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Global Strategies

DOING BUSINESS INTERNATIONALLY



A Practical Guide for Global Employers: The European Rules on Dealing with Employees When Business Changes – Anticipating the Pitfalls

Marcia Goodman, *Partner*

+1 312 701 7953

mgoodman@mayerbrown.com

Laurence Dumure Lambert, *Partner*

+33 1 53 53 03 56

ldumurelambert@mayerbrown.com

Nicholas Robertson, *Partner*

+44 20 3130 3919

nrobertson@mayerbrown.com

Dr. Guido Zeppenfeld, *Partner*

+49 69 79 41 2241

gzeppenfeld@mayerbrown.com

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Mayer Brown Speakers



Marcia Goodman

Partner, Chicago
+1 312 701 7953
mgoodman@mayerbrown.com



Nicholas Robertson

Partner, London
+44 20 3130 3919
nrobertson@mayerbrown.com



Laurence Dumure Lambert

Partner, Paris
+33 1 53 53 03 56
ldumurelambert@mayerbrown.com



Dr. Guido Zeppenfeld

Partner, Frankfurt
+49 69 79 41 2241
gzeppenfeld@mayerbrown.com

TOPICS FOR DISCUSSION TODAY

1. The right for a workforce to transfer with a business being sold or outsourced.
2. The obligation to consult the workforce before business decisions are taken.
3. The protection given to employees who transfer with the business.
4. The process for changing terms of employment for a transferring workforce.

The Acquired Rights Directive – An Overview

Introduction

- The Acquired Rights Directive ("ARD") is the name given to Directive 77/187 of 14 February 1977, (as amended and consolidated in Directive 2001/23 of 12 March 2001)
- It is implemented into national law in a variety of ways e.g.
 - Statutory Regulation Transfer Regulations (UK)
 - Statutory Regulation (French Labour Code L1224-1)
 - Section 613 Civil Code and Works Constitution Act (Germany)
- Directive influences the interpretation of national implementation
- Employee rights (e.g. sanctions) depend on national employment framework

Purpose and Scope

- The purpose of the ARD is to safeguard and protect the rights of employees in the event of a transfer of an undertaking, business or part of an undertaking or business to another employer as a result of a legal transfer or merger (recital 3).
- It applies to public and private under-takings whether or not operating for gain so long as they are engaged in economic activities.
- Applying to employees “assigned” to the relevant business

Transfer of Obligations

- Under Article 3(1) of the Directive "the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee".
- While the transferee must continue to observe terms and conditions previously agreed in any collective agreement for its duration, Member States are permitted to limit the period for observing these so long as that period lasts at least a year (Art 3(3)).

Transfer of Obligations

- There is some leeway for Member States whether transferor or transferee are to be 'jointly and severally liable' in relation to obligations applying before the transfer, and on any measures adopted to ensure that the transferor notifies the transferee of all the rights and obligations to be transferred to it. However, these issues do not affect the rights or obligations themselves (Art 3(2)).
- Old age, invalidity and survivor benefits beyond statutory social security schemes may be carved out of the above obligations, unless they apply to present or former employees immediately or prospectively entitled to such benefits (excluding invalidity) (Art 3(4)).

Grounds for Dismissal

- The transfer itself cannot constitute grounds dismissing staff, dismissal by transferor or transferee.
- However, dismissals for "economic, technical or organizational reasons entailing changes in the workforce" can constitute valid grounds for dismissal.
- Member States may carve out specified groups of employees not protected from dismissal in national legislation. (Art 4(1))

Insolvency

- Special provisions may apply in relation to insolvency (which includes a transferor in "serious economic crisis"). E.g. the parties, including employee representatives, may agree in certain circumstances to modified terms and conditions in order to safeguard the transferring entity's survival (Art 5(3)(b)).

Obligations to Inform and Consult

- The transferor and transferee must inform the affected employees (whether or not they are represented by employee representatives) "in good time" of the proposed date of and reasons for the transfer, and its implications for the affected employees.
- In addition, if any "measures" are envisaged in relation to the employees, the transferor must consult the employee representatives in good time with a view to reaching an agreement before the transfer (Art7(2)).
- These obligations apply irrespective of whether it is an undertaking controlling the employer, rather than the employer itself, which is taking the decisions. It is irrelevant whether any of these obligations are breached due to a lack of information provided by the controlling undertaking (Art 7(4)).

