BONELLI EREDE PAPPALARDO
BREDIN PRAT
DE BRAUW BLACKSTONE WESTBROEK
HENGELER MUELLER
MANNHEIMER SWARTLING
ROSCHIER
SLAUGHTER AND MAY
URÍA MENÉNDEZ

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INFORMATION AND CONSULTATION OBLIGATIONS ON CORPORATE TRANSACTIONS

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1. INTRODUCTION

We are eight independent European law firms that have agreed to offer our own individual and collective expertise and abilities in relation to employment law issues across Europe.

Each firm is a leading law firm in its home jurisdiction. We together form the "Best Friends" Employment Group. Our home countries are Finland, France, Germany, Italy, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. We can draw on the specialist know-how of each firm to respond to any particular employment matter.

We each have our own employment practice, but it is the expertise of all our firms collectively that makes this group of leading Europe-based firms providing top-tier employment-related services stand out. Between us, we have made long-standing commitments to help foster connections at all levels, including investing in joint training and know-how projects.

Information and Consultation Obligations on Corporate Transactions

This joint briefing summarises the legal and regulatory framework which governs information and consultation obligations on corporate transactions in nine key European jurisdictions. The briefing focuses on asset transactions and covers the following areas:

- Is there an obligation to inform / consult and when is it triggered?
- Who must the company inform / consult?
- What information must be provided?
- What is the consultation process?
- How long will the process take and when should it be completed?

- What are the sanctions / penalties for non-compliance?
- What is the position on a share sale?

Each chapter has been written by a representative of the "best friend" firm in the relevant jurisdiction. The chapters demonstrate not only the similarities between the different jurisdictions based on their implementation of underlying European measures, but also the inherent differences between them which derive from their individual laws and approaches to employee consultation.

If you have any questions arising from the content of this briefing, please contact your regular legal contact or the contributor of the relevant chapter.

This guide is intended to provide a summary overview of certain important aspects of the law in the nine jurisdictions which it covers as at June 2014.The information contained in this guide is not intended to be used, and should not be used, as legal advice, either on general questions of any applicable law or on general questions relating to any specific transactions.

2. FINLAND

CONTACT: NINA ISOKORPI
Roschier
Keskuskatu 7A
FI-00100 Helsinki
Tel: **00 358 20 506 6000**
Email: **nina.isokorpi@roschier.com**

2.1. Is there an obligation to inform / consult and when is it triggered?

Provided that:

(A) the employer falls within the scope of application of the Finnish Act on Cooperation within Undertakings (334/2007, as amended, the "Codetermination Act"); and

(B) the asset sale constitutes a "transfer of undertaking",

there is an obligation to inform and, for the transferee, to enter into a dialogue with the employees. There is, however, no actual employee consultation obligation.

Collective bargaining agreements may also contain provisions concerning consultation obligations. Although such provisions do not generally deviate from those of the Codetermination Act, the applicable collective bargaining agreements should always be reviewed before any contemplated measures are undertaken.

Scope of application of the Codetermination Act

The provisions regarding information obligations relating to corporate transactions (i.e. transfers of undertakings and statutory mergers and demergers) in the Codetermination Act apply to Finnish employers regularly employing at least 20 employees. Part-time and fixed-term

employees are also included (and each count as one employee) if they can be considered to be employed regularly.

As regards companies regularly employing 1 to 19 employees, there is no statutory obligation to provide information under the Codetermination Act.

Transfer of undertaking ("TUPE transfer")

The Council Directive 2001/23/EC (Acquired Rights Directive) has been implemented in Finland and thus the definition of a transfer of undertaking under Finnish employment law is similar to the definition in the Directive.

A transfer of an undertaking is defined as the transfer of an enterprise, a business, a corporate entity, a foundation or an operative part thereof to another employer while the transferred business remains the same or similar after the transfer. Since the definition is not exhaustive, the question of whether a business transaction constitutes a transfer of undertaking is determined on a case-by-case basis.

There are three main preconditions which need to be fulfilled in order for a business transaction to be deemed a transfer of undertaking:

(A) **Legal connection between the transferor and the transferee**. The connection usually arises from the business transaction (e.g. business purchase agreement, asset purchase agreement or similar), but the connection can also be indirect.

(B) **Transfer of an operational business entity**. An operational entity is an organised combination of employees, assets and other resources which is or could be used to carry on independent business operations.

(C) **Continuity of operations**. The business should be ongoing at the time of the transfer and the transferee should continue to operate the business without significant interruption. However, short breaks (for example due to renovations or other practicalities) do not prevent the transaction from being considered a transfer of undertaking.

