



TUPE Transfers: Avoiding French Traps

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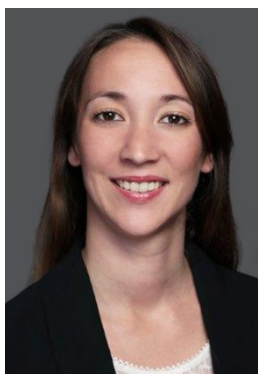
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The transfer of an undertaking systematically creates uncertainty, not to mention anxiety, among employees. One might think that the main stake for employees is the safeguard of their employment. Based on this assumption, the European Union adopted a set of common rules aiming at protecting employees' contracts. The 2001/23/EC directive dated March 12, 2001, addresses the approximation of the laws of the EU member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses ("ARD").

The ARD substantially provides that, in the event of transfer(s) of undertakings or parts of undertakings, the transferor's rights and obligations arising out of a contract of employment or from an employment relationship shall be transferred to the transferee ("TUPE transfer").

Under French law, a similar protection was implemented by a law dated July 19, 1928, and codified at article L. 1224-1 of the French Labor Code.

These European and French provisions imposing the automatic transfer of employment contracts are not only of great interest to employees. They can also be of significant importance to the successive employers, parties to a transaction involving a transfer of an undertaking. Indeed, when the conditions of the ARD and article L. 1224-1 of the French Labor Code are met, no prior consent is required from employees for their contracts to be transferred. As a result, the new owner may run the business with neither interruption, nor delay that could have resulted from employees' potential refusal to transfer to another company. So, the continuance of the business is ensured.

Therefore, the existence of a TUPE transfer is a major stake for the employee, the transferor and the transferee, which is why it has raised floodgates of litigation before the European Court of Justice ("ECJ") as well as before the French Supreme Court.

Experience shows that the analysis is not merely black and white. Depending on the situation, employees may have an interest to transfer or not, even when all the TUPE transfer criteria are met.

Under French case law – known as complex and very protective of employees – judges have a tendency to apply the TUPE transfer criteria on a case-by-case basis to preserve the employees' interests, which sometimes do not necessarily imply the preservation of their job.

In order to circumvent potential TUPE transfer pitfalls, employers must carefully plan the transfer, which requires them to be well-aware of the European TUPE rules and the French specificities outlined in this article. This article aims at providing an overview of the TUPE transfer rules, but also some practical tips to serenely tackle these kinds of situations under French law.

I. What are the main rules governing a TUPE transfer under the ARD?

- **Scope**

The ARD provisions apply in case of transfer *"as a result of a legal transfer or merger"*. The ECJ has ruled that *"legal transfer"* has many different meanings under local laws, so its definition shall not be appraised solely on the basis of a textual interpretation. In this respect, the ECJ has recognized the application of the ARD in various cases, such as the lease of an undertaking to a new lessee, the assignment of an activity to another entrepreneur, the subcontracting of an activity, the decision of an owner to take over an activity previously carried out.

- **Conditions**

The nature of the transaction is not the only criteria to determine whether ARD rules may apply. To qualify, the operation must lead to the *"transfer of an economic entity, which*

retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.”

Many litigations arose from the multiple interpretations of this definition and the analysis has become very factual following a principle laid down by the ECJ: judges shall make an overall assessment of the circumstances in the individual case, in order to determine whether the conditions of a TUPE transfer are fulfilled or not. In particular, judges should verify the existence of the following elements:

- tangible assets (e.g. buildings, movable property, stocks),
- intangible assets (e.g. customers, know-how, entitlements to use the tangible assets),
- taking over of the majority of the employees,
- degree of similarity between the activities carried out before and after the transfer.

In some cases, the ECJ has been flexible and pragmatic, by ruling that in labor-intensive sectors in which activities are based essentially on manpower, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, regardless of the existence, nor the transfer of tangible and/or intangible assets. The ECJ ruled accordingly in the following sectors: cleaning services, catering, home support.

II. What are the French specificities of a TUPE transfer?

To date, the provisions of article L. 1224-1 of the French Labor Code and the French related case law are mostly aligned with the European provisions and case law. Still, French law has of course its specificities.

- **No opt out option**

The main specificity is that the TUPE transfer rules are “*d’ordre public*” (i.e. literally “*public order*”), which means that their application is mandatory for all the stakeholders. Indeed, when the conditions of article L. 1224-1 of the French Labor Code are met, the transfer of the employment contracts is automatic and cannot be impeded by the successive employers, nor the employees, even with their consent.

- **Economic entity’s criteria**

Another French specificity is related to the assets of the economic entity. Indeed, the ARD only refers to an “*organized grouping of resources*” while French case law refers to “*an organization with its own dedicated personal and tangible and/or intangible assets*.” The French courts are traditionally more reluctant to consider that an economic entity could be characterized exclusively by its workforce. As a result, in several cases, the French Supreme Court refused to apply the TUPE transfer rules when the economic entity had no tangible, nor intangible asset.

