 - Generally, prior warning letter(s) required
 - Personal Reasons
 - dismissal of an employee who has been sick for more than 2 years
 - dismissal due to inability to work (example: employee has been arrested, loses visa)
- ◎ In case of gross misconduct immediate dismissal is possible.
 - Termination only admissible within two weeks

France

- ⊙ Dismissal for a personal reason must be based on *a reason which is inherent to the individual employee*. The employee concerned must be personally responsible for the facts that are reproached to him/her and these facts must have occurred whilst the employee was performing the contract of employment.
- ⊙ There is no fixed list of grounds and the following reasons *may* justify a dismissal:
 - abandon of post by the employee, absence ;
 - acts of violence, insults or threats;
 - poor performance;
 - undisciplined behaviour or disobedience; etc.
- ⊙ More generally, dismissal *may* also be justified by any act of professional misconduct (employee under the influence of alcohol or drugs, failure to maintain equipment, indiscretions, failure to comply with safety procedures, etc).
- ⊙ In case of litigation, the judge will base its decision on the grounds detailed in the dismissal letter.

France

- ◎ Economic reasons:
 - the redundancy is based on *a reason that is not inherent to the individual employee*:
 - the elimination of the job;
 - the transformation of the job;
 - a refusal of a modification to the employment contract; or
 - the cessation of activity;
- ◎ the reasons must result from *economic difficulties*.
- ◎ judges will also consider whether or not the redundancy results *"from a reorganisation of the company that was necessary to keep the company competitive or to keep the area of business of the group to which it belongs competitive."*
- ◎ The necessity to keep the company or the group competitive is *strictly* examined by judges. There must be a *serious and actual danger* threatening the survival of the company (or group), or on the maintenance of its competitiveness.

Italy

Dismissal must be based on specific grounds. Three types of dismissal:

- i. **Dismissal for just cause***: serious violation of the fundamental obligations. Examples: stealing, serious misbehavior in the office and willful damage to company property, etc. In this case the employment contract terminates with immediate effect and without notice;
- ii. **Dismissal for justified subjective reasons***: non-fulfilment of the employee's contractual and legal obligations, not so serious as to be considered a just cause. Examples: negligence; desertion of the work place; unjustified absence from work; etc. In this case notice must be given;
- iii. **Dismissal for justified objective reasons***: technical, organizational or production-related reasons. Examples: reorganization of the employer's production business; redundancy; suppression of the employee's job position; closure of unit; reorganization of the productive activity and/or the organization of the job position, also -for instance- as a consequence of a reorganization of the functions at a Group level. In this case notice must be given.

Italy

Consequences in the case of unfair individual dismissal declared by the Employment Court:

- (i) if the reason of the dismissal is deemed as «*manifestly absent*» or (in the case of just cause) if the conduct of the employee cannot be punished with a dismissal according to the general provisions of the NCBA or of the Company's Code of Conduct (if any): the employer is ordered to reinstate the employee (who can opt for an indemnity equal to 15 monthly salaries instead of the reinstatement), to pay him/her a further indemnity equal to 12 monthly salaries and to pay him/her social security contributions due for the period between the dismissal and the decision of the Court
- (ii) if the reason of the dismissal is deemed as «*absent*» but not «*manifestly absent*» (at the Court's discretion): the employer is ordered to pay the unfairly dismissed employee an indemnity which ranges between 12 and 24 monthly salaries (*no reinstatement in this case*)

Please note: These consequences are not applicable to employees hired after 7th March 2015 (purpose: more favourable treatment for employers).

Dismissal Collective

Germany

- ◎ Procedure depending on certain thresholds:
 - Notify the Agency for Employment beforehand
 - Consult the Works Council
 - Waiting period applicable before termination notice may be issued
 - Failure to notify the Agency for Employment leads to invalidity of each single termination notice

France

- ◎ Applicable procedure for 2 to 9 employees:
 - Elaborate an economic note with social measures
 - Consult the Works Council and the Health and Safety Committee
 - No pre-termination meetings
 - Written notification of redundancy
- ◎ Applicable procedure for more than 10 employees:
 - Elaborate and/or negotiate a social plan with trade unions
 - Consult the Works Council and the Health and Safety Committee
 - No pre-termination meetings
 - Obtain the authorization of the Labor Administration
 - Notification of redundancy

