Outsourcing in Europe: What Employers Need to Know

Wednesday, April 20, 2010
Introduction
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Under What Circumstances are Employees Transferred by Operation of Law and What Are the Consequences for the Employee
Introduction

• The EU Directive
• If the outsourcing is a transfer of an undertaking, the employees transfer automatically to the transferee with the same rights and obligations
• No choice! Also all ill, weak and underperforming employees
Germany

• Seven indicators for TUPE
  – Business of the company
  – Operative resources
  – Immaterial resources
  – Key staff
  – Customer relations
  – Similar business
  – Duration of business discontinuity

• No objection of the employee against transfer within one month
Germany

Consequences of TUPE:

- Transfer of the employment relationship to the business successor/ transferee with all rights and duties (including collective and works agreements)
- Exception: objection of the employee against transfer within one month → employment relationship “falls back” to transferor
- Remuneration of the employee remains (esp. pension claims → compensation by the transferor)
Netherlands

Three Conditions for a Transfer of an Undertaking

• There should be an ‘undertaking’
  o Spijkers-case: retain of identity
• The undertaking should transfer as a result of an agreement
• The employees should be employed by the undertaking on the basis of an employment contract and actually work for (part of) the undertaking that will transfer
Netherlands

The Court of Justice in the Albron-Case:

• In a context of a personnel company and an operational company the Directive does not prevent the non-contractual employer, to which employees are seconded on a permanent basis, from being likewise capable of being regarded as a “transferor”, within the meaning of the Directive.
Netherlands

Consequences for the Employee

• Employees transfer by operation of law with the same rights and obligations including any pension rights
• If the employee objects, the employment contract with the previous employer will end by operation of law at the time of the transfer
Basic Legal Acts

- EU Directive of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses, or parts of undertakings or businesses
- Art. 23¹ of the Labour Code, which implements the EU directive
- Art. 241⁸ of the Labour Code pertaining to the collective agreements application
- Art. 26¹ of the Trade Unions Act of May 23, 1991;
- The Work Councils Act of April 7, 2006
Poland

- All the elements of a pre-existing employment relationship (including arrangements pertaining to pensions) are transferred by operation of law once the conditions for the transfer of undertaking are fulfilled;

- Consequences for the employees: employees are bound by the provisions of the pre-existing employment contracts. Thus new employment agreements do not need to be executed.
Poland

Outsourcing:

- The outsourcing agreement between the entrepreneurs may never exclude the application of labor provisions regarding transfer of undertaking.
- Each employee whose main duties (i.e., more than 50%) are within the transferred/outsourced field of tasks is subject to transfer.
- Before the transfer, the former employer may formally move particular employees to other departments/tasks.
Poland

- Two factors are paramount: (i) the scope of tasks, and (ii) assets enabling execution of such tasks
- Mere takeover of tasks without taking over the assets is not sufficient
- The tasks being transferred do not need to be necessarily the same but similar in function and nature
- The identity of the enterprise (e.g., organization of work) is continued
- The wording of the outsourcing agreement and execution thereof are relevant
Poland

• No specific provisions exist in Polish law that would exclude the possibility of cross-border transfer

• Practical problems:
  – Automatic change of place of work - relocation of the employees to another country
  – Determining which national law applies

• Cross-border outsourcing is rarely qualified as transfer of undertaking

• Practical path:
  – Liquidation of an enterprise in one country;
  – Establishment of an enterprise in another country
India

- Limited jurisprudence relating to transfer of employees by operation of law
- Transfers arising from the sale of an independent business undertaking or unit → dealt with under the Industrial Disputes Act, 1947 [Section 25FF transfers]
- Includes a corporate merger or demerger
- Employee consent normally is a prerequisite for the transfer of employment, but not for the transfer of the business undertaking itself
India

- The transferring entity is obligated to pay “retrenchment compensation” to the employees if –
  - There is a break in their employment
  - They do not get same or better terms and conditions of service with the acquirer
  - They do not get continuity of service benefits with the acquirer [**The 3 conditions**]
India

- Mere transfer of employees from one company to another (which may arise in an outsourcing situation) → not statutorily addressed [Non-Section 25FF transfers]

- Ordinarily requires termination and re-hiring of the employee and payment of retrenchment compensation. Some companies try to avoid this liability by structuring it as a transfer that is similar to a 25FF transfer – i.e., the same service conditions and continuity of service are offered and employee consent is obtained.
United Kingdom

• **When does TUPE apply?**
  – Business asset purchase
  – Service provision change
  – Intra group transfer

• **Service provision changes**
  – Client to external contractor (outsourcing)
  – Existing contractor to new contractor (reassignment)
  – Contractor to client (insourcing)
United Kingdom

• **Who transfers?**
  – Organised grouping of employees
  – Principal purpose of which is to carry out the activities

• **Consequences for employees**
  – Transfer on existing terms and conditions
  – Pre-transfer liabilities
  – Collective agreements
  – Some early retirement benefits
  – Transfer related dismissals are automatically unfair unless and ETO
  – Changes to terms and conditions may be void
Harmonization and Termination
Germany

• **Before TUPE:**
  - Legal: dismissal by the transferor because of transferee’s concept
  - Legal: dismissal by the transferor for lack of employment (but: transferor may not have concrete plans about transfer)
Germany

• **After TUPE:**
  – Illegal: dismissal by the transferee because of the TUPE
  – Legal: termination by the transferor after objection for lack of employment (need for employment was also transferred)