If the above preconditions are fulfilled and the transferee continues to operate the transferred business as such or in a similar way while the transferor ceases such business, it is likely that the transaction would be considered to constitute a transfer of undertaking.

The transaction is assessed in its entirety and no individual component of the transaction is decisive. Depending on the field of business in question, the different components of the business entity may, however, have different relevance in the assessment of whether the transaction constitutes a transfer of undertaking. In a business which is labour-intensive, the transfer of employees can be the single most decisive factor. On the other hand, if the business is asset-intensive, the transfer of the production facilities, machinery or trading assets can be decisive.

Information obligation

The Codetermination Act provides for an information obligation on the transferor and the transferee in relation to the transfer of undertaking. It consists of:

(A) an obligation on both the transferor and the transferee to provide certain information to the employees, and

(B) an obligation on the transferee to participate in dialogue with the employee representatives.

The transferor must provide the information well in advance of the completion of the transfer. This usually happens between the signing and the closing but may be before signing if it is simultaneous with (or happens only shortly before) the closing.

2.2. Who must the company inform / consult?

The information must be provided to the representatives of the employee groups concerned. The employees may be represented by a shop steward or a specifically elected employee representative(s). If there are no employee representatives, the information must be provided to all in-scope employees.

2.3. What information must be provided?

The employee representatives (or the employees) must be provided with the following information:

(A) the time, or the estimated time, of the transfer;

(B) the reasons for the transfer;

(C) the legal, economic and social consequences of the transfer for the employees; and

(D) any contemplated actions concerning the employees.

There is no statutory obligation to negotiate with the employees or their representatives about the transfer of undertaking as such. However, any relevant changes impacting the employees prior or after the transfer, such as changes in the organisation of the work, working hours, or redundancies or other reductions in the usage of the work force, must be consulted on with the employees separately as set forth in the Codetermination Act.

The relationship between the information obligation provided for in the codetermination legislation and the obligation not to disclose insider information provided for in the securities market legislation has recently been the focus of some attention. The Finnish Codetermination Ombudsman issued a statement noting that public listed companies are obligated to comply with the obligations of the Codetermination Act, even if by complying they would need to

disclose insider information. The Codetermination Ombudsman's statements are not legally binding and any dispute relating to them would be finally settled by a court.

2.4. What is the consultation process?

Unlike with consultation processes relating to reductions of the workforce, the process to be followed is quite simple and not very strictly regulated as regards, for example, timing.

Step 1: The transferor to provide information well in advance prior to closing. The transferor shall provide available information in its possession (see section 2.3 above) well in advance prior to the execution of the transfer (i.e. closing). The law does not stipulate any minimum time period required for what is considered "well in advance", but often the deadline is regarded as a few weeks in advance of the actual execution of the transfer.

There is one recent district court case in which the court held that informing the employees 7.5 hours in advance of the execution of the transfer could not be considered to be "well in advance". The company has appealed and the case is currently pending with the Court of Appeal. It seems that in the future the transferors will have to consider even more carefully the structure and timing of transactions.

Step 2: The transferee to provide information within a week from closing. The transferee shall provide the aforementioned information (see section 2.3 above) to the employee representatives within a week from the execution of the transfer.

Step 3: The transferee to participate in a dialogue with the employee representatives after providing the information. After providing the information, the transferee shall provide the employee representatives (or the employees) with the opportunity to pose clarifying questions, and the transferee has an obligation to provide answers to the questions posed. The Codetermination Act does not prescribe any minimum time period for such dialogue but the purpose is to reduce uncertainty often related to transfers of undertaking.

Further, upon the employee representatives' request, the employer has to present the questions and answers thereto to the entire personnel of the undertaking in accordance with the principles and practices of the undertaking's internal communication.

It is possible for Steps 1 and 2 to be combined so that the transferee participates in the transferor's information process and provides the information simultaneously with the transferor.

The Finnish Codetermination Ombudsman has recently issued a statement noting that the procedure (including the negotiations and all material relating to the process) shall be carried out either in Finnish or Swedish. In addition it is possible to use other languages (e.g. English).

2.5. How long will the process take and when should it be completed?

As there are no strict rules regarding the timing of the information obligation, and as the duration depends on how the different meetings with the transferor and the transferee are arranged, it is not possible to provide an exact duration for the process. In practice the information is provided in an information meeting that may take anything between 30 minutes and several hours. There is no long-stop date for the subsequent dialogue between the transferee and the employees, but it seldom takes very long.

