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TRANSFER OF UNDERTAKINGS Denmark

The Acquired Rights Directive (and its successor, the Transfer of Undertakings Directive) required all EU member states to implement laws protecting employees who are affected by a transfer of a business. These protections apply when a business is transferred (although generally do not apply to pure share sales). Although the member states have implemented the Directives with some minor variations (and some offer enhanced protections beyond the minimum requirements of the Directives), all require the transferor (typically the seller of the transferring business) and the transferee (the buyer) to share information and consult with affected employees, and provide protections for the affected employees against being dismissed or having their terms of employment altered as a result of the transfer. In some member states, these requirements are relaxed in insolvency scenarios.

1. WHAT IS THE DEFINITION OF A RELEVANT TRANSFER / WHEN DOES TUPE APPLY?

1.1 The Danish Act on Employees' Rights in the event of Transfers of Undertakings (Consolidation Act no. 710 of 22 August 2002) applies in the following scenarios:

1.1.1 A business transfer:

A transfer of a business or undertaking (or part of a business or undertaking) where there is a transfer of an economic entity that retains its identity – typically a transfer of the business and its assets.

1.1.2 A service provision change ("SPC"):

This applies (with limited exceptions) to outsourcings, insourcings and changes of service provider where there was an organised grouping of employees carrying out the relevant activity pre-transfer and the transferor intends that the transferee will take over the activity on a continuous rather than one-off basis.

1.2 TUPE applies in cross border issues where the "economic entity" is situated in Denmark immediately before the transfer and, in the case of a service provision change, where there is an organised grouping of employees situated in Denmark immediately before the change.

1.3 TUPE generally doesn't apply to transfers of shares, as the identity of the employer must change for there to be a relevant transfer. However, it *would* apply to an asset transfer carried out as a precursor to or following a share sale.

2. WHAT ARE THE MANDATORY INFORMATION AND CONSULTATION REQUIREMENTS?

2.1 The former employer shall as early as possible provide information concerning the transfer and discuss it with the employees' elected representatives or directly to the employees if they haven't any elected representatives. Information shall particularly be given concerning:

- a) the agreed or proposed date for the transfer,
- b) the reason for the transfer,
- c) the legal, economic and social implications of the transfer for the employees,
- d) changes in circumstances relating to collective pay agreements,

3. CAN EMPLOYEES OBJECT TO THE TRANSFER AND, IF SO, WHAT ARE THE CONSEQUENCES?

3.1 Although they cannot prevent the transfer going ahead, individual employees can object to their employment being transferred. If they do so, their employment will end on the date of the transfer.

4. CAN THE EMPLOYER CHANGE TERMS AND CONDITIONS OF EMPLOYMENT FOLLOWING THE TRANSFER?

4.1 The transferee takes on the transferring employees on their existing terms of employment, and can only make changes to their terms in limited circumstances. Changes to terms of employment will be void if the sole or principal reason for the change is the transfer itself, unless the reason for the variations is a valid Economic, Technical or Organisational reasons (an 'ETO Reason') entailing changes in the workforce.

5. WHAT PROTECTIONS DO AFFECTED EMPLOYEES HAVE AGAINST DISMISSAL?

5.1 Transfer of an undertaking to another employer is not in itself grounds for dismissal with notice from a former or new employer.

5.2 If a contract of employment or employment relationship expires because a change of employer involves major changes in the working conditions to the detriment of the employee, the termination is deemed to be a consequence of circumstances relating to the employer, and the employee may trigger rights against unfair dismissal.

6. WHAT IS THE EFFECT OF THE TRANSFER ON THE COLLECTIVE STATUS OF EMPLOYEES (COLLECTIVE AGREEMENTS AND COMMON PRACTICES)?

6.1 The new employer shall be bound by any collective agreement that was binding upon the former employer. This shall not apply if the new employer not before three weeks and within five weeks after the date of transfer at the latest declares in writing to the trade union that the new employer does not wish to be bound. The transferred employees have nevertheless the right to retain the individual working

conditions that follow from a collective agreement that was binding upon the former employer. This shall apply until this collective pay agreement expires or until a new collective agreement is concluded that is binding upon the new employer and the transferred employees.

7. WHAT IS THE IMPACT OF THE TRANSFER ON STAFF REPRESENTATIVES?

- 7.1 Representatives of the employees affected by the transfer of a business or part thereof, after the transfer, retain their previous legal position and function.
- 7.2 If the assignment causes the basis for the employee representation to cease, the employee representative remains subject to the rules on protection of employee representatives applicable in the area concerned. However, the protection applies only for a period that, from the termination of the function, corresponds to the contractual or contractual notice for termination of employee representatives.

This material is for general information only and is not intended to provide legal advice

For more information regarding employment law in Denmark, please contact in Denmark

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