• **Generally legal:** agreements on modification of employment (before and after the TUPE)
Netherlands

• Harmonization of employment conditions after the transfer?
  – ING/Astron-case: the observance of company-specific employment conditions whose observance is factually impossible cannot be demanded, but a compensation may be required

• Protection against dismissal, but termination due to ETO-reasons
  – Severance based on A x B x C-formula
Poland

- Transferee employer becomes the party to the existing employment contracts and is automatically bound by all of their provisions.
- The provisions of the transferor bylaws, remuneration terms etc. are considered a part of employment contract conditions;
- If the employees are covered by a collective labor agreement – the provisions thereof may not be changed for one year from the date of transfer.
Poland

Termination before the Transfer

- Only the existing employment contracts are transferred by operation of law
- A termination notice served before the transfer is effective upon the new employer, even if the notice time lapses after the transfer
Poland

Termination after the Transfer

• Within 2 months after the transfer the employee may terminate the employment relationship without notice, but with 7 days’ prior notification

• Sole transfer of undertaking may not constitute justified ground for termination of the employment agreement for the employer. Therefore such dismissal may be challenged at court

• General rules and procedures with respect to termination of the individual employment contracts apply

• Transfer may result with reorganization of the employer.
India

Section 25FF Business Transfer

• Transferee free to harmonize conditions of employment as long as the terms and conditions of service are no less favourable to transferred employees
• Employees who do not consent to the transfer may be terminated by the transferor along with payment of retrenchment compensation
• No service guarantee post transfer → transferee would be entitled to terminate for reasonable cause and after following valid procedure
India

Non-Section 25FF Transfer

- Harmonization depends largely on terms and conditions to which the employee consents.
- If same terms and conditions are offered, any harmonization would have to be carried out with this in mind.
- Pre- or post-transfer dismissals would have to be on justifiable grounds. Redundancy may be difficult to show if a small business function is being outsourced and the employee has skills to suit alternate roles remaining within the organization.
United Kingdom

Harmonising Terms and Conditions

• If a change is not transfer-connected, any change can be agreed with employees or an employer can dismiss and re-engage on new terms.

• If the reason for the change is the transfer, the change is void even if the employee agrees to it.

• Where changes are implemented an employee can "cherry pick" between the old and new terms.

• In practice, many employers harmonise and manage the risk.
United Kingdom

• Dismissals
  – Dismissals are automatically unfair unless for an ETO reason
  – An ETO is an economic, technical or organisational reason entailing changes in the workforce
  – In practice this means that workforce numbers/employee functions need to change
  – Genuine redundancies can be an ETO, but the ETO will belong to the transferee and there may be a need to "pool" transferring employees with the transferee's existing workforce
Information and Consultation Obligations
Germany

• Triggered by “change of business” according to German Works Constitution Act

• Information obligation:
  – Works Council, Economic Committee, and European Works Council in case of affection in German and EU companies
  – In due course and in detail before the process is started

• Consultation obligation towards the Works Council:
  – Good-faith negotiations to a Settlement of Interests
  – Negotiations of Social Plan
Germany

Information Claim of the Employee:

- By the former or new employer prior to transfer -- in written form
- Contents (high scrutiny of review by the labor courts): date of transfer, reason for the transfer, legal economic and social consequences of the transfer, measures considered with regard to the employees
- Consequences of defaulted/wrong information: deadline for the employee’s right to object to transfer of employment is triggered only by correct information letter
- Potential claims for damages
Netherlands

• Right of consultation of the Works Council
• Obligation to inform employees according to article 7:665a Dutch Civil Code
• The Dutch Merger Code: obligation to notify (and inform) the relevant trade unions and the secretary of the Social and Economic Council
• Obligation to notify (and inform) the relevant trade unions according to Collective Labour Agreement
Poland

- Information obligations imposed on both the transferor and the transferee with respect to:
  - Trade unions or
  - Employee representatives

- The transferor and the transferee employer must negotiate with the trade unions any planned changes in the employment conditions
Poland

• Information and consultation with the Works Council (if existing) – no particular time provided, but in due advance so that the Work Council’s suggestions may possibly be implemented

• Non-binding character of the consultations
Poland

- Joint liability of the former and new employer for obligations resulting from the employment relationships in case of transfer of part of the enterprise
- The successor employer must propose new contractual conditions for those performing work under other basis than employment contract
- The transferee is bound by the existing collective agreements’ terms and conditions and may not modify its provisions for the restricted period of **one year**. After that period, they may be modified pursuant to the general rules
India

- No explicit consultation requirements under Indian law for a business transfer
- Employee consent usually necessary to transfer the employment from the transferor to the transferee
United Kingdom

• **Three-step process**
  – Provision of employee liability information
  – Provision of measures letter
  – Inform and consult

• **The duty to inform**
  – The fact of the transfer, when and why.
  – The legal, economic and social implications
  – Any measures envisaged by the transferor and transferee
United Kingdom

• **The duty to consult**
  – Only arises where measures envisaged
  – "With a view to seeking agreement"

• **Timing**
  – “In good time….” before the transfer
  – Need to factor in time to elect representatives (where appropriate)
United Kingdom

• **Who to consult and/or inform**
  – Recognised trade union
  – If no trade union, then elected representatives
  – If no existing and appropriate representatives, then representatives will need to be elected

• **Consequences of failure to consult**
  – A protective award of up to three months of pay per affected employee
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