2.6. What are the sanctions / penalties for non-compliance?

If the employer intentionally or negligently fails to observe or violates the duty to provide the information as required by the Codetermination Act, its relevant representatives, i.e. the individuals who act or should have acted for the employer, shall be fined for violation of the co-operation obligation. The transferee's failure to participate in the dialogue is not, however, sanctioned. In theory, compensation for damages incurred by the employees due to the breach could also be sought, although evidencing such may be difficult in practice.

2.7. What is the position on a share sale?

Share sales, where the employer of the transferring company's employees remains the same (i.e. the company whose shares are being sold), are not considered a transfer of undertaking under Finnish law. Consequently, there is no statutory information or consultation obligation with regard to them. However, it is always recommended to check the potentially relevant provisions in the applicable collective bargaining agreement.

As noted above, statutory mergers and demergers are subject to same information obligations as asset sales.

Under the Securities Market Act (746/2012), a decision to issue a public tender offer must be given to the target company's employee representatives or, in the absence of such, to the employees, without delay. Also subsequent information and the tender offer shall be provided for their information. Further, the target company must publish its opinion of the bid and when making the opinion public, communicate it to employee representatives or, where there are no such representatives, to the employees. The opinion must set out a well-founded assessment of, among other things, the strategic plans of the target presented in the offer document and of their likely repercussions on the operations and employment of the target company.

As with asset sales, in the case of share deals any relevant changes impacting the employees prior or after the transfer, such as changes in the organisation of the work, working hours, or redundancies or other reductions in the usage of work force, must be consulted on with the employees separately as set forth in the Codetermination Act.

3. FRANCE

CONTACT: PASCALE LAGESSE
Bredin Prat
130, rue du Faubourg Saint-Honoré
75008 Paris
Tel: **00 331 44 35 35 35**
Email: **pascalelagesse@bredinprat.com**

3.1. Is there an obligation to inform / consult and when is it triggered?

Under French Law, the works council must be informed and consulted on events relating to the general operation of the company, especially (but not only) when these events have employment-related consequences.

This would be sufficient basis for consultation. However, Article L. 1224-1 of the French Labor Code provides that "*if a change occurs in the legal situation of the employer, notably by succession, sale, merger of the business, incorporation as a company, all the employment contracts, effective on the date of the change, are maintained between the new employer and the employees of the business*".

Accordingly, where an asset sale triggers the application of TUPE Regulations, the employee representatives of the relevant companies must be consulted on the contemplated transaction.

TUPE Regulations usually apply when the asset sale consists of the transfer of an autonomous economic entity that maintains its identity following the transfer. According to French case law, an "economic entity" is defined as an organised combination of persons and tangible and/or intangible assets allowing the operation of an activity that has its own purpose. The notion of an "economic entity" is interpreted on a case-by-case basis and French Supreme Court case

law requires that courts review a number of criteria in this respect, which may include the following:

(A) whether there is a distinct clientele;

(B) whether the employees are specifically dedicated to the business;

(C) whether specific operational means (equipment, offices, intangible assets, etc.) are allocated to the activity; and

(D) whether the activity is organised as a distinct business unit.

In addition, for TUPE Regulations to apply, the "economic entity" that is transferred must maintain its identity. This means that the transfer of the business must not result in a significant change in its nature, and must involve similar employment possibilities (i.e. positions requiring equivalent qualifications).

3.2. Who must the company inform / consult?

Both the transferor and the transferee must inform and consult their respective works councils (if any) on the proposed transfer. Only the employee representative bodies must be informed and consulted on the transaction (i.e. not the trade unions or the employees).

In addition, where an asset sale will have an impact on working conditions and/or health and safety, which is the case when the asset sale triggers the application of TUPE Regulations, the Health and Safety Committee must also be consulted.

3.3. What information must be provided?

Under French Law, "*the employer must indicate the reasons for the contemplated transaction and consult the works council on the contemplated measures regarding the employees when the modifications would impact them*" (Article L.2323-19, §2).

Whilst there is no legal list of what needs to be provided to the works council, the following information is typically given:

(A) **Description of the contemplated transaction**, including presentation of the entities involved, the legal framework of the contemplated transfer, the reasons for the contemplated transfer, and the envisaged terms and conditions for completion of the contemplated transfer (namely, a basic description of the various legal and practical steps for the transaction).

(B) **Social consequences,** including rights deriving from the employment contracts and from collective benefits, and the consequences for the employee representative bodies.

(C) **Anticipated timetable** (which should set out the key dates for the completion of the transaction).

