

CLEARY GOTTlieb

EU Directive on Transfers of Undertakings



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Overview¹



Purpose: The Directive imposes obligations on employers and protects certain employee rights in connection with certain corporate transactions.

Scope

Covered Employees.

The Directive covers full-time, part-time and indefinite-term or fixed-term employees. The Directive does not cover independent contractors or other persons who are not regarded as “employees” under national law.

Covered Transactions.

The Directive broadly covers transactions involving a change in the entity responsible for a business (or part of a business)² resulting in a change of employer, such as an asset sale or a merger.³ The Directive requires the relevant business (or part) to constitute an “economic entity”. Broadly, this requires resources (whether tangible and/or intangible) that are deliberately organized together for purposes of pursuing economic activity of some sort.

Excluded Transactions.

The Directive does not generally apply to:

- Businesses (or the relevant part) not situated within the EEA.
- Stock sales.
- Transfers of assets not constituting an “economic entity” or where the economic entity does not retain its identity. However, the analysis of whether the transfer of assets constitutes an economic entity is fact-specific, and legal advice should always be sought before concluding that the Directive does not apply.
- Unless an EU Member State provides otherwise, liquidations in bankruptcy or analogous proceedings.⁴ Where an EU Member State provides that the Directive does apply in this context, the EU Member State may relax the usual rules and provide that (i) certain employee debts do not transfer where they are otherwise protected under national law and (ii) changes to employees’ terms and conditions may be agreed, provided these are designed to safeguard employment opportunities by ensuring the survival of the business.
- Transfers between certain governmental bodies.

¹ Directive 2001/23/EC.

² The Directive also applies to undertakings, which is a broad concept and includes, for example, charities, trade associations, certain governmental bodies, schools and universities, whether or not operating for profit.

³ The Directive may protect employees of the surviving entity in a merger, subject to the structure of the transaction and the applicable law of the member state in which such merger occurs.

⁴ With respect to insolvency proceedings that do not involve a liquidation, the Directive will apply, but certain of the Directive’s requirements may be relaxed by the EU Member State.

Transfer of Employment and Certain Rights and Obligations by Operation of Law

In General.

Employees assigned to the business transfer automatically by operation of law to the transferee at the same time as the business is transferred, and on their existing terms and conditions of employment.⁵ The transferee becomes the new employer. As a result, all rights and obligations arising from the employment contracts of those transferred employees, or from the employment relationships more broadly, are also transferred to the transferee, and (except as provided in “*The Pension Exception*” and “*Joint and Several Liability*” below and otherwise by the relevant EU Member State) the transferor is released from those obligations by operation of law.

The Pension Exception.

Unless EU Member States provide otherwise, an employee’s rights to old-age, invalidity or survivor’s benefits under supplementary company or intercompany pension schemes outside statutory social security schemes do not transfer automatically by operation of law to the transferee, and so remain with the transferor.

Joint and Several Liability.

EU Member States may provide that, after the transfer, the transferor remains jointly and severally liable with the transferee for obligations that arose in respect of the transferred employees before the transfer.

Collective Agreements.

The transferee is required to continue to observe the terms and conditions agreed in any collective agreement applicable to the transferred employees on the same terms as the transferor, until the termination or expiry of the collective agreement or the entry into force or application of another collective agreement. EU Member States may limit the period for observing collective agreements, provided it is not less than one year.

Employee Representative Recognition.

If the transferred business (or part) preserves its autonomy and is maintained as a separate operating unit after the transfer, the status and function of employee representatives (i.e., recognised trade unions) must also be preserved by the transferor. However, this does not apply if, pursuant to applicable law, conditions for the new appointment of employee representatives are satisfied.

Specific Employee Protections

Protection Against Dismissal.

The corporate transaction cannot, in itself, constitute grounds for dismissal by either the transferor or the transferee. However, dismissals for economic, technical or organizational reasons entailing changes in the workforce are not prohibited by the Directive. Whether those reasons exist in any particular transaction depends on the facts and circumstances.

Substantial Changes in Working Conditions.

If the transfer involves a substantial change in working conditions to the detriment of an employee and the employee resigns in response, the employer is nonetheless regarded as having been responsible for the termination and the employee may under national law be entitled to severance benefits.

Right to Object to the Transfer.

It is for the EU Member States to determine the implication of an employee deciding not to continue to work for the transferee.

Contracting Out.

Any purported waiver by an employee of rights under the Directive is deemed to be invalid as a matter of public policy.

⁵ There is no statutory definition of “assigned”, and the determination of whether an employee is assigned to the business (or part) will be based on the relevant facts and circumstances and the applicable case law of the European Court of Justice.

Employee Engagement

Obligation to Provide Information.

Both the transferor and the transferee must provide representatives of their respective affected employees (or, in certain circumstances if there are no representatives, the employees themselves) with specified information about the transfer “in good time before the transfer is carried out” (i.e., prior to closing). EU Member States have interpreted this timing requirement in different ways. The information required to be provided is (i) the date or proposed date of the transfer, (ii) the reasons for the transfer, (iii) the “legal, economic and social implications” of the transfer for the employees, and (iv) any measures envisaged in relation to the employees. Generally, a “measure” may include limited changes or adjustments to terms and conditions of employment, changes to work locations or practices, redundancies or administrative changes such as changes to the date an employee is paid, but the determination of which actions may constitute a measure is EU Member State-specific.

Obligation to Consult.

Where the transferor or the transferee envisages taking “measures” in relation to its respective affected employees, it must consult representatives of those employees on such measures “in good time before the change in the business is effected”. Consultation must be with a view to reaching an agreement.

Parent Decisions.

The obligations to inform and consult apply irrespective of whether the decision resulting in the transfer is taken by the employer or by a parent.

Cross-Border Transfers

EU Member States have some flexibility in how to implement the Directive and differences between EU Member States are sometimes significant. Such differences give rise to legal uncertainty in case of cross-border transfers as the Directive does not provide for solutions in case of conflicting laws.

Belgium



Transposition of the EU Directive¹

The rules of the Directive are mainly implemented by the nation-wide collective bargaining agreement n°32*bis* of 7 June 1985 (CBA 32*bis*).

Scope

Covered Employees.

CBA 32*bis* covers full-time, part-time and indefinite-term or fixed-term employees. The Directive does not cover independent contractors or other persons who are not regarded as “employees” under national law. Employees working for employers belonging to the public sector are not covered by CBA 32*bis*.

Covered Transactions.

CBA 32*bis* scope of application is aligned with the Directive and its interpretation by the European Court of Justice (“ECJ”). It broadly covers transactions involving a change in the entity responsible for a business (or part of a business) resulting in a change of employer, such as an asset sale or a merger. The relevant business (or part) must constitute an “economic entity” which this requires resources (whether tangible and/or intangible) that are deliberately organized together for purposes of pursuing economic activity of some sort, whether or not operating for profit.

Excluded Transactions.

CBA 32*bis* does not apply to:

- Stock sales.
- Transfers of assets not constituting an “economic entity” or where the economic entity does not retain its identity. However, the analysis of whether the transfer of assets constitutes an economic entity which retains its identity is fact-specific, and legal advice should always be sought before concluding that CBA 32*bis* does not apply.
- Liquidations in bankruptcy or analogous insolvency proceedings.
- Insolvency proceedings that do not involve a liquidation. Some of the more stringent rules of CBA 32*bis* are relaxed ((i) certain employee debts do not transfer where they are otherwise protected under national law, (ii) the new employer may pick and choose which employees are taken over and (iii) changes to employees’ terms and conditions may be collectively agreed) in order to safeguard employment opportunities by ensuring the survival of the business.
- Transfers between employers belonging to the public sector.

¹ Directive 2001/23/EC.

Transfer of Employment and Certain Rights and Obligations by Operation of Law

In General.

Employees assigned² to the business transfer automatically by operation of law to the transferee at the same time as the business is transferred, and on their existing terms and conditions of employment. Employees belonging to shared services which are not transferred as a separate unit are not in scope of the transfer unless their duties are performed exclusively for the benefit of the part of undertaking transferred. The transferee becomes the new employer. As a result, all rights and obligations arising from the employment contracts of those transferred employees are also transferred to the transferee, and (except as provided in “*The Pension Exception*” and “*Joint and Several Liability*” below), the transferor is released from those obligations by operation of law.

The Pension Exception.

Employees’ rights to old-age, invalidity or survivor’s benefits under supplementary company or intercompany pension schemes outside statutory social security schemes do not transfer automatically by operation of law to the transferee, and so remain with the transferor unless the occupational pension schemes are foreseen in a collective bargaining agreement (see “*Collective Agreements*” below). When the transfer of undertaking is the result of the sale or contribution of a “branch of activity” or of a “business as a whole” as defined by the Belgian Company code, the occupational pension rights will also be transferred by operation of specific provisions of that code.

Joint and Several Liability.

After the transfer, the transferor remains jointly and severally liable with the transferee for obligations that arose in respect of the transferred employees before the transfer.

Collective Agreements.

The transferee is required to continue to observe the terms and conditions agreed in any collective agreement applicable to the transferred employees on the same terms as the transferor, until the termination or expiry of the collective agreement or the entry into force or application of another collective agreement. There are arguments, however, to consider that the transferee will no longer be bound anymore by CBAs concluded in another branch of industry when both transferor and transferee do not belong to the same branch. There is not yet any decisive case law in this regard.

Employee Representative Recognition.

Various scenarios are possible: the works council and/or the committee for prevention and protection at work (“*CPPT*”) can either (i) be split, (ii) merge, or (iii) cover both transferor and transferee after the transfer. This depends mainly on the following circumstances: (i) transfer of a full undertaking or of a part of it, and (ii) whether the transferred business (or part) preserves its autonomy and is maintained as a separate technical operating unit after the transfer or not.

Specific Employee Protections

Protection Against Dismissal.

The corporate transaction cannot, in itself, constitute grounds for dismissal by either the transferor or the transferee. However, dismissals for economic, technical or organizational reasons entailing changes in the workforce are allowed by CBA 32*bis*. Whether those reasons exist in any particular transaction depends on the facts and circumstances. Dismissals which breach such prohibition are not null and void and remain effective but are subject to (i) administrative sanctions (administrative fine) and (ii) award of additional damages to the employees.

Substantial Changes in Working Conditions.