United Kingdom

Introduction

- The ARD is implemented in the UK by the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). This amplifies and clarifies TUPE, for the purposes of employers in the UK.

Purpose and scope

- There were a significant number of cases in the UK exploring the boundaries of the concept of a business transfer. Certain areas have proved problematic.
- TUPE 2006 introduced the concept of a "Service Provision Change" to extend the scope of TUPE. It applies where a client engages a third party to do work on its behalf, which it has previously done itself, or where that work is passing from one contractor to another or where it is bringing the work back in-house. It makes it much more difficult to demonstrate that TUPE does not apply.
- TUPE does not apply to a share sale. However, there have been cases where, immediately following a share sale the running of the business has effectively been merged with the company which acquired the shares. In those cases, a TUPE transfer to the new owner has been identified.

Purpose and scope

- Employees who object to transferring are entitled to opt out. Their contracts of employment terminate by operation of law on the transfer date. No claims arise.
- Alternatively, staff who identify a present or future breach of contract can resign and bring claims for unfair dismissal/breach of contract etc. Off-shore – outside EU is caught by TUPE, according to English Courts.
- Where an employee resigns following a substantial change in working conditions to the employees detriment, this is treated as a dismissal by the employer.

Transfer of obligations

- Transferors rights and obligations transfer to the transferee.
- TUPE requires the transferor and transferee to be jointly and severally liable in relation to failures to consult properly but otherwise the transferor is freed from its responsibilities.
- TUPE does not require an new employer to continue occupational pension rights in precisely the same form. However, there is a minimum level of pension contribution which must be continued, where the transferor provided a pension.
- The UK has taken up the option of disapplying certain ARD rights in the case of insolvent businesses.

Sanctions

- The sanctions proposed on employers who breach TUPE are a matter of national legislation.
- Employees who have one years' continuous service, and who are dismissed for a reason in connection with the transfer can claim a basic award plus up to £68,400 for unfair dismissal. In addition, the employee will be entitled to claim notice pay (if this is not served out) and might have other statutory claims (e.g. discrimination).
- If the individual is dismissed because the business is relocating or sliming down there will be a claim for statutory redundancy pay (calculated in the same way as a basic award).

Obligations to inform and consult - sanctions

- The Tribunal can impose an award of up to 90 days pay (uncapped) for a complete failure to consult. This may be reduced, if the employer has consulted to an extent. The sanction is a penalty, and is not linked to loss suffered by the employee.
- Transferors are obliged to provide certain information about the transferring employees ("Employee Liability Information") to the transferee not less than 14 days before the relevant transfer takes place. A Tribunal can award just and equitable compensation, taking account of the loss suffered if there is any breach by the transferor.

Change in terms and conditions of employment

- It is common to change terms and conditions of employment for transferring staff. However, under TUPE any changes to transferring employees terms of employment will be void if the reason for the change is the transfer or a reason connected with it.
- Many employers ignore this risk. It may be safer to issue a new contract, rather than varying an old one.

FRANCE

The Right for the Workforce to Transfer with a Business Being Sold or Outsourced

- The transfer is automatic if 2 conditions are met:
 - The business sold constitutes an autonomous economic entity, i.e.:
 - Could be operated separately
 - Uses its own workforce and its own means of production
 - The transferee will carry out the activity or similar activity after the transfer:
 - The transferee will use the same means of production (same machines, same premises...).
 - Exception: possible transfer of workforce even if no transfer of means of production when the business is operated merely by the workforce (i.e. transfer of the portfolio of a real estate agency).

The Right for the Workforce to Transfer with a Business Being Sold or Outsourced

- No opt-out option for the workforce.
- No need of privity between the transferor and the transferee for the workforce to be transferred.
- In case of a partial transfer of the business, the workforce will partially transfer.

Obligations to Consult the Workforce Before Business Decisions are Made

- Obligation to inform and consult on the project before the final decision.
 - The consultation of the works council is compulsory (for companies having at least 50 employees)
 - No similar obligation regarding staff delegates (companies having between 11 and 49 employees)
- Information of the workforce : no obligation under the French Labour Code to inform each worker individually, but highly recommended:
 - Applicable collective bargaining agreements can provide for such individual information;
 - Council Directive 2001/23/EC dated March 12, 2001 provides that in case the business has no staff representation, workers have to be individually informed.