3.4. What is the consultation process?

The consultation procedure involves the works council issuing an opinion on the contemplated transaction.

The procedure is carried out by the management of the entity that is under the obligation to inform and consult their employee representatives on the contemplated transfer.

For the works council to be in a position to express an opinion, the employer must provide it with all necessary information regarding the contemplated transaction, and the works council must have sufficient time to review this information.

Upon completion of the consultation process, the works council must hold a vote and give its opinion on the contemplated transaction. The employer is not bound by the works council's opinion (whether positive or negative); however, it is necessary to obtain the works council's opinion.

3.5. How long will the process take and when should it be completed?

The consultation process starts on the day management provides the works council with all necessary information on the contemplated transaction. Pursuant to a Law of 14 June 2013, which was supplemented by a Decree of 27 December 2013, the duration of the consultation procedure is now determined by agreement between the company and the works council. If no agreement can be reached, the maximum duration is as follows:

(A) One month from the time the employer provided the works council with the necessary information;

(B) Extended to two months if the works council appoints an "expert" to assist it during the consultation process;

(C) Extended to three months if the Health and Safety Committee has to be consulted on the contemplated transaction. Should the asset sale involve a transfer of employees, the Health and Safety Committee would, in principle, have to be consulted. In this respect, the relevant Health and Safety Committee should have rendered its opinion on the transaction (whether positive or negative) at the latest seven days before the end of the time period to consult the works council, namely seven days before the end of the third month;

(D) Extended to four months if several Health and Safety Committees have to be consulted and a coordination structure is set up.

If, at the end of the above maximum deadlines, the works council has not yet rendered an opinion on the transaction, it will be deemed to have rendered a negative opinion on the transaction and the employer can normally move forward. The Administrative Authority considers that the same rules should apply regarding the opinion of the Health and Safety Committee.

Notwithstanding this rule, it is important to note that the consultation procedure may continue beyond these deadlines if the works council takes legal action to have the consultation procedure delayed on the basis that it did not receive sufficient information on the transaction.

The consultation procedure must be completed before any "decision in principle" is made on the contemplated transaction, which, in practice, translates as prior to the execution of the acquisition agreement.

3.6. What are the sanctions / penalties for non-compliance?

Failure to comply with consultation obligations may result in the criminal offence of "*délit d'entrave*," which is punished by one year's imprisonment and/or a fine of €3,750 for the legal representative of the company and €18,750 for the company itself.

However, failure to consult with the employee representatives would not, in principle, cause the transaction to be rescinded.

In addition to taking criminal action, the employee representatives could ask the courts to suspend the implementation of the transfer until the consultation process has been completed (and request damages). The risk of such an action being taken by the employee representatives mainly depends on the company's past experiences and its relationship with its employee representatives.

3.7. What is the position on a share sale?

In principle, TUPE Regulations do not apply to a take-over of a company by way of acquisition of its share capital. In such a case, the employees continue to be employed by the same company.

However, under French Law, "*the works council must be informed and consulted* ***on the modification of the economic or legal organisation of the company****, especially in case of merger, transfer, important modification of the production structure of the company as well as in*

*case of the **acquisition or sale** of subsidiaries pursuant to Article L.233-1 of the French Commercial Code. (…) The employer must also consult the works council when he acquires a stake in a company and must **inform the works council as well when he becomes aware that a stake has been acquired in its Company**.* " (Article L.2323-19 of the French Labor Code)

Therefore, the question as to whether a share sale would trigger the consultation of the employee representatives would depend on the structure of the contemplated transaction as well as the impact that it would have on the control of the company.

In the event of a direct change of control of the company resulting from a share sale of the "target": French law is very clear on the fact that it is necessary to consult the works council of the "target", and also of the "seller" and "buyer", even in the case of a mere intragroup restructuring.

In the event of an acquisition of a minority stake that *does not* trigger a change in control: in principle, there is no obligation under the French Labor Code to consult the works council of a French company prior to the acquisition of a stake. However, the works council would have to be informed of the contemplated transaction pursuant to Article L.2323-19 §3 of the French Labor Code.

In the event of an acquisition of a minority stake that *does* trigger a change of control of the company, consultation would be required on the basis of Article L.2323-19.

In the context of an indirect change of control of the company resulting from the share sale of its parent company: in principle, there is no obligation under the French Labor Code to consult the works council of a French company prior to the sale of the shares of its parent company. However, there are ongoing debates in this area, and practice varies depending on the nature of the transaction, the impact that it is likely to have on the employees and the nature of the relationships with the staff representatives.

