Data protection and employment — Part 5

Oisin Tobin and Philip Nolan, from Mason Hayes & Curran, discuss the data protection issues involved in disclosure of employee data during due diligence processes in the context of mergers and acquisitions

The purchase of a business can be a complex process. The buyer needs to develop a deep understanding of the company that it intends to acquire to ensure that it represents a sound investment, and is worth the price sought. This detailed knowledge is usually acquired through an analysis of all aspects of the target's operations. This analysis process, usually termed 'due diligence', may involve the disclosure of personal data, including the data of employees.

This article considers the data protection issues involved in disclosure of employee data during the due diligence process. We will also look the ways that data protection law can impact upon mergers and acquisitions ('M&A') activities in other ways, for example, issues that arise with respect to the transfer of customer databases (particularly in cases where only parts of the business are being sold via an asset sale) and the data protection assurances (or warranties) given by the seller.

How do the issues arise — a scenario

The best way to consider the issues arising during a due diligence process is by way of an example:

Target Co is an Irish based SME with 150 employees. Buyer Co is an international conglomerate headquartered in New York. Buyer Co wishes to acquire the entire issued share capital of Target Co. Before the sale can complete, Buyer Co wishes to acquire detailed information about, among other things, Target Co's employees, including union activities and absenteeism.

Addressing this example requires consideration of a number of different data protection issues:

- is the transfer of employee data to Buyer Co a data controller to data processor transfer, or a data controller to data controller transfer?
- what conditions must be met before Target Co can transfer employee personal data to Buyer Co?
- can Target Co transfer employees' sensitive personal data to Buyer Co?
- what restrictions should be placed on Buyer Co's use of the employee information?
- do the employees need to be notified about the transfer?
- can the employee data be transferred to the US?

How should we classify this disclosure?

The rules governing data controller to data controller transfers differ from the rules governing data controller to data processor transfers. Thus it is important to establish at the outset whether Buyer Co is receiving the employee personal data as a data controller or a data processor.

Section 1 of the Data Protection Acts 1988 and 2003 ('the DPAs') define a data controller as being 'a person who, either alone or with others, controls the contents and use of personal data'. In contrast, a data processor is defined as 'a person who processes personal data on behalf of a data controller'. In the above example, Target Co is handing over information about its employees so as to enable Buyer Co, and its advisors, to consider the risks involved in the transaction, to draft the deal documentation properly and to properly assess the value of Target Co. In a context such as this, it is clear that Buyer Co receives the employee personal data on its own behalf, and for its own purposes. In these circumstances Buyer Co is a data controller in respect of the employee data transferred as part of the diligence process.

Pre-conditions to transfer

The handover of employee personal data from Target Co to Buyer Co is a form of processing and, consequently, is only permissible if one of the pre-conditions set down in Section 2A of the DPAs has been met.

The two key pre-conditions in the above context are 'consent' and 'legitimate interests'. Section 2A(1)(a) allows for processing in circumstances where the employee has freely given his or her

specific and informed consent. A well drafted employee privacy policy should contain a provision which foresees the handover of personal data as part of a merger, acquisition or restructuring. The Data Protection Commissioner ('DPC') has endorsed this approach in his guidance note 'Transfer of Ownership of a Business' (available at www.pdp.ie/docs/10004) ('Guidance note'), which states that: '[S]uch an eventuality should be foreseen in an organisation's Data Protection Policy. The policy should provide that certain specifiable personal data may be disclosed in the context of acquisition discussions, particularly because secrecy may be a condition of negotiations.'

If the relevant employee privacy policy does not contain a robustly drafted clause allowing for the disclosure of personal data in the event of a corporate deal, then it should ideally be amended and redistributed.

As regards the conditions in section 2A(1)(a), it is, of course, open to Target Co to seek the relevant consents from its employees during the deal process. This approach may work if, for example, Target Co is a small enterprise (such as a family owned business). However, seeking such consents, mid-deal, could prove to be extremely difficult for medium or large businesses.

If employees have not consented to the transfer, Target Co may be able to rely on its legitimate interests, or those of Buyer Co, to legitimise the transfer. Section 2A(1)(d) of the DPAs allows for processing, in the absence of consent, where it is necessary 'for the purposes of the legitimate interests pursued by the data controller or by a third party or parties to whom the data are disclosed'. This justification is not available if the processing causes unwarranted prejudice to the fundamental rights and freedoms or interests of the relevant employees.

