



Buying a business in Europe: understanding the employment issues and how to ensure a smooth acquisition

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Agenda

- The impact of the Acquired Rights Directive on the purchase of a business
- How can you ensure that you get all relevant employee information?
- What consultation must take place and when?
- Can you choose not to hire certain employees i.e. in central functions?
- Can you change the transferring employees' terms and conditions?

Case Study

- Your company has decided to increase its global footprint by purchasing another business which trades in the UK, France, Germany and Italy. You are keen to close the deal quickly. If possible, you want to avoid taking on the employees working within the business' administrative and central functions as you believe you already have enough employees fulfilling these roles.
- Unfortunately, so far it has been very difficult to obtain information from the seller about employees who work in these administrative roles. You also want all employees to be put immediately on to your company's employment terms and conditions. You are aware employees will need to be informed of the deal but you do not want this to slow the purchase down. Someone has mentioned the existence of a European Directive which covers the purchase of businesses and may put a large "employee –related" spanner in the works...



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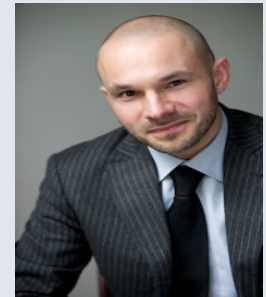
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United Kingdom

The impact of the Acquired Rights Directive on the purchase of a business

- ARD is implemented in the UK by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”)
- Applies to:
 - a) A transfer of business, undertaking or part of a business or undertaking where there is a transfer of any economic entity that retains its identity (business transfer);
 - b) A client engaging a contractor to do work on its behalf, reassigning such a contract, or bringing the work back “in-house” (a service provision change).
- Case study engages (a)

The impact of the Acquired Rights Directive on the purchase of a business cont.

- 3 basic principles:
 - Automatic transfer – employees transfer to transferee who inherits all rights, liabilities and obligations in relation to them
 - Protection against dismissal in connection with a TUPE transfer
 - Obligation to inform and consult with representatives of the affected employees

How can you ensure that you get all relevant employee information?

- Due diligence:
 - Request specific information required
 - Pay particular attention to liabilities e.g. redundancy policy, enhancements to statutory rights, change of control clauses, benefits
 - Immigration checks



How can you ensure that you get all relevant employee information cont.

- Employee Liability Information (Regulation 11) must be provided 28 days prior to transfer date:
 - Identity and age of employees
 - Particulars of employment includes:
 - salary, length of service, notice, location etc.
 - Collective Agreements
 - Disciplinary or grievance proceedings in prior 2 years
 - Legal action or potential legal action by employees in prior 2 years
- Claim for non-compliance within 3 months of transfer. Award is what is “*just and equitable*” subject to minimum of £500 /employee

What consultation must take place and when?

- Obligation to inform and (if appropriate) consult with recognised trade unions or elected employee representatives;
- if no union or representatives in place:
 - Follow provisions of Regulation 14
 - Factor in time
- Employers with fewer than 10 employees can inform and consult directly with affected employees



What consultation must take place and when cont.

- When?
 - *“Long enough before the relevant transfer to enable the employer of any affected employees to consult the appropriate representatives”*
 - *“In good time”*

What consultation must take place and when cont.

- Following information must always be given:
 - Fact of transfer, date and reasons for it
 - Legal, economic and social implications of the transfer
 - Measures which the employer envisages or fact that there are none
 - Measures the transferee envisages or fact that there are none
- Duty to consult if measures envisaged
- Consultation must be with view to seeking agreement
- Failure to inform and consult = claims for up to 13 weeks' gross pay/affected employee

Can you choose not to hire certain employees i.e. in central functions?

- Anyone “*employed by the transferor and assigned to the organised grouping of resources or employees ... which would otherwise be terminated by the transfer*” will transfer
- Contractors and agency workers do not transfer
- Must be “*assigned*” and employed “*immediately before*” transfer:



Can you choose not to hire certain employees i.e. in central functions cont.

- Consider:
 - Can they be moved and perform functions for other parts of the business which are not transferring?
- Redundancy?
 - Dismissals where the sole or principal reason is the transfer are automatically unfair unless there is an economic, technical or organisational reason entailing changes in the work force
 - Can now elect to commence collective consultation for redundancy purposes prior to transfer
- Objection?
 - Unlikely as terminates employment with no right to redundancy or notice pay

Can you change the transferring employees' terms and conditions?

- Variation is void if the sole or principal reason for the variation is the transfer
- Variation allowed if:
 - Sole or principal reason for variation is ETO reason and both parties agree variation
 - Terms of the contract allow it
 - If collective agreement term and change takes effect after one year from date of transfer and employee rights and obligations when “*considered together*” are no less favourable



Can you change the transferring employees' terms and conditions cont.