If the transfer involves a substantial change in working conditions to the detriment of an employee and the employee resigns in response, the employer is

² In the absence of statutory definition of “assigned”, the determination of whether an employee is assigned to the business (or part) will be based on the relevant facts and circumstances and the applicable case law of the ECJ.

nonetheless regarded as having been responsible for the termination (constructive dismissal) and the employee may be entitled to severance benefits.

Right to Object to the Transfer.

In the absence of a substantial changes in working conditions (see “*Substantial Changes in Working Conditions*” above), an employee who decides not to continue to work for the transferee is deemed to have resigned. An employee cannot be forced to transfer.

Contracting Out.

Any purported waiver by an employee of rights under the Directive or CBA 32*bis* is deemed to be invalid as a matter of public policy. Such waiver cannot be validly negotiated by the union organizations and laid down in a CBA concluded at the time of the transfer: such CBA is deemed to be invalid.

However, case law and legal doctrine consider that an employee can validly refuse to be transferred and remain with his current employer but only if the latter accepts.

Employee Engagement

Obligation to Provide Information.

Both the transferor and the transferee must provide representatives of their respective affected employees (or, in certain circumstances if there are no representatives, the employees themselves) with specified information about the transfer “in good time before the transfer is carried out”. The information required to be provided is (i) the date or proposed date of the transfer, (ii) the reasons for the transfer, (iii) the “legal, economic and social implications” of the transfer for the employees, and (iv) any measures envisaged in relation to the employees.

Obligation to Consult.

Both transferor and transferee must consult their respective employee representatives bodies (works council or CPPT or trade union) about the contemplated transfer of undertaking. The consultation must be completed prior to any decision. Such obligation does not apply in the absence of employee representatives bodies.

Sanctions.

Failure to comply with these obligations may trigger criminal sanctions and claim for damages by employees or their representatives.

Parent Decisions.

The obligations to inform and consult apply irrespective of whether the decision resulting in the transfer is taken by the employer or by a parent.

Cross-Border Transfers

CBA 32*bis* is generally applicable in cases of a transfer of undertaking to a transferee located abroad. However, the move to another country will generally result in a significant change of an essential element of the employment contract (place of employment, possibly new set of legal rules governing the contract, *etc.*). If such change is not accepted by the employees, it cannot be unilaterally imposed by the employer (constructive dismissal, see “*Substantial Changes in Working Conditions*” above). Hence, in such a situation, the transferor may have to engage, prior to any decision about the contemplated cross-border transfer, in information and consultation with its employee representatives as required whenever an employer faces a collective dismissal.

France



Transposition of the EU Directive

The rules on transfer of undertakings are mainly enshrined in articles L. 1224-1 to L. 1224-4 of the French labor code which largely preexisted the Directive.

Scope

Covered Employees.

Are covered full-time, part-time and indefinite-term or fixed-term employees. Independent contractors or other persons who are not regarded as “employees” are not covered.

Covered Transactions.

French law relies on the same test as provided under the Directive as interpreted by the European Court of Justice (“ECJ”) and requires the relevant business (or part) to constitute an “economic entity”. However, by contrast to the ECJ case-law, French case-law is more demanding on the nature of the assets transferred by the transferor to the transferee and requires that substantial assets are transferred. This implies that businesses that rely on manpower and do not use material assets (e.g., cleaning services) are usually not considered to characterize an economic entity for the purpose of the application of French rules on transfer of undertakings whereas the ECJ has accepted to apply the Directive to this type of activities.

Excluded Transactions.

French rules on transfer of undertakings do not generally apply to:

- Stock sales.
- Transfers of assets not constituting an “economic entity” or where the economic entity does not retain its identity. However, the analysis of

whether the transfer of assets constitutes an economic entity is fact-specific, and legal advice should always be sought before concluding that French rules do not apply.

- With respect to transfers happening in the framework of bankruptcy or analogous insolvency proceedings, French law permits the bankruptcy Court to authorize the liquidator (or similar practitioner) to proceed with some dismissals to happen prior to the transfer of the economic entity, an exception to the general rule that dismissals related to the transfer are prohibited (see “*Protection Against Dismissal*” below). In addition, liabilities owed to the employees and relating to the period prior to transfer are not transferred to the transferee.
- Specific rules govern the transfer of economic entities from the private sector to the public sector and vice and versa, including the conditions under which the transferee is required to offer to the transferred employees private law or public law governed employment agreements (as applicable).

Transfer of Employment and Certain Rights and Obligations by Operation of Law

In General.

Employees assigned to the business transfer automatically by operation of law to the transferee at the same time as the business is transferred, and on their existing terms and conditions of employment. After having retained that employees partially assigned to the business were transferred for the portion of their employment agreement dedicated to this business, French case-law seems now to consider that only employees who are fully dedicated or those who dedicate most of their activity to the transferred business transfer along with the business. The transferee becomes the new employer. As a result, all rights and obligations arising from the employment contracts of those transferred employees, or from the employment relationships more broadly, are also transferred to the transferee.

The Pension Exception.

France has not implemented the pension exception, on the account that most of pension benefits stem from statutory social security schemes. The transfer of company pension schemes, which are not widespread except in large companies, are subject to the rules applicable to the legal documentation which established them (see “*Collective Agreements*” below).

Joint and Several Liability.

French rules on transfer of undertakings provide that, after the transfer, the transferor remains jointly and severally liable with the transferee vis-a-vis the employee for obligations that arose in respect of the transferred employees before the transfer. The transferee can nonetheless get reimbursement from the transferor for the liabilities relating to the period prior to transfer. Notwithstanding the foregoing, in case of transfer of an economic entity without any agreement between the transferor and the transferee (e.g., in case of change of service provider), the transferee is not jointly and severally liable with the transferor.

Collective Agreements.

The transferee is required to continue to observe the terms and conditions agreed in any collective agreement applicable to the transferred employees on the same terms as the transferor, until the termination or expiry of the collective agreement or the entry into force of a new negotiated collective agreement or a maximum period of time of generally 15 months comprised of (i) the termination notice provided in such collective agreement (generally 3 months) and (ii) the continuation period provided in such collective agreement (generally 12 months). In the absence of collective agreement concluded during that period of time, the obligation to observe the terms of the collective agreements applicable to the transferred employees will terminate but the transferee will be required to maintain to the transferred employees a level of compensation at least equal to the compensation that stemmed from these collective agreements and enjoyed by the transferred employees during the 12-month period prior to the transfer.

The transferor, the transferee and the recognized trade unions can sign prior to the transfer a collective bargaining agreement in order to determine the collective bargaining agreements that will remain applicable after the transfer.

Unilateral commitments of the transferor as well as customs or usages applicable to the transferred employees are binding on the transferee by operation of law. The transferee must continue them subject to the general rules on the termination of unilateral commitments, customs and usages.

Employee Representative Recognition.

If the transferred business (or part) preserves its autonomy and is maintained as a separate operating unit after the transfer, the status and function of employee representatives (i.e., social and economic committee, recognised trade unions) must also be preserved by the transferee.

Specific Employee Protections

Protection Against Dismissal.

The corporate transaction cannot, in itself, constitute grounds for dismissal by either the transferor or the transferee of the employees who are part of the transferred undertaking. Dismissals for economic reasons by the transferor prior to a transfer are deemed by French case-law to be related to such transfer and are voidable. The dismissed employee is entitled to either get damages from the transferor or be reinstated in its former job position with the transferee.

Substantial Changes in Working Conditions.

The rule pursuant to which the employer remains responsible for the termination of employment in case the transfer involves a substantial change in working conditions to the detriment of an employee and the employment is terminated has not specifically been implemented under French law. However, general rules of French law tend to the same purpose since a refusal by an employee of a change in its working conditions does not allow the employer to consider that the employee has resigned but rather requires the employer to initiate a dismissal procedure.

Right to Object to the Transfer.

French rules on the transfer of undertaking do not permit to the employees to object to the transfer of their employment agreement. The transfer is an obligation for the transferor, the transferee as well as for the employee.

Contracting Out.

Any purported waiver by an employee of rights under the Directive is deemed to be invalid as a matter of public policy.

Employee Engagement

Obligation to Provide Information and to Consult.

French law does not provide for a specific requirement to inform and consult in relation to transfer of undertakings. However, general rules on information and

consultation of the social and economic committee established in companies with 50 employees or more generally require that the social and economic committee be informed and consulted prior to any decision relating to the modifications of the legal or economic organisation of the business, which generally encompasses transfer of undertakings. As a result, binding agreements to consummate a transfer of undertaking cannot be entered into prior to the completion of such information and consultation procedure.

In addition, in case of transfer of an undertaking as a sale of a going concern (*vente de fonds de commerce*), the following rules are applicable:

- In companies with less than 50 employees, the employer must, at least two months prior to the signing of the asset purchase agreement, inform all the employees assigned to such undertaking of its intention to sell the business with a view to allow one or more of such employees to make an offer for the purchase of such business. The 2-month time frame can be reduced if all employees waive their right to make an offer.
- In companies with 50 employees or more and less than 250 employees and whose turnover is less than EUR50 million or whose total balance sheet is less than EUR43 million (or both), the employer must, simultaneously with the procedure of information and consultation of the social and economic committee, inform all the employees assigned to such undertaking of its intention to sell the business with a view to allow one or more employees to make an offer for the purchase of such business.

According to the position of the administration, the seller is not obliged to accept an offer of the employees (if any) or to negotiate with the employees.

Parent Decisions.

The obligations to inform and consult apply irrespective of whether the decision resulting in the transfer is taken by the employer or by a parent.

Germany



Transposition of the EU Directive¹

The rules of the Directive are mainly implemented in Section 613a of the German Civil Code (*Bürgerliches Gesetzbuch*).

Scope

Covered Employees.

Section 613a of the German Civil Code covers all existing employment relationships irrespective of whether full-time or part-time, indefinite-term or fixed term, active or on leave of absence as well as apprentices, executive employees (*leitende Angestellte*) and employees seconded outside of Germany. Independent contractors, civil servants and freelancers as well as managing directors (*Geschäftsführer*) and managing board members (*Vorstand*) are not covered.

Covered Transactions.

Section 613a of the German Civil Code broadly covers transactions involving a change in the entity responsible for a business (or part of a business) resulting in a change of employer (in particular an asset sale and transfer) and also applies in cases of mergers, demergers and transfers of assets in accordance with the provisions of the German Transformation Act (*Umwandlungsgesetz*). Section 613a of the German Civil Code requires the relevant business (or part) to constitute an “economic entity”. Broadly, this requires resources (whether tangible and/or intangible) that are deliberately organized together for purposes of pursuing economic activity of some sort. Section 613a of the German Civil Code does not deviate from the provisions of the Directive in this respect.

