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## TRANSFER OF UNDERTAKINGS HUNGARY

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 DO THE RULES ON TRANSFER OF UNDERTAKINGS APPLY?**

1.1 The Act I of 2012 on the Labour Code (hereinafter: "Labour Code") (as amended) regulates the subject matter as follows:

#### **The transfer of an economic entity ("business transfer"):**

According to the Act on the Labour Code, an economic entity is an organized grouping of material or non-material resources. Rights and obligations arising from employment relationships existing at the time of transfer of an economic entity by way of a legal transaction are transferred to the transferee from the transferor. It must be noted that as a principal all such legal transaction which are appropriate to replace (change) the employer's controlling power, in other words to obtain the employer's controlling power, shall be deemed as a legal transaction for which the rules on transfer of undertakings shall be applicable. Other than the transactions involving the transfer of ownership the below mentioned transactions are the most common to be considered in this respect.

#### **A service provision change ("SPC"):**

This – dependent on the circumstances – might also apply 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. To determine whether the relevant rules shall be applicable might be decided on a case by case basis, however in general it can be noted that for instance in case of such activities regarding which the human resources are predominant (i.e. activities with service characteristics and therefore the transfer of material resources is not so significant) legal succession in the person of the employer may not be established without the relevant agreement of the parties concerned even if the activity concerned remains the same following the transfer.

### **Mergers, demergers, acquisitions:**

The rules of transfer of undertakings of employment rights and obligations apply also regarding corporate transactions such as mergers, acquisitions and all forms of demergers. They do not apply although in a case of a business association choosing to continue business in a different corporate form, since this type of transaction *does not cause a change in the employer's position*.

### **Temporary assignment of employees**

According to the prevailing laws, rules of transfer of undertakings of employment rights and obligations may apply also in some cases of temporary assignment of employees to another entity, referred to as "loan" of employees in the Act on the Labour Code. Although we have to note, that there is no significant precedent established by case law yet.

- 1.2 Rules of transfer of undertakings of employment rights and obligations generally do not 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. In general it must be noted that the practice of the Hungarian Courts are in compliance with the practice of the European Court, therefore the rules on transfer of undertakings are not only applicable if there is a legal transaction relating to the transfer of ownership, but also in case of usage agreements (for instance lease), the termination of certain agreements, de facto transfer without direct agreement between the transferor and the transferee and also certain corporate transaction (e.g. providing in kind contribution or mergers) as well. That is in principal obtaining controlling power over an economic unit usually triggers the applicability of the rules concerned. It must be also noted that the relevant rules – except for the consultation obligation with the works council - shall not be applicable in case of a transaction within the framework of a forced liquidation procedure (procedure in case of insolvent entities aiming to terminate the company).

## **2. WHAT ARE THE MANDATORY INFORMATION AND CONSULTATION REQUIREMENTS?**

- 2.1 Before the transfer the transferor shall inform the transferee on the employment relationships affected by the transfer, and also on the rights and obligations arising from non-competition and study agreements. Failure to provide the information shall have no effect as to the enforcement of rights arising from such relationships against the transferee nor on the transfer of the employees.
- 2.2 In case there is a works council or a staff representative elected, the transferor and the transferee shall, at least fifteen days before the date of transfer, inform the works council or the staff representative on:
- a) the date or proposed date of transfer;
  - b) the reason of the transfer;
  - c) the legal, economic and social consequences affecting the employees.
- 2.3 Within the same time referred to in Subsection 2.2. above, the transferor and the transferee shall - with an aim to conclude an agreement – also enter into negotiations with the works council or the staff representative concerning the planned measures affecting the employees.

The negotiations shall cover the principles of the planned measures, the ways and means of avoiding detrimental consequences as well as the means for mitigating any such consequences.

The transferor and the transferee is obliged to comply with the requirements as explained above (both information providing and negotiating) even if the decision on the transfer itself had been adopted by the body or person exercising control over the transferor or the transferee. The transferor's or the transferee's failure to satisfy the obligation above shall not be excused on the grounds that the controlling organization or person had failed to inform the transferor or the transferee concerning its decision on the transfer itself.