However, in practice, judges adopt a pragmatic approach in the employees' interests, which consists in making a different application of the criteria of the TUPE transfer while placed in a situation that seems similar. This case-by-case assessment leads to inconsistency and hence legal uncertainty, especially for companies operating in the services industry and contemplating merger or acquisition operations, e.g. bank, insurance, IT, tech industries.

- **Information and consultation of the employee representative bodies**

While under ARD a simple information of the employee representative bodies is required, under French law, the Social and Economic Committee ("CSE") must be informed and consulted. "Informing" implies to provide the CSE with the fullest, clearest and most useful information possible regarding the contemplated operation and its social consequences while "consulting" means that the employer must comment on and reply to the remarks, suggestions and questions of the CSE. In practice, throughout the process, the President of the CSE (i.e. the representative of the employer) will have to make his/her best efforts (supported by the management of the company) to provide responses and comments, in a timely manner, in order to avoid that the CSE complains about a lack of information. At the end of the process, the CSE is requested to give its opinion on the operation and related consequences. The opinion can be positive, neutral or negative, but it does not bind the employer.

No prior individual information of the employee is required by the European provisions (except in the absence of employee representative body), nor by the French provisions. However, in practice, a courtesy letter is sent to the impacted employees, either as a welcome letter from the new employer, or as a letter commonly drafted by the transferor and the transferee.

- **Partial transfer of undertaking**

Lastly, in case of transfer of part of an undertaking or business, French case law imposes even further requirements. Only employees dedicated to the transferred part of business are automatically transferred.

An issue may arise when the employee's duties are shared between several segments of business, but one cannot identify for which segment the employee essentially performs his/her duties. The French Supreme Court initially ruled that the employment contract should be partially transferred to the transferee while partially remaining, on a part-time basis, with the transferor. However, this ruling raised numerous issues, for the transferor who must request for the employee's prior consent to work on a part-time basis, and for the employee employed by two companies within two different groups. Given those issues, there is a growing tendency among judges to deny the application of the TUPE transfer rules to employees who do not perform most of their duties for the transferred part of business.

In practice, the employer must rely on objective criteria to justify its selection of impacted employees, such as the time spent on the business at stake.

The last (but not least) French specificity is related to the situation where an employee representative is impacted by a partial transfer. In such a case, the employee representative

benefits from a specific protection, requiring the approval of the transfer by the Labor Authority. In this context, the Labor Authority conducts an investigation to verify whether the conditions of the TUPE transfer rules are met or not and if the contemplated transfer is not a means to discriminate against employee representatives.

III. Practical tips to avoid pitfalls when contemplating a TUPE transfer in France

The analysis of French case law on TUPE transfers shows that judges rule on a case-by-case basis, since they have a tendency to interpret the TUPE transfer rules in the most favorable way for the employees.

This being said, employees' interests are variable and are not necessarily related to the safeguard of their employment. It has happened that employees fiercely opposed the automatic transfer of their employment contract. The reasons are various and include, *inter alia*: the exit from a group or a company offering more benefits (e.g. company cars, profit sharing, RSU, etc.), the cap of the wages' scale in the transferee's company, the implementation of a social plan with generous severance package in the transferor's company alongside the divestiture project.

France, unlike Germany or Austria, does not grant employees any right of objection. As a result, the only way for employees to avoid their transfer is to challenge the application of the TUPE transfer rules. In this respect, they may consider two options:

- Either bring a case before the Emergency judge and request for the suspension of the project of transfer until the Employment Tribunal rules on the application the TUPE transfer rules.

Given the length of the judicial proceedings (months, even years), a suspension of the contemplated transfer may have harmful consequences for the transferor and the transferee.

Based on experience, after weighing all the interests at stake and taking into account the absence of damages employees may suffer just from the maintenance of their employment, and related benefits the Emergency judge are generally inclined to dismiss the suspension request.

- Or challenge their transfer before the Employment Tribunal after it actually occurred.

Under this option, employees request for the disqualification of the TUPE transfer and claim for damages to the transferor on the ground of unfair termination. In this case, the provisions of an agreement signed by the transferor and the transferee, setting forth the terms and conditions of the transaction, will be of interest to determine which party should be ultimately liable.

Given the above-mentioned risks, if the conditions of a TUPE transfer are obviously met and/or if not proceeding to the transfer will trigger more drawbacks than advantages, we

usually advise our clients to proceed to the automatic transfer of the employment contracts and to keep a strong position in case of threat of subsequent litigations.

However, when one or more conditions of the TUPE transfer are not met or are arguable and/or there is no strategic interest to proceed to the automatic transfer, it is advisable to transfer the employees on a voluntary basis.

Either way, a thorough analysis of the operation contemplated by the transferor and the transferee, at the very beginning of the process, is key to either (and ideally) mitigate the risk of litigation that may arise from an operation involving the transfer of employees, or (at least), identify the exposure and its related cost, so that the transferor and the transferee are fully aware of the consequences of the operation they contemplate.