Excluded Transactions.

Section 613a of the German Civil Code does generally not apply to:

- Stock sales.
- Transfers of assets not constituting an “economic entity” or where the economic entity does not retain its identity. However, the analysis of whether the transfer of assets constitutes an economic entity is fact-specific and highly depended on individual circumstances. Legal advice should always be sought to evaluate whether Section 613a of the German Civil Code does apply.
- Transfers exclusively by act of public authority.
- In compliance with the derogations provided for in the Directive, Section 613a of the German Civil Code applies in insolvency proceedings with regard to safeguarding jobs and the continuity of the works councils. In transfers occurring during insolvency proceedings, the liability of the transferor for claims already arisen before the transfer of undertaking are not transferred to the transferee, e.g., the transferee does not assume pension liabilities towards the transferring employees with respect to the time period prior to the transfer.

¹ Directive 2001/23/EC.

Transfer of Employment and Certain Rights and Obligations by Operation of Law

In General.

Employees assigned to the business transfer automatically by operation of law to the transferee at the same time as the business is transferred, unless the employees in question object to such transfer (see “*Right to Object to the Transfer*” below). The transferee becomes the new employer. As a result, all rights and obligations arising from the employment contracts of those transferred employees, or from the employment relationships more broadly, are also transferred to the transferee, and (except as provided in “*The Pension Exception*” and “*Joint and Several Liability*” below) the transferor is released from those obligations by operation of law.

The Pension Exception.

Does not apply in Germany. Under Section 613a of the German Civil Code, rights of current employees to old-age, invalidity or survivor’s benefits under company or group pension schemes outside statutory social security schemes transfer automatically by operation of law to the transferee (also with respect to pension liabilities accrued in the time period prior to the transfer) rendering the transferee fully liable for pension commitments that were initially made by the transferor. Rights of former employees of the transferor remain with the transferor.

Joint and Several Liability.

Both the transferor and the transferee are jointly and severally liable without limitation for all obligations arising from the transferred employment relationship that arose and fell due prior to the date of transfer. Joint and several liability of the transferor with the transferee is limited to obligations arising prior to the transfer but falling due prior to the expiry of one year after the date of transfer. The transferor’s liability for such obligations is prorated for the time prior to the transfer. Transferor and transferee may not deviate from this mandatory liability *vis-a-vis* the transferring employees, but may arrange for a different allocation among themselves.

Collective Agreements.

The transferee is required to continue to observe the terms and conditions agreed in any collective agreement (i.e., collective bargaining agreements with unions (*Tarifverträge*) and shop agreements with works councils (*Betriebsvereinbarungen*)) applicable to the transferred employees on the same terms as the transferor, until the termination or expiry of the collective agreement or the entry into force or application of another collective agreement, provided that the transferee may not amend the terms and conditions for a period of one year after the date of transfer. However, this does not apply if a certain subject matter is governed by terms and conditions of a collective agreement already existing at the transferee, in which case such collective agreement applicable at the transferee supersedes the terms and conditions of the collective agreement applicable at the transferor, even if it contains terms and conditions that are detrimental to the transferring employees.

Employee Representative Recognition.

If the transferred business preserves its autonomy and is maintained as a separate operating unit after the transfer, the status and function of employee representatives (i.e., works council) must also be preserved by the transferee. If only a part of a business is transferred, the transferor’s works council will retain a transitional mandate (*Übergangsmandat*) for six months or a remaining mandate (*Restmandat*) in order to preserve employee rights until the next works council elections.

Specific Employee Protections

Protection Against Dismissal.

The corporate transaction cannot, in itself, constitute grounds for dismissal by either the transferor or the transferee. The termination of the employment relationship of an employee by the transferor or by the transferee due to the transfer of a business or a part of a business is invalid. However, dismissals for economic, technical or organizational reasons entailing changes in the workforce are not prohibited by Section 613a of the German Civil Code. The same applies to other permitted reasons for termination under German labor law.

Whether those reasons exist in any particular transaction depends on the facts and circumstances.

Substantial Changes in Working Conditions.

German law does not provide for an obligation to pay severance, even if the working conditions are subject to substantial changes to the detriment of the employee. Instead, the employee has a right to object to the transfer (see “*Right to Object to the Transfer*” below). Once the employee is transferred, there is no entitlement to severance benefits in case of a resignation. However, in case the transfer of undertaking involves a change in the business operation (*Betriebsänderung*) (e.g., a relocation or separation of the business operation), the works council may be entitled to demand negotiations on a reconciliation of interests and a social plan, under which the transferring employees may be entitled to compensation for any financial disadvantages of such change in business operation.

Right to Object to the Transfer.

The employee may object in writing to the transfer within a period of one month after having received an employee information letter, including, inter alia, correct and complete information on the legal, economic and social consequences of the transfer for the employees (see “*Obligation to Provide Information*” below). The one-month objection period only commences upon receipt of correct and complete employee information letter; an incorrect or incomplete employee information letter results in an unlimited objection right of the employees that is only subject to general forfeiture rules. In case an employee exercises the right to object, he or she does not transfer to the transferee and will remain with the transferor, risking that the employment relationship will be terminated by the transferor based on redundancy.

Contracting Out.

In general, a purported waiver by an employee of rights under Section 613a of the German Civil Code is deemed to be invalid.

Employee Engagement

Obligation to Provide Information.

In deviation to the Directive, both the transferor and the transferee must provide every affected employee with specified information about the transfer in an employee information letter prior to the transfer of undertaking, whereas no obligation to inform the trade unions exists. Such employee information letter is a quite technical and lengthy legal document that must be delivered in writing or by e-mail. As a practical matter, the employee information letter should be delivered at least one month prior to the transfer of undertaking, in order to gain clarity on which employees actually transfer at the closing of the transaction (as the one-month objection period will have generally lapsed). The information required to be provided is (i) the date or proposed date of the transfer, (ii) the reasons for the transfer, (iii) the “legal, economic and social implications” of the transfer for the employees, and (iv) any measures envisaged in relation to the employees. Generally, a “measure” may include limited changes or adjustments to the terms and conditions of employment, changes to work locations or practices, redundancies or administrative changes.

Obligation to Consult.

Where the transferor or the transferee envisages taking “measures” in relation to its respective affected employees, it must notify the competent works council in a comprehensive manner and in good time before a decision about such “measures” has been made. To the extent any such “measures” qualify as a change in the business operation, the employer must consult with the works council about such measures with a view to reaching an agreement on a reconciliation of interests and a social plan. Should an economic committee (*Wirtschaftsausschuss*) or a representative body for executive employees (*Sprecherausschuss*) exist, they have to be informed about any “measures” as well.

Parent Decisions.

The obligations to inform and consult apply irrespective of whether the decision resulting in the transfer is taken by the employer or by a parent.

Cross-Border Transfers

Section 613a of the German Civil Code is generally applicable in cases of a transfer of undertaking from a transferor located in Germany to a transferee located abroad (irrespective of whether the transferee is located within the EU or not). However, if the essential means of production (e.g., real estate, production facilities, business premises) are being transferred to a location of transferee which is a substantial distance (generally more than several hundred kilometers) away from the transferor's location, a transfer of undertaking within the meaning of Section 613a of the German Civil Code may not be assumed. If the employment agreement does not provide for a choice of law, the agreement will be governed by the law of the transferee after the transfer.

Italy



Transposition of the EU Directive¹

The rules of the Directive are mainly implemented in Article 2112 of the Italian Civil Code and Article 47 of Law No. 428 of December 29, 1990.

Scope

Covered Employees.

Covered employees include both indefinite-term and fixed-term employees, as well as part-time employees and executives treated as employees or quasi-employees from employment law purposes. Consultants and directors do not fall within the scope of these rules.

Covered Transactions.

Article 2112 of the Italian Civil Code broadly covers any transactions resulting in a change of ownership of an organized going concern, which existed prior to the transfer and maintains its “identity” afterwards. The type of agreement or provision on the basis of which the transfer takes place is irrelevant for these purposes. Transfers of parts of a business or business units are also included, provided that such parts could be treated as an autonomously functioning and organized going concern, as identified by the transferor and transferee at the time of the transfer.

Excluded Transactions.

Article 2112 of the Italian Civil Code does not generally apply to:

- Stock sales.
- Transfers of assets not constituting a going concern or where the going concern does not maintain its “identity” following the transfer. However, the analysis of whether a transfer of assets can be characterized as going concern is fact-specific and highly depends on specific circumstances. Legal advice should always be sought to evaluate whether Article 2112 of the Italian Civil Code does apply.
- Transfers occurring in the context of bankruptcy procedures or similar insolvency procedures, in case during the consultation procedure (see “*Obligation to Consult*” below) an agreement on preserving jobs is reached (and unless the provisions of Article 2112 are agreed to be applied in the context of the consultation procedure).

¹ Directive 2001/23/EC.

Transfer of Employment and Certain Rights and Obligations by Operation of Law

In General.

In case of a transfer of a going concern, the employment relationships of the transferred employees automatically continue with the transferee and the transferred employees retain all the rights arising from such relationships (including salary and benefits).

The Pension Exception.

Does not apply in Italy. The pension plan funding obligations relating to the transferred employees under the Italian mandatory social security system are not affected by the business transfer. With respect to any complementary pension schemes possibly implemented by transferor and to which the transferred employees participate, following a transfer of going concern, the transferred employees are generally entitled to convert the position accrued by them under the transferor's complementary pension scheme into quotas of the transferee's one but different rules and funding obligations may apply depending on the actual terms and conditions of such complementary pension schemes.

Joint and Several Liability.

Both the transferor and the transferee are jointly and severally liable, without limitations, for all liabilities relating to the transferred employees that have accrued as of the transfer date, irrespective of any agreement that the parties to the deal might reach on how to allocate such liability between them. By following certain statutory procedures (i.e., settlement at court or labor office), the employee may release the transferor from obligations deriving from the employment relationship.

Collective Agreements.

The transferee must apply substantially the same terms and conditions provided for by any national, regional and plant-level collective bargaining agreements applied by the transferor at the date of the transfer until the date of their expiry, unless the transferee applies different collective bargaining agreements, in which case they will replace the agreements in place before the transfer.

Employee Representative Recognition.

There is no provision regarding employee representatives and it is a matter for negotiation. However, standard practice is that employee representatives within the transferred business continue their appointment until it expires.