- Consider if changes can be linked to an event other than the transfer
- Longer gap between TUPE transfer and harmonisation the greater the chance of breaking the TUPE connection
- Link new benefit terms to acceptance of new contract

Summary

- You must plan for the transfer of employees:
 - a) Obtain thorough due diligence – know what you are getting
 - b) Consider what changes, or “*measures*” are critical
 - c) Create a strategy for information and consultation – factor in adequate time
 - d) Consider if dismissals will be necessary post-transfer and ensure you have an ETO reason. Consider redundancy consultation pre-transfer
 - e) Create a long-term strategy for harmonising terms and conditions or handling different contracts in the business



France

France: conditions for transfer

Conditions for transfer of employment contracts under French labor law (art L.1224-1 of the French labour code)

There is an automatic transfer of employment contracts if it concerns:

- (i) The transfer of an autonomous economic entity
 - With specific dedicated employees and means (immovable/movable assets)
- (ii) Whose identity and activity are maintained
 - No or only minor changes in activity

Complete transfer of activity

In the case of the transfer of the whole business in France (e.g. the entire French company):

- All employees (even protected employees) are automatically transferred
- No rights for the employees to object to the automatic transfer (unlike in Germany)
- No prior approval required from the labour inspector for the transfer of protected employees

Partial transfer of activity

In the case of a partial transfer of the business in France (e.g. if only one branch of activity of the French company is transferred)

- All non-protected employees fully dedicated to this business are automatically transferred
- The transfer of protected employees (e.g. members of the work council) is subject to the labor inspector's prior approval
- If no authorisation is granted, protected employees cannot be transferred

Option to select transferred employees?

- No possibility for the new employer to pick and choose employees
 - e.g. the employer cannot avoid taking on certain employees dedicated to administrative or central functions even if the employer already has enough employees to fulfill these roles

Transfer and work conditions

- The transfer of employment contracts under same work conditions is automatic
- Seniority, salary, position, qualification do not change
- If there is a need to change a contract, the changes proposed must be provided in writing after the transfer and are subject to employee approval

Consultation of the employee representatives

Consultation with the works council:

- Consultation with works council required prior to any transfer
- Prior consultation with the CHSCT (Hygiene, Safety and Work conditions Committee) often required (if the transfer changes the work conditions of the employees)
- The transfer of the employment contracts must occur **AFTER** the works council (and/or CHSCT) have rendered their opinion

Transfer and dismissal

- **Caution:** Mandatory provisions of Article L.1224-1
Therefore, dismissals prior to transfer would be null and void (e.g. the employee concerned is entitled to be reinstated in his previous position)
- After the transfer, the employer is allowed to eliminate « duplicate » positions.

Post transfer restructuring

- Any dismissal due to post-transfer restructuring must comply with the French labor law requirements,
- Any planned dismissal must be based on economic grounds, i.e. the company is currently facing:
 - (i) substantial financial losses;
 - (ii) or suffering from a lack of its competitiveness.



Germany

The impact of the Acquired Rights Directive on the purchase of a business

- ARD is implemented by sec. 613a German Civil Code (BGB), providing for a transfer of (a part of) a business in general:
 - employment relationships automatically transfer to the buyer together with all rights and obligations pertaining hereto
 - if rights and obligations of the employment are regulated by collective bargaining agreement or by works agreement, they remain valid and continue on a collective / individual basis
 - termination by the seller or by the buyer due to transfer is invalid
 - the seller or the buyer must notify affected employees
 - affected employees may object to the transfer of the employment within 1 month of receipt of notification and thereby remain employees of the seller

The impact of the Acquired Rights Directive on the purchase of a business

- Whether the purchase of a business is deemed a transfer of (a part of) a business requires examination on a case by case basis
- German labor courts tend to find that a transfer of business has taken place
- In general, sec. 613a BGB applies if
 - a separate, operationally and organizationally identifiable economical unit (“operational unit”)
 - is transferred by asset deal without losing its identity

How can you ensure that you get all relevant employee information?

- Buyer should insist on getting information at an early stage of due diligence by seller
- Relevant employee information:
 - which and how many employees are assigned to the transferring (part of) operation
 - individual employment agreements (including operational customs)
 - works agreements
 - applicable collective bargaining agreements
 - company pensions

What consultation must take place and when?

- 613a BGB provides obligation to consult employees, not Works Council
- However, participation rights of the Works Council pursuant to German Works Constitution Act (BetrVG) applicable
- **Step 1: The Purchase of a whole operation**
 - requires notification of Works Council according to sec. 80 para 2 BetrVG / Economic Committee (if any) according to sec. 106 para 2 BetrVG of buyer and seller
 - when to notify: as soon as plans are “in concrete terms”
 - could lead to a transfer of sellers’ Works Council to buyer

What consultation must take place and when?

- **Step 1:** The purchase of a part of an operation may be deemed, both for the buyer and for the seller, a “change of operation“ following sec. 111 et. seq. BetrVG, triggering co-determination rights of the Works Council:
 - notification of the Works Council about planned “change of operation”
 - negotiation on “balance of interests“
 - agreeing on a social plan (if required)
 - when to notify / start negotiations: as soon as plans are “in concrete terms”

What consultation must take place and when?