2.4 If no works council and no staff representative had been elected at the transferor employer - due to the number of employees concerned not exceeding 50 or 15 respectively - the transferor or - if so agreed by the employers - the transferee shall inform the employees concerned in writing on the following, at least fifteen days before the date of transfer:

a) the date or proposed date of the transfer;

b) the reason of the transfer;

c) the legal, economic and social consequences affecting the employee; and

d) any measures planned which affect the employee .

2.5 Furthermore, the transferee employer within fifteen days following the time of the transfer, shall inform the employees in writing by disclosing the employer's identification data regarding the change in the person of the employer, and on changes regarding the working conditions set out by the Labour Code.

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

3.1 Employees cannot prevent the transfer going ahead, but individual employees can object to their employment being transferred as follows.

3.2 If the new employer seeks to impose new terms or working arrangements which are materially detrimental to the employees, and in consequence maintaining the employment relationship would entail unreasonable disadvantage or would be impossible for the employees, they may be entitled to terminate their employment relationship within 30 days from the day of the transfer of the employment.

3.3 In the case above, the termination shall be treated as if it would have been initiated by the employer, and the employee is entitled to compensation and shall be relieved from work duty for at least half of the notice period as set forth in the Labour Code.

### 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 and conditions of employment, and may make changes to certain conditions (such as working hours of the employment, conditions stemming from unilateral undertakings in certain cases etc.) provided that the amendment of the employment agreement and change to the terms recorded therein, i.e. the change to any significant term in the employment requires mutual agreement by the parties and cannot be changed unilaterally. However, as mentioned in Section 3.2., if changes to the conditions are materially detrimental (i.e. a change of work

schedule, or in case the terms of the collective agreement in force at the transferee materially differ from the one at the transferor), the employees have the option to terminate the relationship.

**5. WHAT PROTECTIONS DO AFFECTED EMPLOYEES HAVE AGAINST DISMISSAL?**

5.1 Under the Act on the Labour Code, the transfer of rights and obligations means that the employment relationship of the employees will continue, just with the transferee and not the transferor, therefore the relationship will be considered as continuous service.

5.2 The Act on the Labour Code explicitly declares that the change in the employer's position (so, the transfer of employment rights and obligations) in itself may not qualify as grounds for termination of the employment relationship by the employer.

5.3 Furthermore it is worth to note that, according to the Labour Code the transferor and the transferee shall be jointly liable for employee claims which became due prior to the date of the transfer if the employee enforces the claim concerned within 1 year following the transfer.

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

6.1 If a collective agreement has been agreed and is in force at the time of the transfer then the transferee must uphold the terms and conditions set forth therein for 1 year after the date of the transfer.

6.2 The obligation described above shall not apply to the transferee in case

- a) the collective agreement becomes ineffective 1 year prior to post-transfer, or
- b) another collective agreement is already in force at the transferee.

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

7.1 The Act on the Labour Code requires employers to ensure that fair elections of staff representatives can take place.

7.2 The Act on the Labour Code sets forth that upon the transfer of economic entities (see Section 1.1.), if there is a works council established in each of the economic entities concerned, a new works council shall be elected within three months from the date of transfer.

7.3 In case there is a works council in only one of the economic entities, a works council member shall be elected within three months from transfer in order to provide representation to the unrepresented employees.

7.4 In case of a transfer by demerger of an economic entity, a works council shall be elected for the new economic entities within three months from the date of demerger.

7.5 The rules above apply to entities where there is no works council, but solely a staff representative is elected.

Finally, we have to note that the Act on the Labour Code sets forth that there may be alterations agreed (either in the collective agreement or in individual agreements) with respect to the rights and

obligations of the parties set out in the Act regarding the transfer of rights and obligations in an employment relationship, but strictly and solely to the benefit of the employees.

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

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