Specific Employee Protections

Protection Against Dismissal.

The transfer of going concern cannot, in itself, constitute grounds for dismissal by either the transferor or the transferee. The termination of the employment relationship of an employee by the transferor or by the transferee due to the transfer of a business or a part of a business is invalid. However, dismissals (whether individual or collective) are not prohibited by Article 2112 of the Italian Civil Code. If redundancies are necessary (e.g., because the transferee is going to carry out a restructuring of the business) the transferee must state this information in the notification to the applicable trade unions and works councils (see "*Obligation to Provide Information*" below).

Substantial Changes in Working Conditions.

As a general principle, employees continue to be employed by the transferee on the same terms and conditions on which they were employed by the transferor. The transferee cannot unilaterally change the terms of any existing employment agreement. Any reduction in employees' rights must either be negotiated with works council in the context of the consultation procedure (see "*Obligation to Consult*" below) or be subject of individual waivers signed before the labor authorities.

Right to Object to the Transfer.

If their working conditions change materially during the three-month period following the transfer of the business concern, the transferred employees would be entitled to resign for cause.

Contracting Out.

Any provision with the purpose to exclude or limit the application of the law is void.

Employee Engagement**Obligation to Provide Information.**

If the transferor employs more than 15 employees, both the transferor and the transferee must notify the applicable trade unions and works councils 25 days before entering into a binding agreement for the sale of the business. The information required to be provided includes (i) the date or proposed date of the transfer, (ii) the reasons for the transfer, (iii) the "legal, economic and social implications" of the transfer for the employees, and (iv) any measures envisaged in relation to the employees. Generally, a "measure" may include changes or adjustments to the terms and conditions of employment, changes to work locations or practices, redundancies or administrative changes.

Obligation to Consult.

From the date of receipt of the notice of transfer referred to in "*Obligation to Provide Information*" above, the trade unions or work councils have seven calendar days to file a request for consultation with the transferor and transferee. Once the transferor and transferee have received the request for consultation, they in turn have seven calendar days to start the consultation process. It is common practice for the transferor and transferee to conduct one consultation process together. The consultation ends after 10 calendar days, even if an agreement has not been reached with the trade unions or work councils. Overall, the consultation procedure may take up to 24 days to complete. Only consultation is required; unions cannot veto the transaction.

Parent Decisions.

The obligations to inform and consult apply irrespective of whether the decision resulting in the transfer is taken by the employer or by its parent company.

UK



Transposition of the EU Directive¹

The rules on transfer of undertakings are contained in the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246), as amended (“TUPE”).

Scope

Covered Employees.

In the UK, individuals can provide their services as employees (with full employment rights under English law), workers who are not employees (individuals whose employment relationship with their employer is looser than employees, but who still benefit from limited core employment rights), or as independent contractors who are in business on their own behalf. TUPE covers *employees*, including full-time, part-time, indefinite-term or fixed-term employees². TUPE does not cover workers who are not employees or self-employed individuals.

Covered Transactions.

TUPE applies to a “relevant transfer”, which means:

- **A business transfer:** broadly tracking the Directive, TUPE covers a transfer of a business (or part of a business) which constitutes an “economic entity”. An “economic entity” requires resources that are deliberately organized to pursue an economic activity, and must have a degree of structure, autonomy and stability. In asset-light businesses, an economic entity may be made up only of the employees (or even an individual employee) that form part of it.; or

- **A service provision change (“SPC”):** building and expanding on the Directive, TUPE covers outsourcing of services, insourcing of services or a transition from one service provider to another (“on-sourcing”). Broadly, this captures situations where an organized grouping of employees is carrying on an activity for a client, and that client intends that, following the SPC, these activities will be carried out by a (different) service provider or (in an insourcing) by the client. The service provider’s employees must be operating as a dedicated team, but need not necessarily be devoting the whole (or even the majority) of their working time to the client’s work. Whether a change in service provider will constitute and SPC under TUPE will be highly fact-sensitive and legal advice should be sought on a case by case basis.

Excluded Transactions.

TUPE does not generally apply to:

- Businesses (or the relevant part) or, in relation to an SPC, organized groupings of employees not situated in the UK immediately prior to the transfer.

¹ Directive 2001/23/EC.

² Note that this will include employees of associated companies (for example group service companies) who have an employment relationship with the transferor of a business or, in relation to a service provision change, with the service provider or client.

- An intra-governmental transfer, which may involve any public body whose functions involve the exercise of public authority: it need not necessarily be a public sector organisation.

In relation to a business transfer:

- Stock sales.
- A transfer of a business not constituting an economic entity or where the economic entity does not retain its identity. However, the analysis of whether the transfer of assets constitutes an economic entity is fact-specific, and legal advice should always be sought before concluding that UK rules do not apply.

In relation to an SPC:

- Supplies of goods.
- An SPC where the nature of the activity carried out by the service provider (or client) after the change is fundamentally or essentially different from the activity carried out prior to the change.
- Activities which the client intends to be carried out in relation to a single specified project or a task of short duration.
- An on-sourcing where the client changes.

Transfer of Employment and Certain Rights and Obligations by Operation of Law

In General.

Employees assigned to the business (or, in relation to an SPC, to the organized grouping of employees) transfer automatically by operation of law to the transferee at the same time as the business or service provision arrangement is transferred, and on their existing terms and conditions of employment.³ Employees who are assigned to the business or organized grouping of employees on a purely temporary basis, or whose employment with the putative transferor would not be terminated as a result of the transfer, are excluded under TUPE. The transferee becomes the new employer. As a result, all rights and obligations arising from the employment contracts of those transferred employees, or from the employment relationships more broadly, are also transferred to the transferee, and (subject to certain exceptions, covered below) the transferor is released from those obligations by operation of law.

The Pension Exception.

Employees' rights under occupational pension schemes which relate to old age (i.e. retirement), invalidity or survivors benefits do not transfer automatically by operation of law to the transferee, and so remain with the transferor. Notably, liability to provide enhanced redundancy benefits will transfer. Under separate UK pensions legislation, transferees may be required to provide a minimum pension benefit to transferring employees who, prior to the transfer, were members of an occupational pension scheme.

Liability.

As set out above, the transferee will “step into the shoes” of the transferor and take on all liabilities associated with the employees' pre-transfer employment. Liabilities incurred in connection with the transfer and with failures to inform and consult (see below) are dealt with separately: where the liability arises as a result of the transferee's failure to inform and consult, the transferee will be solely liable. However, where the liability arises as a result of the transferor's failing, the transferor and transferee will be jointly and severally liable.

³ There is no statutory definition of “assigned”, and the determination of whether an employee is assigned to the business (or part), or the relevant organized grouping of employees, will be based on the relevant facts and circumstances and the applicable case law of the European Court of Justice and the English courts.

Collective agreements.

The transferee is required to continue to observe the terms and conditions agreed in any collective agreement applicable to the transferred employees on the same terms as the transferor, subject to the following caveats:

- The transferee will not be bound to observe terms and conditions introduced to a collective agreement subsequently to the transfer where the transferee has not been involved in the (re-)negotiation of those terms; and
- As an exception to the general prohibition on making changes to employees' terms and conditions by reason of the transfer (see below), a transferee will be permitted under TUPE to make a change to terms that are derived from a collective bargaining agreement so long as (i) changes are not made within one year of the transfer, and (ii) the changes, viewed as a whole, are not unfavourable to the employees in question.

Employee Representative Recognition.

If the transferred business (or part) preserves its autonomy and is maintained as a separate operating unit after the transfer, then the recognition of any trade union will also be preserved following the transfer. TUPE does not, however, place restrictions on a trade union being derecognized in accordance with applicable contractual or statutory procedures following the transfer.

Specific Employee Protections**Protection Against Dismissal.**

The dismissal of an employee (by the transferor or the transferee), where the sole or principal reason for the dismissal is the transfer, will be automatically unfair under English law. This rule does not apply where the employer can show that the dismissal was carried out for an economic, technical or organizational reason entailing changes in the workforce. This will depend on the facts of each case.

Changes in Terms and Conditions of Employment.

Changes made to the contractual terms of employees' employment will generally be void and unenforceable by an employer⁴ if (i) the transfer is the sole or principal reason for the change, and (ii) the employer cannot show that the change was made as a result of an economic, technical or organizational reason entailing changes in the workforce. This rule is relaxed where the transfer is taking place in the context of the transferor's insolvency.

Substantial Changes in Working Conditions.

If the transfer involves a substantial change in working conditions to the detriment of an employee and the employee resigns in response prior to the transfer, the employee will be treated as having been dismissed and may be entitled to remedies for unfair dismissal.

Right to Object to the Transfer.

Under TUPE, an employee is entitled to object to the transfer of their employment. Their employment will then be treated as terminating at the time of the transfer. The employee will have no remedy in connection with the termination of their employment and will effectively be treated as having resigned.

Contracting Out.

Parties cannot contract out of the application of TUPE.

Employee Engagement**Obligation to Provide Information.**

Both the transferor and the transferee must provide representatives of their respective affected employees⁵ (or, in certain circumstances if there are no representatives, the employees themselves) with specified information about the transfer long enough before the transfer to allow meaningful consultation to take place. The information required to be provided is (i) the date or proposed date of the transfer, (ii) the reasons for the transfer, (iii) the "legal, economic and social implications" of the transfer for the employees, (iv) any measures envisaged in relation to the employees (by

⁴ Note that where changes have been made in breach of TUPE, an employee may "cherry-pick" by enforcing a newly introduced term that is otherwise void under TUPE, while still relying on the terms that applied prior to the amendment where it suits the employee to do so.

⁵ If the workforce is unionised, employers will be required to engage with union representatives. If no appropriate representative body is in place, the employer will generally need to arrange a ballot to allow employees to elect representatives.

either the transferor or the transferee), and (v) certain information in relation to the number and roles of temporary agency workers within the organisation. The concept of a “measure” is interpreted very widely and may include changes or adjustments to terms and conditions of employment (for example, in relation to benefit or pension provision), changes to work locations or practices, redundancies or administrative changes such as changes to the date an employee is paid. Separately, there is an obligation on the transferor to provide certain information about transferring employees (referred to as “employee liability information” or “ELI”) at least 28 days before the transfer.

Obligation to Consult⁶.

Where the transferor or the transferee envisages taking “measures” in relation to its respective affected employees, it must consult representatives of those employees on such measures with a view to reaching an agreement. There is no specific timeframe prescribed for the consultation period, but sufficient time must be allowed to allow meaningful consultation to take place.

