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TRANSFER OF UNDERTAKINGS THE NETHERLANDS

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 A transfer of a business or undertaking (or part of a business or undertaking) takes place where there is a transfer of an economic unit as a consequence of an agreement, a merger or a demerger. An economic unit is defined as a set of organized resources, intended to carry out a mainly or not mainly economic activity. A further condition is that the identity of the transferred economic unit is retained. This means that the activities are continued immediately or after a short period of cessation after the transfer in essentially the same way.
- 1.2 Furthermore, TUBE 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. In this respect TUBE also applies to public tenders.
- 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.
- 1.4 It should be noted that TUPE does not apply to employees of a bankrupt employer, albeit with the caveat that an exception to this exception is made for pre-packaged bankruptcy.
- 1.5 An employee under TUPE can be considered to be part of a transferred undertaking even if that employee formally has no formal contractual relationship with the entity or with the part of the entity which is being transferred. This is referred to as the material employment relationship. Whether or not the rights and obligations of a specific employment agreement are transferred therefore depends on all circumstances, and is not simply determinable by looking at the parties to the agreement.

2. WHAT ARE THE MANDATORY INFORMATION AND CONSULTATION REQUIREMENTS?

- 2.1 The transferor and the transferee must provide prescribed information either to the works council, or the employee representative, if those organs exist or to the employees who are to be transferred themselves. This duty is limited to the 'own employees' involved with the transfer. They are obliged to provide information on (a) the proposed transfer decision, (b) on the proposed date for the transfer, (c) on the reason for the transfer, (d) on the legal economic and social consequences of the transfer for the employees and (e) on the measures which are being considered with regarding the employees.
- 2.2 This information must be provided in a timely fashion. For the transferor this means that the information must at least be provided before the transfer decision has been made and the date for the transfer is set. This is to ensure that the employees have time to voice their opinions on the matter. For the transferee this means that the information must be given before the employees are affected in their employment terms and conditions.
- 2.3 If the employer fails to provide this information (in a timely manner), the employee can claim tort damages.
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 or they can sign a termination agreement with the transferee.
- 3.2 If the new employer seeks to impose new terms or working arrangements which are materially detrimental to the employees, the termination of the employment contract will be regarded as having been initiated by the employer. This also applies if the employee decided not to agree to a new contract after the end of the term of his or her fixed-term contract.
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.
- 4.2 The employer could be entitled to change existing terms of employment in order to harmonize the terms with existing employees of the transferee and only if the interest of the transferee supersedes the interest of the transferring employees. If terms are changed, the transferring employees must be compensated for any adverse change.
5. **WHAT PROTECTIONS DO AFFECTED EMPLOYEES HAVE AGAINST DISMISSAL?**
- 5.1 Termination of the employment contact on the basis of the transfer of an undertaking is forbidden.
- 5.2 Furthermore, the regular dismissal protections rules apply. Dutch law dictates an exhaustive list of all legitimate grounds for termination; the transfer of the undertaking is not included.
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 applies to transferring employees the transferee is bound to these collective agreement. The terms and conditions of the collective agreement are 'frozen' at

the moment of the transfer. If a different collective agreement applies to the employees of the transferee itself, the transferee is not allowed to apply these terms to the transferring employee on the basis of the transfer. Therefore it could occur that for a period of time the transferee must apply several different collective agreements to its employees, although the transferee may (if it interest supersedes the interest of the transferring employee) harmonize the employment terms. If terms are however changed, the transferring employees must be compensated for any adverse change.

- 6.2 The transferee stops being bound by the collective agreement of the transferor the moment a new applicable collective agreement comes into force or another collective agreement is made compulsory for the transferee after the transfer has taken place.

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

- 7.1 If the business activity transfers, also the works council of that economic unit transfers to the transferee. In principle the business activity (economic unit) and the works council form a single unit. As a consequence the staff members of the works council remain member to the works council after the transfer.

- 7.2 The staff representatives are granted rights and protections so that they can effectively carry out their function. For instance, if they are dismissed and the dismissal is chiefly related to their role as representative, then that dismissal will be deemed to be **automatically unfair**.

- 7.3 The representatives must have access to such facilities as is appropriate for them to carry out their function. They also have a right to reasonable time off with pay during working hours so that they can dedicate time to their duties as representative.

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

For more information regarding employment law in the Netherlands, please contact:

Myrddin van Westendorp, Fruytier Lawyers in Business, at mvanwestendorp@flib.nl

Vincent van Oosteren, Fruytier Lawyers in Business, at vvanoosteren@flib.nl