

August 2019

TRANSFER OF UNDERTAKINGS PORTUGAL

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 business transfer:

1.1.1 A transfer of undertaking will occur where a stable economic entity or business unit is transferred, but retains its identity. An economic unit is defined as (i) a set of organized means, (ii) for the purpose of carrying out an economic activity, main or ancillary, has been given the following additional requirements: (iii) which is deemed as a productive unit, (iv) with autonomous technical organization, (v) that maintains a proper identity. Therefore, business transfer provisions apply to the:-

- Transfer of the whole business or the business as a going concern;
- Transfer of a part of the business/undertaking; and
- Return of the economic exploitation of the undertaking.

To ascertain whether a transfer of undertaking has taken place, the key criterion is to determine whether the business retains its identity after the transfer, although in different hands. In this analysis, it is necessary to look at the assets of the business that have been transferred, such as tangible assets (e.g. premises, equipment), intangible assets (e.g. intellectual property rights, contracts, goodwill, client lists), employees and clients.

1.2 A service provision change ("SPC"):

1.2.1 As a rule, a service provision change would not constitute a relevant transfer, and so, business transfer provisions would not apply.

1.2.2 However, business transfer provisions may also apply to service provision change situations where the transfer relates to an economic unit which maintains its identity (e.g. site

security or employee catering operation). Therefore, a specific assessment of the particular activity/operation must be made on a case-by-case basis.

1.2.3 In addition, collective bargaining agreements (CBAs) may impose an automatic transfer obligation regarding service provision change, commonly designated by “loss of a work place”, such as a CBA applicable to facility services.

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

2.1 Business transfers require information and consultation phases for both the transferor and transferee employers. Additionally, both the transferor and the transferee employers must inform, in writing, the affected employees (and the employees’ representatives if any), without prejudice to the duty of confidentiality of the employees’ representatives of:

- the date of the transfer;
- the reasons for the transfer;
- the contents of the agreement between transferor and transferee;
- its legal, economic and social implications for the employees;
- measures envisaged regarding them; and
- the contents of the agreement between transferor and transferee.

2.2 At the request of either party (transferor/transferee and employees’ representatives), the labour authorities may participate in the negotiations aiming at confirming that the process has been conducted properly; conciliating the parties and impose the respect of employees’ rights.

2.3 Consultation and information duty must be complied with the following representation structures (as applicable):

- Works council;
- Trade unions;
- Inter-union committees;
- Union committees;
- Union delegates within the companies.
- In the absence of employees’ representatives the affected employees may appoint a representative committee with a maximum of three or five members, depending on whether the transfer involves up to five or more employees.

2.4 For companies with more than 50 employees, the transferor must inform the labour authorities about: a) the contents of the agreement between the transferor and the transferee, or b) if there is a transfer of an economic unit, of all the elements that are part of it. This obligation may also apply to companies with under 50 employees, at the request of the labour authorities.

- 2.5 The information to the employees or its representatives must be provided in writing, before the transfer, in reasonable time, i.e. at least 10 working days before the consultation with the employee representatives (if applicable).
- 2.6 The duty to consult is only triggered if there are representative structures for the affected employees.
- 2.7 Consultation duty of the representative bodies takes place at least 7 working days pre-transfer.
- 2.8 Under the Portuguese law, employees and their representatives do not have co-determination rights regarding business transfers. Therefore, this consultation duty is more of an exchange of views, with a view to reaching an agreement. The employer is not bound to undertake the employees' demands.
- 2.9 Each employer (transferor and transferee) shall consult their own respective representative structures of the employees in order to reach an agreement regarding the measures envisaged to apply to the employees after the transfer.
- 2.10 From a practical standpoint, these consultation meetings can be held by both the transferor and the transferee employers simultaneously, in order to expedite the process but this is not mandatory.

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

- 3.1 When the transfer entails a significant and substantial change to the employee's position, the employee may exercise the right of objection to the transfer in particular as a result of a manifest lack of solvency or a difficult financial situation for the purchaser, or the organization's work policy does not merit confidence for the employee. The objection of the employee prevents the transfer of the employment contract, and the employment relationship is maintained with the transferor.