Parent Decisions.

The obligations to inform and consult apply irrespective of whether the decision resulting in the transfer is taken by the employer or by a parent.

⁶ Note that, where large numbers of redundancies are envisaged, separate collective consultation requirements may apply.

Topical Summaries

Scope

Covered Employees

EU Directive.

The Directive covers full-time, part-time and indefinite-term or fixed-term employees. The Directive does not cover independent contractors or other persons who are not regarded as “employees” under national law.

Belgium.

CBA 32bis covers full-time, part-time and indefinite-term or fixed-term employees. The Directive does not cover independent contractors or other persons who are not regarded as “employees” under national law. Employees working for employers belonging to the public sector are not covered by CBA 32bis.

France.

Covers full-time, part-time and indefinite-term or fixed-term employees. Independent contractors or other persons who are not regarded as “employees” are not covered.

Germany.

Section 613a of the German Civil Code covers all existing employment relationships irrespective of whether full-time or part-time, indefinite-term or fixed term, active or on leave of absence as well as apprentices, executive employees (*leitende Angestellte*) and employees seconded outside of Germany. Independent contractors, civil servants and freelancers as well as managing directors (*Geschäftsführer*) and managing board members (*Vorstand*) are not covered.

Italy.

Covered employees include both indefinite-term and fixed-term employees, as well as part-time employees and executives treated as employees or quasi-employees from employment law purposes. Consultants and directors do not fall within the scope of these rules.

UK.

In the UK, individuals can provide their services as employees (with full employment rights under English law), workers who are not employees (individuals whose employment relationship with their employer is looser than employees, but who still benefit from limited core employment rights), or as independent contractors who are in business on their own behalf. TUPE covers *employees*, including full-time, part-time, indefinite-term or fixed-term employees¹. TUPE does not cover workers who are not employees or self-employed individuals.

Covered Transactions

EU Directive.

The Directive broadly covers transactions involving a change in the entity responsible for a business (or part of a business)² resulting in a change of employer, such as an asset sale or a merger.³ The Directive requires the relevant business (or part) to constitute an “economic entity”. Broadly, this requires resources (whether tangible and/or intangible) that are deliberately organized together for purposes of pursuing economic activity of some sort.

¹ Note that this will include employees of associated companies (for example group service companies) who have an employment relationship with the transferor of a business or, in relation to a service provision change, with the service provider or client.

² The Directive also applies to undertakings, which is a broad concept and includes, for example, charities, trade associations, certain governmental bodies, schools and universities, whether or not operating for profit.

³ The Directive may protect employees of the surviving entity in a merger, subject to the structure of the transaction and the applicable law of the member state in which such merger occurs.

Belgium.

CBA 32*bis* scope of application is aligned with the Directive and its interpretation by the European Court of Justice (“ECJ”). It broadly covers transactions involving a change in the entity responsible for a business (or part of a business) resulting in a change of employer, such as an asset sale or a merger. The relevant business (or part) must constitute an “economic entity” which this requires resources (whether tangible and/or intangible) that are deliberately organized together for purposes of pursuing economic activity of some sort, whether or not operating for profit.

France.

French law relies on the same test as provided under the Directive as interpreted by the ECJ and requires the relevant business (or part) to constitute an “economic entity”. However, by contrast to the ECJ case-law, French case-law is more demanding on the nature of the assets transferred by the transferor to the transferee and requires that substantial assets are transferred. This implies that businesses that rely on manpower and do not use material assets (e.g., cleaning services) are usually not considered to characterize an economic entity for the purpose of the application of French rules on transfer of undertakings whereas the ECJ has accepted to apply the Directive to this type of activities.

Germany.

Section 613a of the German Civil Code broadly covers transactions involving a change in the entity responsible for a business (or part of a business) resulting in a change of employer (in particular an asset sale and transfer) and also applies in cases of mergers, demergers and transfers of assets in accordance with the provisions of the German Transformation Act (*Umwandlungsgesetz*). Section 613a of the German Civil Code requires the relevant business (or part) to constitute an “economic entity”. Broadly, this requires resources (whether tangible and/or intangible) that are deliberately organized together for purposes of pursuing economic activity of some sort. Section 613a of the German Civil Code does not deviate from the provisions of the Directive in this respect.

Italy.

Article 2112 of the Italian Civil Code broadly covers any transactions resulting in a change of ownership of an organized going concern, which existed prior to the transfer and maintains its “identity” afterwards. The type of agreement or provision on the basis of which the transfer takes place is irrelevant for these purposes. Transfers of parts of a business or business units are also included, provided that such parts could be treated as an autonomously functioning and organized going concern, as identified by the transferor and transferee at the time of the transfer.

UK.

TUPE applies to a “relevant transfer”, which means:

- **A business transfer:** broadly tracking the Directive, TUPE covers a transfer of a business (or part of a business) which constitutes an “economic entity”. An “economic entity” requires resources that are deliberately organized to pursue an economic activity, and must have a degree of structure, autonomy and stability. In asset-light businesses, an economic entity may be made up only of the employees (or even an individual employee) that form part of it.; or
- **A service provision change (“SPC”):** building and expanding on the Directive, TUPE covers outsourcing of services, insourcing of services or a transition from one service provider to another (“on-sourcing”). Broadly, this captures situations where an organized grouping of employees is carrying on an activity for a client, and that client intends that, following the SPC, these activities will be carried out by a (different) service provider or (in an insourcing) by the client. The service provider’s employees must be operating as a dedicated team, but need not necessarily be devoting the whole (or even the majority) of their working time to the client’s work. Whether a change in service provider will constitute and SPC under TUPE will be highly fact-sensitive and legal advice should be sought on a case by case basis.

Excluded Transactions

EU Directive.

The Directive does not generally apply to:

- Businesses (or the relevant part) not situated within the EEA.
- Stock sales.
- Transfers of assets not constituting an “economic entity” or where the economic entity does not retain its identity. However, the analysis of whether the transfer of assets constitutes an economic entity is fact-specific, and legal advice should always be sought before concluding that the Directive does not apply.
- Unless an EU Member State provides otherwise, liquidations in bankruptcy or analogous proceedings.⁴ Where an EU Member State provides that the Directive does apply in this context, the EU Member State may relax the usual rules and provide that (i) certain employee debts do not transfer where they are otherwise protected under national law and (ii) changes to employees’ terms and conditions may be agreed, provided these are designed to safeguard employment opportunities by ensuring the survival of the business.
- Transfers between certain governmental bodies.

Belgium.

CBA 32bis does not apply to:

- Stock sales.
- Transfers of assets not constituting an “economic entity” or where the economic entity does not retain its identity. However, the analysis of whether the transfer of assets constitutes an economic entity which retains its identity is fact-specific, and legal advice should always be sought before concluding that CBA 32bis does not apply.
- Liquidations in bankruptcy or analogous insolvency proceedings.

- Insolvency proceedings that do not involve a liquidation. Some of the more stringent rules of CBA 32bis are relaxed ((i) certain employee debts do not transfer where they are otherwise protected under national law, (ii) the new employer may pick and choose which employees are taken over and (iii) changes to employees’ terms and conditions may be collectively agreed) in order to safeguard employment opportunities by ensuring the survival of the business.
- Transfers between employers belonging to the public sector.

France.

French rules on transfer of undertakings do not generally apply to:

- Stock sales.
- Transfers of assets not constituting an “economic entity” or where the economic entity does not retain its identity. However, the analysis of whether the transfer of assets constitutes an economic entity is fact-specific, and legal advice should always be sought before concluding that French rules do not apply.
- With respect to transfers happening in the framework of bankruptcy or analogous insolvency proceedings, French law permits the bankruptcy Court to authorize the liquidator (or similar practitioner) to proceed with some dismissals to happen prior to the transfer of the economic entity, an exception to the general rule that dismissals related to the transfer are prohibited (see “*Protection Against Dismissal*”). In addition, liabilities owed to the employees and relating to the period prior to transfer are not transferred to the transferee.
- Specific rules govern the transfer of economic entities from the private sector to the public sector and vice versa, including the conditions under which the transferee is required to offer to the transferred employees private law or public law governed employment agreements (as applicable).

⁴ With respect to insolvency proceedings that do not involve a liquidation, the Directive will apply, but certain of the Directive’s requirements may be relaxed by the EU Member State.

Germany.

Section 613a of the German Civil Code does generally not apply to:

- Stock sales.
- Transfers of assets not constituting an “economic entity” or where the economic entity does not retain its identity. However, the analysis of whether the transfer of assets constitutes an economic entity is fact-specific and highly depended on individual circumstances. Legal advice should always be sought to evaluate whether Section 613a of the German Civil Code does apply.
- Transfers exclusively by act of public authority.
- In compliance with the derogations provided for in the Directive, Section 613a of the German Civil Code applies in insolvency proceedings with regard to safeguarding jobs and the continuity of the works councils. In transfers occurring during insolvency proceedings, the liability of the transferor for claims already arisen before the transfer of undertaking are not transferred to the transferee, e.g., the transferee does not assume pension liabilities towards the transferring employees with respect to the time period prior to the transfer.

Italy.

Article 2112 of the Italian Civil Code does not generally apply to:

- Stock sales.
- Transfers of assets not constituting a going concern or where the going concern does not maintain its “identity” following the transfer. However, the analysis of whether a transfer of assets can be characterized as going concern is fact-specific and highly depends on specific circumstances. Legal advice should always be sought to evaluate whether Article 2112 of the Italian Civil Code does apply.

- Transfers occurring in the context of bankruptcy procedures or similar insolvency procedures, in case during the consultation procedure (see “*Obligation to Consult*”) an agreement on preserving jobs is reached (and unless the provisions of Article 2112 are agreed to be applied in the context of the consultation procedure).

UK.

TUPE does not generally apply to:

- Businesses (or the relevant part) or, in relation to an SPC, organized groupings of employees not situated in the UK immediately prior to the transfer.
- An intra-governmental transfer, which may involve any public body whose functions involve the exercise of public authority: it need not necessarily be a public sector organization.
- In relation to a business transfer:
 - Stock sales.
 - A transfer of a business not constituting an economic entity or where the economic entity does not retain its identity. However, the analysis of whether the transfer of assets constitutes an economic entity is fact-specific, and legal advice should always be sought before concluding that UK rules do not apply.
- In relation to an SPC:
 - Supplies of goods.
 - An SPC where the nature of the activity carried out by the service provider (or client) after the change is fundamentally or essentially different from the activity carried out prior to the change.
 - Activities which the client intends to be carried out in relation to a single specified project or a task of short duration.
 - An on-sourcing where the client changes.

