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TRANSFER OF UNDERTAKINGS ITALY

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 or their representatives, 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 certain cases.

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

- 1.1 Pursuant to Article 2112 of the Italian Civil Code, which implemented the Transfer of Undertakings Directive (TUPE) in Italy, a transfer of undertaking (or “going concern” or “business”) is defined as any operation which, through a transfer contract or a merger, transfers the ownership of an undertaking, or part thereof (a “branch of business”) of an organized economic activity, with or without the aim of profit, pre-existent to the transfer and which maintains its identity in the transfer, regardless of the type of legal procedure or legal act this transfer is put into effect by, including the case of lease of the undertaking.
- 1.2 A specific definition of “undertaking” exists (Article 2555 of the Italian Civil Code) according to which an undertaking is the whole of the assets organized by the entrepreneur for the exercise of the business. A “part of an undertaking” (or “branch of business”) is defined as a functionally independent division of an organized economic activity, identified by the transferor and the transferee at the time of the transfer.
- 1.3 If all the elements which identify the transfer of an undertaking (or of a part thereof) are present, there will be an automatic transfer of the affected employees to the transferee, without their consent. In certain cases, the transfer must be preceded by an information and consultation procedure with the works council / trade unions. The employees are transferred with all existing employment rights and benefits deriving from their previous relationship with the transferor.
- 1.4 Transfers of undertakings occur through, amongst others:
 - a) the sale and purchase of a business or branch of business,
 - b) mergers or de-mergers,

- c) the contribution of a business or branch of business into the share capital of a target company, and
 - d) leases or usufructs of a business or branch of business.
- 1.5 The TUPE does not apply to transfers of shares.
- 2. WHAT ARE THE MANDATORY INFORMATION AND CONSULTATION REQUIREMENTS?**
- 2.1 Under Italian law, the transfer of business or part thereof entails the automatic transfer of the affected employees, who do not need to be individually informed or consulted.
 - 2.2 In the event of a transfer of business or part thereof, for companies staffed with more than 15 employees, a mandatory information and consultation procedure set forth by Article 47 of Law no. 428/1990 must be complied with, in order to protect the workers' collective interests, whenever the business to be transferred includes employees (even when the employees to be transferred are less than 15).
 - 2.3 A joint written notice must be given to the local works council, if any, and to the local representative of the relevant trade unions that have signed the national collective bargaining agreement (NCA) applied by the companies involved in the transfer, at least 25 days before closing (i.e., before signing a deed of transfer of the undertaking before a notary public in Italy).
 - 2.4 The joint notice should be signed by the transferor and the transferee and contain the date or proposed date of the transfer, the reasons for it and its legal, economic, and social consequences for the workers. The contents of this joint notice are particularly sensitive, particularly if any of the effected employees are or may become redundant, and/or if any of the assets of the going concern are excluded from the transfer.
 - 2.5 Within 7 days of the joint notice, the works council/trade unions may, and usually will, ask for a meeting with the transferor and the transferee in order to jointly examine the details of the transaction, including its potential negative effects on the concerned employees. This meeting must be scheduled within 7 days of the request. In complex cases, the works council/trade unions may ask for more than one meeting.
 - 2.6 In any event, 10 days after the commencement of the meetings, if the parties fail to reach an agreement, the procedure will be deemed as completed, even if no agreement is reached. An agreement with the works councils/trade unions is of course advisable but it is not compulsory to close the transaction.
 - 2.7 At the end of this procedure, or at the date planned for the transfer indicated in the written notice to the works council or trade unions, the transferor and transferee must give individual communications of the effective transfer and of the terms and conditions of employment to all the employees concerned.
 - 2.8 Under Italian law, all transferred employment contracts will automatically be assigned to the transferee by operation of law. As a result, there is no need for a novation of such contracts.
 - 2.9 Applicable NCAs may provide for additional union consultation requirements, so it is advisable to check them on a case-by-case basis.

2.10 Failure by the transferor and the transferee to comply with this mandatory information and information procedure may be regarded as an anti-union activity, and it may even give rise to a criminal offence.

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

3.1 Individual employees do not need to be consulted and will automatically continue their employment relationship with the transferee, independently of their consent which is not required. They cannot object to the transfer.

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

4.1 Pursuant to Art. 2112 of Italian Civil Code, the employees whose conditions of work suffer a significant change in the 3 months following the transfer of undertaking may resign according to Article 2119 of the Italian Civil Code. Such employees may resign for just cause and are entitled to receive payment in lieu of notice (the length of the notice period and of the amount of the payment in lieu of it is generally fixed by the NCBAs and is proportional to the length of service and tasks of the employee).

4.2 Specific rules apply to executives (*dirigenti*) being transferred with the business. Applicable NCAs would typically grant executives (*dirigenti*) the right to terminate their employment relationship as a result of the transfer and to receive a special indemnity from the transferee for such termination in addition to the indemnity *in lieu* of notice. The amount of this indemnity, which shall be on top of usual severance payments upon termination of the employment, varies based on the applicable NCA.

4.3 These protections may be relaxed, or amended, if agreed between the transferee, the transferor and the unions in the framework of the mandatory information and consultation procedure mentioned at paragraph 2 above.

5. WHAT PROTECTIONS DO AFFECTED EMPLOYEES HAVE AGAINST DISMISSAL?

5.1 Under Italian law, the transfer of undertakings does not constitute a justified reason (“giustificato motivo”) or just cause (“giusta causa”) for dismissing the employees of the transferred business.

5.2 This does not mean that, however, that the transferee is no longer entitled to terminate the employment of transferred employees. The transferee may still dismiss them, either as a disciplinary measure in reaction to serious misconduct (e.g. theft, serious misbehaviour in the office and wilful damage to the employer’s property, negligence, unjustified absence from work) or in the framework of a re-organization. In the latter case, however, the reason for the termination must not depend solely on the transfer, but it should rather refer to autonomous economic, technical, organizational or production-related reasons (e.g. shut-down of the employee’s job position, closure of unit, reorganization of the production activity and/or the reorganization of the job position, also, for instance, as a consequence of a reorganization of the functions at a group level).

- 5.3 In the light of this, redundancies are one of the chief points to be dealt with in the mandatory information and consultation procedure mentioned at paragraph 2 above.
6. **WHAT IS THE EFFECT OF THE TRANSFER ON THE COLLECTIVE STATUS OF EMPLOYEES (COLLECTIVE AGREEMENTS AND COMMON PRACTICES)?**
- 6.1 The transferee is entitled to replace the NCA applied by the transferor to the affected employees with a different NCA of the same level (if any) which is already applied by the transferee to its own employees. Vice-versa, transferees having no employees before the transfer should maintain the NCA of the transferor.
- 6.2 In common practice, changes of the applicable NCA are regulated by *ad hoc* settlements between the transferee and the unions, known as harmonization agreements.
7. **WHAT IS THE IMPACT OF THE TRANSFER ON STAFF REPRESENTATIVES?**
- 7.1 Italian law does not expressly regulate the impact of the transfer of undertakings on staff representatives. According to certain rulings of the Italian Supreme Court, if the transferred business includes staff representatives, they keep representing the employees affected by the transfer, until election of new representatives in the new working reality.

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

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