- **Step 2:** Sec. 613a para 5 BGB requires comprehensive information of affected employees be provided in text form about the transfer of the (part of) business prior to the transfer, in particular:
 - date or the planned date of the transfer
 - reason for the transfer
 - legal, economic and social consequences of the transfer for employees
 - prospective measures in relation to the employees
- Even sec. 613a BGB provides that the seller or the buyer is obligated to provide such information, in practice, both parties jointly inform affected employees

What consultation must take place and when?

- If the notification to employees is insufficient
 - affected employees may object to the transfer after the 1 month period, even years after the transfer, and return to seller
 - ⇒ employment of objecting employee does not transfer to buyer but continues with the seller
 - any waiver of this right of objection / consent to transfer by employee is invalid
- German labor courts tend to be very strict regarding the requirements for the content of the information letter
- Buyer should carry out sufficient and tailored warranties / indemnities in the Asset Purchase Agreement (APA)

Can you choose not to hire certain employees i.e. in central functions?

- All employees of the (part of) operation transfer automatically
- Any dismissal, by seller or buyer, that is solely based on a transfer of business is automatically deemed to be unfair; termination for operational reasons remain possible
- But, only the employment relationships of the relevant business or part thereof pass to the buyer
- As it is sometimes unclear and disputable which employees are assigned to the respective business or part thereof, one could attempt to “sidestep” the transfer of certain employees and/or safeguard the buyer by warranties / indemnities in the APA
 - e.g. indemnity for all legal costs including severance if an employee in a central function claims to be part of the respective (part of) operation and needs to be terminated by buyer after transfer

Can you change the transferring employees' terms and conditions?

- Employees of the (part of) operation transfer automatically under the terms and conditions existing at the time of transfer
- Individual employment contracts remain unchanged; mutual changes of individual employment agreement legally possible, e.g. on occasion of a promotion or rise of salary
- If rights and obligations of the employment are regulated by provisions of a collective bargaining agreement or a works agreement of the seller, they will generally become part of the employment with the buyer
 - Exception: such rights and obligations may be superseded by a conflicting collective bargaining / works agreement of the buyer, even if conditions are worse
 - Legal examination for such conflict required in each case

Summary

- Make sure to get all relevant employee information in course of due diligence procedure
- Compulsory Works Council consultation process and information of employees to take place prior to the transfer
- Even if you cannot choose not to hire certain employees, use legal latitude to minimize risk of transfer of additional employees
- In general, transferred employees' terms and conditions cannot be changed as a result of the transfer. Examine current terms & conditions and whether exceptions may be applicable



Italy

Italy - Acquired Rights Directive

- Section 2112 of Italian Civil Code is the implementation provision of the Acquired Rights Directive.
- Section 2112 sets out the relationship between the transferor and the transferee about the employees in case of business transfer: (a) Automatic continuation of the ongoing employment agreements [no consent of the employees needed]; (b) Conservation of the rights of the individual employment agreement; (c) Application of the same Collective Bargaining Agreement or of the transferee's Collective Bargaining Agreement; (d) Statutory notice to the trade unions, if the company has more than 15 employees; (e) Transferor and transferee are jointly liable for all credits of the employees before the business transfer.

Italy - Transfer Of A Business Unit

- Company's business unit feature pursuant to Section 2112 of the Italian Civil Code and judicial decisions: Autonomous organization pre-existing to the transfer.
- This definition is made to avoid the creation of specific business units composed by different employees with several roles at the moment of the transfer to outsource them and dismiss them after a brief period with the transferee.

Italy - Relevant Employees' Information

- All relevant employees' information are ensured by means of a due diligence of specialized lawyers on the employment agreements, before the purchasing of the business;
- Ineffectiveness of indemnity agreements between the transferor and the transferee towards the employees;
- Effectiveness of indemnity agreements between the transferor and the transferee.

Italy - Statutory Consultation

- Statutory notice to the trade unions, if the company has more than 15 employees (Section 47 of Italian law No. 428/1990);
- Notice: (a) Date of the transfer; (b) Reasons of the transfer; (c) Economic and legal consequences for the employees; (d) Possible measures towards the employees;
- Dead-line for the notice: 25 days before the signing or the closing of the transfer;
- Sanction: Judge can order the removal of the operation; or suspend the operation until the filing of the notice.

Italy - Power of Choice

- Transferor and transferee could proceed, prior or after the transfer, with individual or collective dismissals. However the dismissal must be justified with reasons or business needs different from the transfer, because it is not a valid reason for the dismissal (Section 2112 paragraph 4).
- The power of choice not to hire some employees is not expressly granted by Italian law, however there are a few minor judicial decisions that establish that the dismissal of employees by the transferor could be justified by a provision imposed by the transferee to reduce the employees for the realization of the transfer.

Questions?



CPD POINTS and CLE CREDIT

- For CPD points and CLE credit please email:
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