Specific Employee Protections

Protection Against Dismissal

EU Directive.

The corporate transaction cannot, in itself, constitute grounds for dismissal by either the transferor or the transferee. However, dismissals for economic, technical or organizational reasons entailing changes in the workforce are not prohibited by the Directive. Whether those reasons exist in any particular transaction depends on the facts and circumstances.

Belgium.

The corporate transaction cannot, in itself, constitute grounds for dismissal by either the transferor or the transferee. However, dismissals for economic, technical or organizational reasons entailing changes in the workforce are allowed by CBA 32*bis*. Whether those reasons exist in any particular transaction depends on the facts and circumstances. Dismissals which breach such prohibition are not null and void and remain effective but are subject to (i) administrative sanctions (administrative fine) and (ii) award of additional damages to the employees.

France.

The corporate transaction cannot, in itself, constitute grounds for dismissal by either the transferor or the transferee of the employees who are part of the transferred undertaking. Dismissals for economic reasons by the transferor prior to a transfer are deemed by French case-law to be related to such transfer and are voidable. The dismissed employee is entitled to either get damages from the transferor or be reinstated in its former job position with the transferee.

Germany.

The corporate transaction cannot, in itself, constitute grounds for dismissal by either the transferor or the transferee. The termination of the employment relationship of an employee by the transferor or by the transferee due to the transfer of a business or a part of a business is invalid. However, dismissals for economic, technical or organizational reasons entailing changes in the workforce are not prohibited by Section 613a of the German Civil Code. The same applies to other permitted reasons for termination under German labor law. Whether those reasons exist in any particular transaction depends on the facts and circumstances.

Italy.

The transfer of going concern cannot, in itself, constitute grounds for dismissal by either the transferor or the transferee. The termination of the employment relationship of an employee by the transferor or by the transferee due to the transfer of a business or a part of a business is invalid. However, dismissals (whether individual or collective) are not prohibited by Article 2112 of the Italian Civil Code. If redundancies are necessary (e.g., because the transferee is going to carry out a restructuring of the business) the transferee must state this information in the notification to the applicable trade unions and works councils (see “*Obligation to Provide Information*”).

UK.

The dismissal of an employee (by the transferor or the transferee), where the sole or principal reason for the dismissal is the transfer, will be automatically unfair under English law. This rule does not apply where the employer can show that the dismissal was carried out for an economic, technical or organizational reason entailing changes in the workforce. This will depend on the facts of each case.

Substantial Changes in Working Conditions

EU Directive.

If the transfer involves a substantial change in working conditions to the detriment of an employee and the employee resigns in response, the employer is nonetheless regarded as having been responsible for the termination and the employee may under national law be entitled to severance benefits.

Belgium.

If the transfer involves a substantial change in working conditions to the detriment of an employee and the employee resigns in response, the employer is nonetheless regarded as having been responsible for the termination (constructive dismissal) and the employee may be entitled to severance benefits.

France.

The rule pursuant to which the employer remains responsible for the termination of employment in case the transfer involves a substantial change in working conditions to the detriment of an employee and the employment is terminated has not specifically been implemented under French law. However, general rules of French law tend to the same purpose since a refusal by an employee of a change in its working conditions does not allow the employer to consider that the employee has resigned but rather requires the employer to initiate a dismissal procedure.

Germany.

German law does not provide for an obligation to pay severance, even if the working conditions are subject to substantial changes to the detriment of the employee. Instead, the employee has a right to object to the transfer (see “*Right to Object to the Transfer*” below). Once the employee is transferred, there is no entitlement to severance benefits in case of a resignation. However, in case the transfer of undertaking involves a change in the business operation (*Betriebsänderung*) (e.g., a relocation or separation of the business operation), the works

council may be entitled to demand negotiations on a reconciliation of interests and a social plan, under which the transferring employees may be entitled to compensation for any financial disadvantages of such change in business operation.

Italy.

As a general principle, employees continue to be employed by the transferee on the same terms and conditions on which they were employed by the transferor. The transferee cannot unilaterally change the terms of any existing employment agreement. Any reduction in employees’ rights must either be negotiated with works council in the context of the consultation procedure (see “*Obligation to Consult*”) or be subject of individual waivers signed before the labor authorities.

UK.

Changes made to the contractual terms of employees’ employment will generally be void and unenforceable by an employer¹ if (i) the transfer is the sole or principal reason for the change, and (ii) the employer cannot show that the change was made as a result of an economic, technical or organizational reason entailing changes in the workforce. This rule is relaxed where the transfer is taking place in the context of the transferor’s insolvency. If the transfer involves a substantial change in working conditions to the detriment of an employee and the employee resigns in response prior to the transfer, the employee will be treated as having been dismissed and may be entitled to remedies for unfair dismissal.

Right to Object to the Transfer

EU Directive.

It is for the EU Member States to determine the implication of an employee deciding not to continue to work for the transferee.

Belgium.

In the absence of a substantial changes in working conditions (see “*Substantial Changes in Working Conditions*” above), an employee who decides not to continue to

¹ Note that where changes have been made in breach of TUPE, an employee may “cherry-pick” by enforcing a newly introduced term that is otherwise void under TUPE, while still relying on the terms that applied prior to the amendment where it suits the employee to do so.

work for the transferee is deemed to have resigned. An employee cannot be forced to transfer.

France.

French rules on the transfer of undertaking do not permit to the employees to object to the transfer of their employment agreement. The transfer is an obligation for the transferor, the transferee as well as for the employee.

Germany.

The employee may object in writing to the transfer within a period of one month after having received an employee information letter, including, *inter alia*, correct and complete information on the legal, economic and social consequences of the transfer for the employees (see “*Obligation to Provide Information*”). The one-month objection period only commences upon receipt of correct and complete employee information letter; an incorrect or incomplete employee information letter results in an unlimited objection right of the employees that is only subject to general forfeiture rules. In case an employee exercises the right to object, he or she does not transfer to the transferee and will remain with the transferor, risking that the employment relationship will be terminated by the transferor based on redundancy.

Italy.

If their working conditions change materially during the three-month period following the transfer of the business concern, the transferred employees would be entitled to resign for cause.

UK.

Under TUPE, an employee is entitled to object to the transfer of their employment. Their employment will then be treated as terminating at the time of the transfer. The employee will have no remedy in connection with the termination of their employment and will effectively be treated as having resigned.

Contracting Out

EU Directive.

Any purported waiver by an employee of rights under the Directive is deemed to be invalid as a matter of public policy.

Belgium.

Any purported waiver by an employee of rights under the Directive or CBA 32*bis* is deemed to be invalid as a matter of public policy. Such waiver cannot be validly negotiated by the union organizations and laid down in a CBA concluded at the time of the transfer: such CBA is deemed to be invalid. However, case law and legal doctrine consider that an employee can validly refuse to be transferred and remain with his current employer but only if the latter accepts.

France.

Any purported waiver by an employee of rights under the Directive is deemed to be invalid as a matter of public policy.

Germany.

In general, a purported waiver by an employee of rights under Section 613a of the German Civil Code is deemed to be invalid.

Italy.

Any provision with the purpose to exclude or limit the application of the law is void.

UK.

Parties cannot contract out of the application of TUPE.

Employee Engagement

Obligation to Provide Information

EU Directive.

Both the transferor and the transferee must provide representatives of their respective affected employees (or, in certain circumstances if there are no representatives, the employees themselves) with specified information about the transfer “in good time before the transfer is carried out” (i.e., prior to closing). EU Member States have interpreted this timing requirement in different ways. The information required to be provided is (i) the date or proposed date of the transfer, (ii) the reasons for the transfer, (iii) the “legal, economic and social implications” of the transfer for the employees, and (iv) any measures envisaged in relation to the employees. Generally, a “measure” may include limited changes or adjustments to terms and conditions of employment, changes to work locations or practices, redundancies or administrative changes such as changes to the date an employee is paid, but the determination of which actions may constitute a measure is EU Member State-specific.

Belgium.

Both the transferor and the transferee must provide representatives of their respective affected employees (or, in certain circumstances if there are no representatives, the employees themselves) with specified information about the transfer “in good time before the transfer is carried out”. The information required to be provided is (i) the date or proposed date of the transfer, (ii) the reasons for the transfer, (iii) the “legal, economic and social implications” of the transfer for the employees, and (iv) any measures envisaged in relation to the employees.

France.

French law does not provide for a specific requirement to inform and consult in relation to transfer of undertakings. However, general rules on information and consultation of the social and economic committee established in companies with 50 employees or more

generally require that the social and economic committee be informed and consulted prior to any decision relating to the modifications of the legal or economic organisation of the business, which generally encompasses transfer of undertakings. As a result, binding agreements to consummate a transfer of undertaking cannot be entered into prior to the completion of such information and consultation procedure.

In addition, in case of transfer of an undertaking as a sale of a going concern (*vente de fonds de commerce*), the following rules are applicable:

- In companies with less than 50 employees, the employer must, at least two months prior to the signing of the asset purchase agreement, inform all the employees assigned to such undertaking of its intention to sell the business with a view to allow one or more of such employees to make an offer for the purchase of such business. The 2-month time frame can be reduced if all employees waive their right to make an offer.
- In companies with 50 employees or more and less than 250 employees and whose turnover is less than EUR50 million or whose total balance sheet is less than EUR43 million (or both), the employer must, simultaneously with the procedure of information and consultation of the social and economic committee, inform all the employees assigned to such undertaking of its intention to sell the business with a view to allow one or more employees to make an offer for the purchase of such business.

According to the position of the administration, the seller is not obliged to accept an offer of the employees (if any) or to negotiate with the employees.

Germany.

In deviation to the Directive, both the transferor and the transferee must provide every affected employee with specified information about the transfer in an employee

information letter prior to the transfer of undertaking, whereas no obligation to inform the trade unions exists. Such employee information letter is a quite technical and lengthy legal document that must be delivered in writing or by e-mail. As a practical matter, the employee information letter should be delivered at least one month prior to the transfer of undertaking, in order to gain clarity on which employees actually transfer at the closing of the transaction (as the one-month objection period will have generally lapsed). The information required to be provided is (i) the date or proposed date of the transfer, (ii) the reasons for the transfer, (iii) the “legal, economic and social implications” of the transfer for the employees, and (iv) any measures envisaged in relation to the employees. Generally, a “measure” may include limited changes or adjustments to the terms and conditions of employment, changes to work locations or practices, redundancies or administrative changes.