Italy

- Applicable to companies with **more than 15 employees** in the case of: economic crisis, reorganization and restructuring and insolvency
- Applicable in the case of **at least 5 dismissals** within a 120-day period, in a single unit or in different units located in the same province.
- **75-days information and consultation procedure** split in two phases:
 - **First internal phase (45 days)**: consultation with Works Councils (if any) and Trade Unions
 - **Second administrative phase (30 days)**: consultation with Works Councils (if any) and Trade Unions before the Employment Authority (Ministry of Employment or Regional Employment Office)
- **Length of the procedure halved if the dismissals are less than 10**
- Mandatory selection criteria (which can be derogated by the Trade Union agreement):
 - employees' family obligations (i.e., dependants);
 - employees' length of service in the company (i.e. «*Last In First Out*»), and
 - technical, production-related and organizational needs of the employer.

Italy

Consequences in the case of unfair collective dismissal:

Collective consequences:

Legal action by the Trade Unions for anti-trade union behaviour (as provided for by the Italian Workers' Statute) if the contractual or legal procedure is not followed properly by the employer

Individual consequences:

- (i) if the unfairness of the dismissal is due to a breach of the collective dismissal procedure with the Trade Unions: the employer is ordered to pay an indemnity ranging between 12 and 24 monthly salaries (*no reinstatement* in this case)
- (ii) if the unfairness of the dismissal is due to a breach of the «*selection criteria*» agreed with the Trade Unions (see above): the employer is ordered to reinstate the employee (who can opt for an indemnity equal to 15 monthly salaries instead of the reinstatement), to pay him/her a further indemnity equal to 12 monthly salaries and to pay him/her social security contributions due for the period between the dismissal and the decision of the Court

Please note: These consequences are not applicable to employees hired after 7th March 2015 (purpose: more favourable treatment for employers).

Italy

Purposes of the JOBS ACT 2015

- ◎ Move to a **stable occupational level**
- ◎ Move from a «**property rule**» system (i.e. reinstatement) to a «**liability rule**» system (i.e. indemnification only)
- ◎ **Less powers to Employment Courts** (i) in the evaluation of the unfairness of the dismissal and (ii) in the application of the sanctions in case of unfair dismissal
- ◎ Improvement of social benefits in the event of economic crisis (**lower but to all employees**)

Italy

JOBS ACT 2015: new rules about dismissals

A) Reduction of cases of unfair dismissal punished with reinstatement of the employee (from general rule to exception)

B) Improvement of ADR (*Alternative Dispute Resolution*) –in order to reduce claims before the Employment Court

C) Amendments to the rules on proceedings before the Employment Court - Monti's 2012 reform repealed

D) Amendments to the rules on mandatory ADR in case of dismissal for economic reasons - Monti's 2012 reform repealed

Italy

Who is subject to the new rules on dismissals?

- ✓ Blue-collar, white-collar and middle managers hired **after 7th March 2015**
- ✓ Blue-collar, white-collar and middle managers converted from fixed-term contracts to open ended contracts **after 7th March 2015**
- ✓ **NO executives** (i.e. «*dirigenti*») (*but remark: new NCBA for Industrial and Commercial Executives – similar discipline, lower protection for executives in the case of dismissals*)
- ✓ **NO employees hired before 7th March 2015**



Therefore, currently there are two parallel paths: employees hired before and after 7th March 2015

Italy

Evolution of the protection on economic dismissals (i.e. objective reasons) in 3 years:

1970-2012	2012 (Monti's reform)	2015 (Jobs Act)
<p><u>Always reinstatement</u> (employee's option for 15 months) + <u>Indemnity</u>: salary from the date of dismissal to the date of actual reinstatement (min 5 months, onwards).</p>	<p><u>Case A.</u> («manifest absence of grounds for dismissal») <u>Reinstatement</u> (or 15 months) + <u>Indemnity</u> of max. 12 months</p> <p><u>Case B.</u> («other cases») <u>Indemnity</u> from 12 to 24 months</p>	<p><u>Indemnity</u> equal to 2 monthly salaries for each year of service, in an amount, in any event, of <u>not less than 4 and not more than 24 monthly salaries</u></p> <p><u>Never reinstatement</u></p>
No longer applicable to any employee	Still applicable to employees hired before 7/3/2015	Applicable to employees hired after 7/3/2015

Rules applicable to employers with more than 15 employees

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