"In light of the above, the best practice approach would be to remove any specific medical or union information relating to an identifiable employee from material handed over to Buyer Co. Though information with respect to levels of abstinence, or union membership may be provided, it should be given in an anonymised or aggregate form."

The transfer of information so as to conduct a proper diligence of Target Co would appear to be in the legitimate interests of Buyer Co, and also possibly Target Co. In his Guidance note, the DPC accepted the availability of the legitimate interests justification in an M&A context. If the parties intend to rely on this justification, it is particularly important that proper safeguards are put in place to protect the employees' personal data. If such safeguards are not put in place, there is a possibility that the processing may cause 'unwarranted prejudice' to the employees, negating this justification.

Disclosure of sensitive personal data

Section 1 of the DPAs defines sensitive personal data as including (amongst other things) data relating to health or union membership.

The disclosure of this information as part of the diligence process can be problematic. A buyer may be interested in obtaining this information, so as to assess the level of employee abstinence or to consider the possibility of industrial unrest. However, from the perspective of data protection law, such information cannot be handed over unless at least one of the conditions in Section 2B of the DPAs is met. One cannot rely on general consent, or legitimate interests, to handover this information. In his Guidance note, the DPC suggests that sensitive personal data can rarely be handed over as part of a diligence exercise:

'Disclosure of sensitive data, such as individual employees' health data or union membership details, should be avoided unless one of the provisions of Section 2B of the Acts can be relied upon which is unlikely in most acquisition processes.'

If Target Co wanted to hand over sensitive personal data, it would likely need to show that it had obtained the explicit consent of the employee or, alternatively, that the employee had deliberately made the relevant information public.

Thus it may be theoretically possible to disclose medical or trade union information if an employee explicitly agreed to such disclosure. However, the employer would need to show that such consent was freely given. In the employment context, this could be a challenge. Alternatively, if an employee had deliberately and publically disclosed the relevant information (such as if they announced that they were a shop steward in a publication), then the information may be handed over.

In light of the above, the best practice approach would be to remove any specific medical or union information relating to an identifiable employee from material handed over to Buyer Co. Though information with respect to levels of abstinence, or union membership may be provided, it should be given in an anonymised or aggregate form.

Protecting employee interests

In the above example, Target Co should limit the extent to which Buyer Co can process the employee data. This is not only commercially advisable, but may also be necessary to

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ensure that Target Co is meeting its obligation to keep the personal data secure (under Section 2(1)(d) of the DPAs) and to avoid unnecessary processing (Section 2(1)(c)(ii)).

In his Guidance Note, the DPC advises that Target Co should only hand over personal information prior to the final merger or acquisition decision after securing formal assurances that:

- it will be used solely for the evaluation of assets and liabilities;
- it will be treated in confidence and will not be disclosed to other parties; and
- it will be destroyed or returned after use.

In a practical sense, these assurances should be given in the confidentiality agreement which should be signed at the start of the deal process.

Fair processing

As noted above, the handover of employee personal data from Target Co to Buyer Co constitutes a data controller to data controller transfer. The fair processing obligations as set down in Section 2D of the DPAs require that employees be informed of this transfer. This notice should ideally be given before the transfer of the relevant personal data. On a literal reading of Section 2D, this notification should come from Buyer Co. However, in practice, this notification is often given by Target Co, since it has the relationship with the employees.

This notice should at least detail the name of Buyer Co and the categories of personal data being transferred, and make it clear that personal data are being transferred in connection with the proposed transaction.

Data transfer

In the above example, Buyer Co is based in New York. Consequently, part of the diligence exercise may be conducted by its executives, or advisors, in the US. This will require that the employee personal data be transferred outside of the European Economic Area. Section 11 of the DPAs prevents such a transfer in the absence of certain pre-conditions being met. In a M&A context, the key pre-conditions are employee consent, Safe Harbor and the use of EU Commission approved Model Clauses.

Ideally, the employees will have consented to the transfer of their personal data. If such consent has not been provided and the transfer is to a US based Buyer Co, it may be worth checking if Buyer Co participates in the US Department of Commerce Safe Harbor scheme. If there is no consent to the transfer, and Safe Harbor is not an option, it may prove necessary to put a data controller to data controller model form agreement in place between Target Co and Buyer Co so as to legitimise the export of the personal data.

Conclusion

The sale of a business can be a challenging but exciting time for any organisation and its employees. Numerous issues need to be considered, and addressed, to bring the deal to a successful conclusion. In the midst of this activity, it is important not to forget employees' data protection rights. Simple forward planning, particularly with respect to the preparation of an organisation's privacy policy, can go a long way towards heading off these issues.

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