The Protection Given to Employees Who Transfer with the Business

- Employment terms are transferred with the employee.
- Prohibition of dismissals prior to the transfer of business except where reorganization due to economic difficulties is needed.
- Transferee is fully liable towards employees for the payment of salaries and benefits. Transferor reimburses the transferee of the salaries and related costs incurred before the transfer unless otherwise agreed between them.

The Protection Given to Employees Who Transfer with the Business

- Specific rules as regards transfer of staff representatives in case of partial transfer of business:
 - Transferor must obtain authorization from the Labour Authority to transfer staff representatives.
 - In case the Labour Authority refuses, the transferor cannot dismiss the staff representative who must be offered a similar position together with an equivalent remuneration.

The Process for Changing Terms of Employment for a Transferring Workforce

- Prior to the transfer, the transferor cannot change the employment terms.
- After the transfer, the transferee can change the workers' working conditions without the workers' consent and/or amend the employment contracts with the workers' agreement.

The Process for Changing Terms of Employment for a Transferring Workforce

- Collective bargaining agreements (CBAs) applicable to the transferor are not transferred to the transferee, but:
 - They remain applicable to transferred workers during a 3-month notice period after transfer.
 - After this 3-month period, the transferee has an obligation to negotiate with unions new CBAs in order to replace the former CBAs. In the meantime, former CBAs continue to apply.
 - If negotiations are unsuccessful after 12 months, the former CBAs cease to apply but transferred workers continue to benefit from acquired rights.

GERMANY

Right to Transfer

- German law implementing ARD: Section 613a German Civil Code (“German ARD”)
- Transfer of business
 - (partial) transfer of business requires an organizational unit at transferor which transfers to transferee with continuing operational identity.
 - German courts (in line with ECJ) apply an overall assessment on a case-by-case basis
 - No “service provision clause” under German ARD
 - German ARD in outsourcing transactions

Right to Transfer

- Right to object
 - Individual employee may effectively obstruct “automatic” transfer pursuant to German ARD
- Legal consequence
 - Full assumption of employer’s obligations by “new owner” of the business
 - Limited liability of “old employer” for “past service”
 - Pension liabilities particularly tricky in Germany

Information and Consultation Obligations

- Statutory obligation to inform individual “in scope employees”
 - Prior to transfer and in writing
 - Information about:
 - Date of transfer
 - Reason of transfer
 - Legal, economic and social consequences of transfer
 - Prospective measures in respect of employees

Information and Consultation Obligations

- Consultation obligations vis-a-vis employee reps
 - Complex works council consultation requirements (including statutory arbitration procedures) to the extent the transfer coincides with an “operational change”.
 - Interest reconciliation/social plan
 - Considerable impact on timing, procedure and costs (but no legal right to effectively obstruct the transfer)

Protection of Employees

- Full continuation of rights and entitlements under the employment agreement
- Full continuation of rights and entitlements under collective agreements
 - continuation on collective level
 - Transformation to individual employment agreements (with one year “freeze”)
- Dismissal on the (sole) grounds of the transfer are void
- Mutual termination agreements subject to judicial review. Courts likely to protect the individual – even against his/her “own free will”

Changing Terms of Employment

Subject to legal basis of “original” terms of employment

- Individual employment contract
 - Mutual agreement vs. circumvention of German ARD
 - Unilateral termination vs. special protection under German ARD
- Works council agreement
 - If transferred “collectively”: mutual termination, unilateral termination or substitution by collective agreements applicable at “new employer”
 - If transformed into individual employment agreement: mutual or unilateral termination without prejudice to statutory “freeze” period

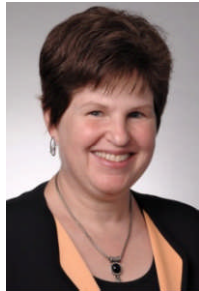
Changing Terms of Employment

- Collective bargaining agreements on union level
 - Similar to works council agreement

Questions & Answers



Mayer Brown Speakers



Marcia Goodman

Partner, Chicago
+1 312 701 7953
mgoodman@mayerbrown.com



Nicholas Robertson

Partner, London
+44 20 3130 3919
nrobertson@mayerbrown.com



Laurence Dumure Lambert

Partner, Paris
+33 1 53 53 03 56
ldumurelambert@mayerbrown.com



Dr. Guido Zeppenfeld

Partner, Frankfurt
+49 69 79 41 2241
gzeppenfeld@mayerbrown.com