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

- 4.1 The transferee employer inherits the transferring employees with their existing terms and conditions of employment (e.g. length of service, salary conditions, working schedule, category, etc.). Any changes to terms and conditions of employment in connection with the transfer, to the extent that they are detrimental to the employee, may be deemed null and void and may entitle the employee to damages and/or fair cause for termination of contract with severance pay.
- 4.2 However, the new employer may change terms and conditions of employment after transfer in the same situations as the law would allow for such change to happen should there not have been a transfer. For example, changes may have to be based
- On mutual consent (when possible);
 - Operation of a variation clause; or
 - Changing terms and conditions through collective regulation instruments (e.g. CBAs); etc.

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

5.1 Scope of protection: The business transfer cannot be valid grounds for the termination of the employees' employment contracts. Instead, these will automatically transfer from the transferor to the transferee employers. Therefore, any dismissal, pre or post transfer directly grounded on the transfer will be deemed unlawful.

5.2 Dismissals connected with the transfer of undertaking may only happen on general terms, i.e. where there are market, structural or technological grounds that entail changes in the workforce, such as genuine redundancies or reorganisations.

5.3 On the other hand, where the transfer of an undertaking causes serious damage to the employee, in particular by a manifest lack of solvency or based on a difficult financial situation of the transferee, or, if the employee is not confident with the transferee's policy on the organization of work, the employee may terminate the employment contract with cause being entitled to compensation calculated on the same terms of collective redundancies.

5.4 Remedy for breach: If an employee is dismissed without exercising his right of objection and in breach of statutory provisions, the dismissal may be deemed unlawful and the court may require the employer to:

- pay all salaries due from the date of the dismissal until the date of the Court's final and definitive decision;
- either to reinstate the employee or pay him/her a compensation for the wrongful dismissal (please see below);
- pay any outstanding credits;
- pay damages (either material or moral) directly arising from the wrongful dismissal.

5.5 The compensation due for non-reinstatement of the employee will be determined as follows:

- If the employee requested not to be reinstated in the company, the compensation will be established by the Court, ranging between 15 and 45 days of the employee's base salary and seniority allowances per each full year of service or fraction thereof, with a minimum of 3 months salaries;
- If the company has grounding requested not to reinstate the employee (which is possible in the case of micro sized companies or when the employee held a management or direction position), the compensation will be established by the Court ranging between 30 and 60 days of the employee's base salary and seniority allowances per each full year of service or fraction thereof, with a minimum of 6 months salaries.

5.6 Injunction procedures may also be launched by the employees with a view to preliminarily challenge the employer's termination decision.

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

6.1 The collective bargaining agreement (CBA) applicable to the employment relationships between the transferor employer and its employees will remain in force until its term or at

least for a year following the date of the transfer, except if, in the meantime, a new CBA becomes applicable to the employment relationships between the transferee employer and all its employees (i.e. transferred employees and previous employees). In this case, the first CBA (the one that was applicable to the transferred employees) will be overridden.

6.2 However, if after one year, no collective bargaining agreement is applied to the transferee, the effects already produced in the employment contract shall be maintained by the collective bargaining that binds the transferor in relation to remuneration, category and definition, working time and social protection schemes whose benefits substitute those guaranteed by the general social security scheme or by protocol of substitution of the National Health Service.

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

7.1 Where the undertaking maintains its autonomy after the transfer, the employees' representatives will keep their status and functions provided that the requirements that enabled the creation of such representation body are still met.

7.2 Should the undertaking or business unit be incorporated in the transferee's company, and where there is no representative body at the transferee, the pre-existing one will remain in force for a period of two months or until a new representative body initiates its mandate.

7.3 Where the transferee company already has existing employee representative bodies (e.g. a works council) the transferring employee representatives will lose their roles. However, in any event, the members of the employee representative bodies whose mandates terminate by virtue of the transfer will still benefit from the special protection arising from their status until the date their mandate would eventually terminate.

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

For more information regarding employment law in Portugal:

Inês Albuquerque e Castro - FCB Sociedade de Advogados - ic@fcblegal.com