Italy.

If the transferor employs more than 15 employees, both the transferor and the transferee must notify the applicable trade unions and works councils 25 days before entering into a binding agreement for the sale of the business. The information required to be provided includes (i) the date or proposed date of the transfer, (ii) the reasons for the transfer, (iii) the “legal, economic and social implications” of the transfer for the employees, and (iv) any measures envisaged in relation to the employees. Generally, a “measure” may include changes or adjustments to the terms and conditions of employment, changes to work locations or practices, redundancies or administrative changes.

UK.

Both the transferor and the transferee must provide representatives of their respective affected employees¹ (or, in certain circumstances if there are no representatives, the employees themselves) with specified information about the transfer long enough before the transfer to allow meaningful consultation to take place. The information required to be provided is (i) the date or proposed date of the transfer, (ii) the reasons for the transfer, (iii) the “legal, economic and social

implications” of the transfer for the employees, (iv) any measures envisaged in relation to the employees (by either the transferor or the transferee), and (v) certain information in relation to the number and roles of temporary agency workers within the organisation. The concept of a “measure” is interpreted very widely and may include changes or adjustments to terms and conditions of employment (for example, in relation to benefit or pension provision), changes to work locations or practices, redundancies or administrative changes such as changes to the date an employee is paid. Separately, there is an obligation on the transferor to provide certain information about transferring employees (referred to as “employee liability information” or “ELI”) at least 28 days before the transfer.

Obligation to Consult

EU Directive.

Where the transferor or the transferee envisages taking “measures” in relation to its respective affected employees, it must consult representatives of those employees on such measures “in good time before the change in the business is effected”. Consultation must be with a view to reaching an agreement.

Belgium.

Both transferor and transferee must consult their respective employee representatives bodies (works council or CPPT or trade union) about the contemplated transfer of undertaking. The consultation must be completed prior to any decision. Such obligation does not apply in the absence of employee representatives bodies.

France.

French law does not provide for a specific requirement to inform and consult in relation to transfer of undertakings. However, general rules on information and consultation of the social and economic committee established in companies with 50 employees or more generally require that the social and economic committee be informed and consulted prior to any decision relating to the modifications of the legal or economic organisation of the business, which generally

¹ If the workforce is unionised, employers will be required to engage with union representatives. If no appropriate representative body is in place, the employer will generally need to arrange a ballot to allow employees to elect representatives.

encompasses transfer of undertakings. As a result, binding agreements to consummate a transfer of undertaking cannot be entered into prior to the completion of such information and consultation procedure.

In addition, in case of transfer of an undertaking as a sale of a going concern (*vente de fonds de commerce*), the following rules are applicable:

- In companies with less than 50 employees, the employer must, at least two months prior to the signing of the asset purchase agreement, inform all the employees assigned to such undertaking of its intention to sell the business with a view to allow one or more of such employees to make an offer for the purchase of such business. The 2-month time frame can be reduced if all employees waive their right to make an offer.
- In companies with 50 employees or more and less than 250 employees and whose turnover is less than EUR50 million or whose total balance sheet is less than EUR43 million (or both), the employer must, simultaneously with the procedure of information and consultation of the social and economic committee, inform all the employees assigned to such undertaking of its intention to sell the business with a view to allow one or more employees to make an offer for the purchase of such business.

According to the position of the administration, the seller is not obliged to accept an offer of the employees (if any) or to negotiate with the employees.

Germany.

Where the transferor or the transferee envisages taking “measures” in relation to its respective affected employees, it must notify the competent works council in a comprehensive manner and in good time before a decision about such “measures” has been made. To the extent any such “measures” qualify as a change in the business operation, the employer must consult with the works council about such measures with a view to reaching an agreement on a reconciliation of interests and a social plan. Should an economic committee (*Wirtschaftsausschuss*) or a representative body for

executive employees (*Sprecherausschuss*) exist, they have to be informed about any “measures” as well.

Italy.

From the date of receipt of the notice of transfer referred to in “*Obligation to Provide Information*” above, the trade unions or work councils have seven calendar days to file a request for consultation with the transferor and transferee. Once the transferor and transferee have received the request for consultation, they in turn have seven calendar days to start the consultation process. It is common practice for the transferor and transferee to conduct one consultation process together. The consultation ends after 10 calendar days, even if an agreement has not been reached with the trade unions or work councils. Overall, the consultation procedure may take up to 24 days to complete. Only consultation is required; unions cannot veto the transaction.

UK.

Where the transferor or the transferee envisages taking “measures” in relation to its respective affected employees, it must consult representatives of those employees on such measures with a view to reaching an agreement. There is no specific timeframe prescribed for the consultation period, but sufficient time must be allowed to allow meaningful consultation to take place.²

Sanctions

Belgium.

Failure to comply with these obligations may trigger criminal sanctions and claim for damages by employees or their representatives.

Parent Decisions

EU Directive.

The obligations to inform and consult apply irrespective of whether the decision resulting in the transfer is taken by the employer or by a parent.

² Note that, where large numbers of redundancies are envisaged, separate collective consultation requirements may apply.

Belgium.

The obligations to inform and consult apply irrespective of whether the decision resulting in the transfer is taken by the employer or by a parent.

France.

The obligations to inform and consult apply irrespective of whether the decision resulting in the transfer is taken by the employer or by a parent.

Germany.

The obligations to inform and consult apply irrespective of whether the decision resulting in the transfer is taken by the employer or by a parent.

Italy.

The obligations to inform and consult apply irrespective of whether the decision resulting in the transfer is taken by the employer or by its parent company.

UK.

The obligations to inform and consult apply irrespective of whether the decision resulting in the transfer is taken by the employer or by a parent.

Transfer of Employment and Certain Rights and Obligations by Operation of Law

In General

EU Directive.

Employees assigned to the business transfer automatically by operation of law to the transferee at the same time as the business is transferred, and on their existing terms and conditions of employment.¹ The transferee becomes the new employer. As a result, all rights and obligations arising from the employment contracts of those transferred employees, or from the employment relationships more broadly, are also transferred to the transferee, and (except as provided in “*The Pension Exception*” and “*Joint and Several Liability*” below and otherwise by the relevant EU Member State) the transferor is released from those obligations by operation of law.

Belgium.

Employees assigned² to the business transfer automatically by operation of law to the transferee at the same time as the business is transferred, and on their existing terms and conditions of employment. Employees belonging to shared services which are not transferred as a separate unit are not in scope of the transfer unless their duties are performed exclusively for the benefit of the part of undertaking transferred. The transferee becomes the new employer. As a result, all rights and obligations arising from the employment contracts of those transferred employees are also transferred to the transferee, and (except as provided in “*The Pension Exception*” and “*Joint and Several Liability*” below), the

transferor is released from those obligations by operation of law.

France.

Employees assigned to the business transfer automatically by operation of law to the transferee at the same time as the business is transferred, and on their existing terms and conditions of employment. After having retained that employees partially assigned to the business were transferred for the portion of their employment agreement dedicated to this business, French case-law seems now to consider that only employees who are fully dedicated or those who dedicate most of their activity to the transferred business transfer along with the business. The transferee becomes the new employer. As a result, all rights and obligations arising from the employment contracts of those transferred employees, or from the employment relationships more broadly, are also transferred to the transferee.

Germany.

Employees assigned to the business transfer automatically by operation of law to the transferee at the same time as the business is transferred, unless the employees in question object to such transfer (see “*Right to Object to the Transfer*”). The transferee becomes the new employer. As a result, all rights and obligations arising from the employment contracts of those transferred employees, or from the employment relationships more broadly, are also transferred to the transferee, and (except as provided in “*The Pension Exception*” and

¹ There is no statutory definition of “assigned”, and the determination of whether an employee is assigned to the business (or part) will be based on the relevant facts and circumstances and the applicable case law of the European Court of Justice.

² In the absence of statutory definition of “assigned”, the determination of whether an employee is assigned to the business (or part) will be based on the relevant facts and circumstances and the applicable case law of the ECJ.

“*Joint and Several Liability*” below) the transferor is released from those obligations by operation of law.

Italy.

In case of a transfer of a going concern, the employment relationships of the transferred employees automatically continue with the transferee and the transferred employees retain all the rights arising from such relationships (including salary and benefits).

UK.

Employees assigned to the business (or, in relation to an SPC, to the organized grouping of employees) transfer automatically by operation of law to the transferee at the same time as the business or service provision arrangement is transferred, and on their existing terms and conditions of employment.³ Employees who are assigned to the business or organized grouping of employees on a purely temporary basis, or whose employment with the putative transferor would not be terminated as a result of the transfer, are excluded under TUPE. The transferee becomes the new employer. As a result, all rights and obligations arising from the employment contracts of those transferred employees, or from the employment relationships more broadly, are also transferred to the transferee, and (subject to certain exceptions, covered below) the transferor is released from those obligations by operation of law.

The Pension Exception

EU Directive.

Unless EU Member States provide otherwise, an employee’s rights to old-age, invalidity or survivor’s benefits under supplementary company or intercompany pension schemes outside statutory social security schemes do not transfer automatically by operation of law to the transferee, and so remain with the transferor.

Belgium.

Employees’ rights to old-age, invalidity or survivor’s benefits under supplementary company or intercompany pension schemes outside statutory social security schemes do not transfer automatically by operation of

law to the transferee, and so remain with the transferor unless the occupational pension schemes are foreseen in a collective bargaining agreement (see “*Collective Agreements*” below). When the transfer of undertaking is the result of the sale or contribution of a “branch of activity” or of a “business as a whole” as defined by the Belgian Company code, the occupational pension rights will also be transferred by operation of specific provisions of that code.

France.

France has not implemented the pension exception, on the account that most of pension benefits stem from statutory social security schemes. The transfer of company pension schemes, which are not widespread except in large companies, are subject to the rules applicable to the legal documentation which established them (see “*Collective Agreements*” below).

Germany.

The pension exception does not apply in Germany. Under Section 613a of the German Civil Code, rights of current employees to old-age, invalidity or survivor’s benefits under company or group pension schemes outside statutory social security schemes transfer automatically by operation of law to the transferee (also with respect to pension liabilities accrued in the time period prior to the transfer) rendering the transferee fully liable for pension commitments that were initially made by the transferor. Rights of former employees of the transferor remain with the transferor.

Italy.

The pension exception does not apply in Italy. The pension plan funding obligations relating to the transferred employees under the Italian mandatory social security system are not affected by the business transfer. With respect to any complementary pension schemes possibly implemented by transferor and to which the transferred employees participate, following a transfer of going concern, the transferred employees are generally entitled to convert the position accrued by them under the transferor’s complementary pension scheme into quotas of the transferee’s one but different rules and funding

³ There is no statutory definition of “assigned”, and the determination of whether an employee is assigned to the business (or part), or the relevant organized grouping of employees, will be based on the relevant facts and circumstances and the applicable case law of the European Court of Justice and the English courts.

obligations may apply depending on the actual terms and conditions of such complementary pension schemes.

UK.

Employees' rights under occupational pension schemes which relate to old age (i.e. retirement), invalidity or survivors benefits do not transfer automatically by operation of law to the transferee, and so remain with the transferor. Notably, liability to provide enhanced redundancy benefits will transfer. Under separate UK pensions legislation, transferees may be required to provide a minimum pension benefit to transferring employees who, prior to the transfer, were members of an occupational pension scheme.

Joint and Several Liability

EU Directive.

EU Member States may provide that, after the transfer, the transferor remains jointly and severally liable with the transferee for obligations that arose in respect of the transferred employees before the transfer.

Belgium.

After the transfer, the transferor remains jointly and severally liable with the transferee for obligations that arose in respect of the transferred employees before the transfer.

France.

French rules on transfer of undertakings provide that, after the transfer, the transferor remains jointly and severally liable with the transferee vis-a-vis the employee for obligations that arose in respect of the transferred employees before the transfer. The transferee can nonetheless get reimbursement from the transferor for the liabilities relating to the period prior to transfer. Notwithstanding the foregoing, in case of transfer of an economic entity without any agreement between the transferor and the transferee (e.g., in case of change of service provider), the transferee is not jointly and severally liable with the transferor.

Germany.

Both the transferor and the transferee are jointly and severally liable without limitation for all obligations arising from the transferred employment relationship

that arose and fell due prior to the date of transfer. Joint and several liability of the transferor with the transferee is limited to obligations arising prior to the transfer but falling due prior to the expiry of one year after the date of transfer. The transferor's liability for such obligations is prorated for the time prior to the transfer. Transferor and transferee may not deviate from this mandatory liability *vis-a-vis* the transferring employees, but may arrange for a different allocation among themselves.

Italy.

Both the transferor and the transferee are jointly and severally liable, without limitations, for all liabilities relating to the transferred employees that have accrued as of the transfer date, irrespective of any agreement that the parties to the deal might reach on how to allocate such liability between them. By following certain statutory procedures (i.e., settlement at court or labor office), the employee may release the transferor from obligations deriving from the employment relationship.

UK.

As set out above, the transferee will "step into the shoes" of the transferor and take on all liabilities associated with the employees' pre-transfer employment. Liabilities incurred in connection with the transfer and with failures to inform and consult (see below) are dealt with separately: where the liability arises as a result of the transferee's failure to inform and consult, the transferee will be solely liable. However, where the liability arises as a result of the transferor's failing, the transferor and transferee will be jointly and severally liable.

Collective Agreements

EU Directive.

The transferee is required to continue to observe the terms and conditions agreed in any collective agreement applicable to the transferred employees on the same terms as the transferor, until the termination or expiry of the collective agreement or the entry into force or application of another collective agreement. EU Member States may limit the period for observing collective agreements, provided it is not less than one year.

Belgium.

The transferee is required to continue to observe the terms and conditions agreed in any collective agreement applicable to the transferred employees on the same terms as the transferor, until the termination or expiry of the collective agreement or the entry into force or application of another collective agreement. There are arguments, however, to consider that the transferee will no longer be bound anymore by CBAs concluded in another branch of industry when both transferor and transferee do not belong to the same branch. There is not yet any decisive case law in this regard.

France.

The transferee is required to continue to observe the terms and conditions agreed in any collective agreement applicable to the transferred employees on the same terms as the transferor, until the termination or expiry of the collective agreement or the entry into force of a new negotiated collective agreement or a maximum period of time of generally 15 months comprised of (i) the termination notice provided in such collective agreement (generally 3 months) and (ii) the continuation period provided in such collective agreement (generally 12 months). In the absence of collective agreement concluded during that period of time, the obligation to observe the terms of the collective agreements applicable to the transferred employees will terminate but the transferee will be required to maintain to the transferred employees a level of compensation at least equal to the compensation that stemmed from these collective agreements and enjoyed by the transferred employees during the 12-month period prior to the transfer.

The transferor, the transferee and the recognized trade unions can sign prior to the transfer a collective bargaining agreement in order to determine the collective bargaining agreements that will remain applicable after the transfer.

Unilateral commitments of the transferor as well as customs or usages applicable to the transferred employees are binding on the transferee by operation of law. The transferee must continue them subject to the general rules on the termination of unilateral commitments, customs and usages

Germany.

The transferee is required to continue to observe the terms and conditions agreed in any collective agreement (i.e., collective bargaining agreements with unions (*Tarifverträge*) and shop agreements with works councils (*Betriebsvereinbarungen*)) applicable to the transferred employees on the same terms as the transferor, until the termination or expiry of the collective agreement or the entry into force or application of another collective agreement, provided that the transferee may not amend the terms and conditions for a period of one year after the date of transfer. However, this does not apply if a certain subject matter is governed by terms and conditions of a collective agreement already existing at the transferee, in which case such collective agreement applicable at the transferee supersedes the terms and conditions of the collective agreement applicable at the transferor, even if it contains terms and conditions that are detrimental to the transferring employees.

Italy.

The transferee must apply substantially the same terms and conditions provided for by any national, regional and plant-level collective bargaining agreements applied by the transferor at the date of the transfer until the date of their expiry, unless the transferee applies different collective bargaining agreements, in which case they will replace the agreements in place before the transfer.

UK.

The transferee is required to continue to observe the terms and conditions agreed in any collective agreement applicable to the transferred employees on the same terms as the transferor, subject to the following caveats:

- The transferee will not be bound to observe terms and conditions introduced to a collective agreement subsequently to the transfer where the transferee has not been involved in the (re-)negotiation of those terms; and
- As an exception to the general prohibition on making changes to employees' terms and conditions by reason of the transfer (see below), a transferee will be permitted under TUPE to make a change to terms that

are derived from a collective bargaining agreement so long as (i) changes are not made within one year of the transfer, and (ii) the changes, viewed as a whole, are not unfavourable to the employees in question.

Employee Representative Recognition

EU Directive.

If the transferred business (or part) preserves its autonomy and is maintained as a separate operating unit after the transfer, the status and function of employee representatives (i.e., recognised trade unions) must also be preserved by the transferor. However, this does not apply if, pursuant to applicable law, conditions for the new appointment of employee representatives are satisfied.

Belgium.

Various scenarios are possible: the works council and/or the committee for prevention and protection at work (“CPPT”) can either (i) be split, (ii) merge, or (iii) cover both transferor and transferee after the transfer. This depends mainly on the following circumstances: (i) transfer of a full undertaking or of a part of it, and (ii) whether the transferred business (or part) preserves its autonomy and is maintained as a separate technical operating unit after the transfer or not.

France.

If the transferred business (or part) preserves its autonomy and is maintained as a separate operating unit after the transfer, the status and function of employee representatives (i.e., social and economic committee, recognised trade unions) must also be preserved by the transferee.

Germany.

If the transferred business preserves its autonomy and is maintained as a separate operating unit after the transfer, the status and function of employee representatives (i.e., works council) must also be preserved by the transferee. If only a part of a business is transferred, the transferor's works council will retain a transitional mandate (*Übergangsmandat*) for six months or a

remaining mandate (*Restmandat*) in order to preserve employee rights until the next works council elections.

Italy.

There is no provision regarding employee representatives and it is a matter for negotiation. However, standard practice is that employee representatives within the transferred business continue their appointment until it expires.

UK.

If the transferred business (or part) preserves its autonomy and is maintained as a separate operating unit after the transfer, then the recognition of any trade union will also be preserved following the transfer. TUPE does not, however, place restrictions on a trade union being derecognized in accordance with applicable contractual or statutory procedures following the transfer.

Cross-Border Transactions

EU Directive.

EU Member States have some flexibility in how to implement the Directive and differences between EU Member States are sometimes significant. Such differences give rise to legal uncertainty in case of cross-border transfers as the Directive does not provide for solutions in case of conflicting laws.

Belgium.

CBA 32*bis* is generally applicable in cases of a transfer of undertaking to a transferee located abroad. However, the move to another country will generally result in a significant change of an essential element of the employment contract (place of employment, possibly new set of legal rules governing the contract, *etc.*). If such change is not accepted by the employees, it cannot be unilaterally imposed by the employer (constructive dismissal, see “*Substantial Changes in Working Conditions*”). Hence, in such a situation, the transferor may have to engage, prior to any decision about the contemplated cross-border transfer, in information and consultation with its employee representatives as required whenever an employer faces a collective dismissal.

Germany.

Section 613a of the German Civil Code is generally applicable in cases of a transfer of undertaking from a transferor located in Germany to a transferee located abroad (irrespective of whether the transferee is located within the EU or not). However, if the essential means of production (e.g., real estate, production facilities, business premises) are being transferred to a location of transferee which is a substantial distance (generally more than several hundred kilometers) away from the transferor’s location, a transfer of undertaking within the meaning of Section 613a of the German Civil Code may not be assumed. If the employment agreement does not provide for a choice of law, the agreement will be governed by the law of the transferee after the transfer.

Transposition of the EU Directive

Belgium.

The rules of the Directive are mainly implemented by the nation-wide collective bargaining agreement n°32*bis* of 7 June 1985 (CBA 32*bis*).

France.

The rules on transfer of undertakings are mainly enshrined in articles L. 1224-1 to L. 1224-4 of the French labor code which largely preexisted the Directive.

Germany.

The rules of the Directive are mainly implemented in Section 613a of the German Civil Code (*Bürgerliches Gesetzbuch*).

Italy.

The rules of the Directive are mainly implemented in Article 2112 of the Italian Civil Code and Article 47 of Law No. 428 of December 29, 1990.

UK.

The rules on transfer of undertakings are contained in the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246), as amended ("TUPE").

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