The Health and Safety Committee may also have to be consulted, depending on whether the transaction would have an impact on the working environment of the employees of the target company (e.g. change of duties, working organisation, place of work, secondments etc).

As stated above, the maximum deadlines for these works council consultations would be between 15 days and four months; however it is rare for the Health and Safety Committee to have to be consulted in a share sale situation, which caps the maximum duration of the consultation process at two months.

The consultation process with the employee representatives as well as the related sanctions would be the same as those described above.

4. GERMANY

CONTACT: HANS-JOACHIM LIEBERS
Hengeler Mueller
Bockenheimer Landstraße 24
D-60323 Frankfurt am Main
Tel: **00 49 69 170 950**
Email: **joachim.liebers@hengeler.com**

4.1. Is there an obligation to inform / consult and when is it triggered?

Information to Employees:

An asset sale can trigger the obligation to comprehensively inform the employees about the transaction if a transfer of business (*Betriebsübergang*) in terms of Section 613a German Civil Code takes place. According to Section 613a para. 5 German Civil Code, the previous or the new owner must notify the affected employees in text form prior to the transfer.

A transfer of business in terms of Section 613a of the German Civil Code requires that a business (*Betrieb*) or a part of a business (*Betriebsteil*) is transferred to a new owner. The Federal Labour Court has defined a business as a lastingly organised entity of individuals and assets which has the objective of pursuing an economic activity with a purpose of its own and the identity of which is defined by its activities, personnel, management, business organisation and methods as well as the assets available to it. A transfer of business takes place if the identity of the business or part of the business is preserved after the transfer.

A transfer of business in terms of Section 613a German Civil Code has the consequence that all existing employment relationships, including all rights and obligations under the various employment contracts, which exist at the time of the transfer of business and are assigned to the business or the part of the business transferred, transfer to the new owner by operation of law.

According to Section 613a para. 6 German Civil Code, each employee may object to the transfer of employment within one month of receiving information about the transfer. In this event, the contract of employment remains in force with the seller, but the seller may be entitled to terminate the contract of employment if there is no longer any suitable job for the objecting employee.

Information to the Economic Committee:

An asset sale and a transfer of business or part of a business must be reported to the relevant Economic Committee (*Wirtschaftsausschuss*), if any. The Economic Committee is a special body for the discussion of economic matters. An Economic Committee must be established in companies with a works council which regularly employ 100 or more employees.

Only in case of Operational Change - Information / Consultation with the Works Council and Negotiation of a Compromise of Interests:

German law has not incorporated a duty to consult with employee representatives in the context of a business transfer. However, pursuant to Section 111 German Works Constitution Act a company with 20 or more employees must timely and comprehensively inform and consult the competent works council if, in connection with the contemplated transaction, operational changes to a business (*Betriebsänderungen*) are planned which may have detrimental effects for employees. For example, mass redundancies, relocation of the business, split of the business or combination with another business and/or new working methods will generally constitute an operational change within the meaning of Section 111 German Works Constitution Act.

4.2. Who must the company inform / consult?

Information to Employees:

The current or future employer (i. e. the seller or acquirer of the business) must inform all employees who are affected by the transfer of business to the purchaser. Only true

employments are affected by the transfer; managing directors, pensioners or former employees are not transferred to the purchaser by operation of law and, therefore, do not have to be provided with information about the transfer.

Information to the Economic Committee:

The seller has to inform the relevant seller's Economic Committee (if any), and the purchaser has to inform the purchaser's Economic Committee (if any), about the contemplated asset sale.

Only in case of Operational Change - Information / Consultation with the Works Council and Negotiation of a Compromise of Interests:

If an operational change is given, the employer must enter into a consultation and negotiation process with the works council competent for the respective business which is transferred to the purchaser.

4.3. What information must be provided?

Information to Employees:

The following information must be provided to the employees: information on the purchaser, the (intended) time of the transfer, the economic reasons for the transfer, its legal, economic and social consequences for the employees as well as any measures envisaged that will have an impact on the employees.

Information to the Economic Committee:

The Economic Committee must be informed about the planned transaction, including the deal structure, the economic reasons for the transaction, its economic consequences and about the transfer of the employees. The Economic Committee must be provided with all information necessary to form an opinion on, and assess the consequences of, the intended transaction.

Only in case of Operational Change - Information / Consultation with the Works Council and Negotiation of a Compromise of Interests:

If an operational change is planned, the employer has to comprehensively inform the works council about the scope of the measure, its economic reasons, its consequences for the employees and the envisaged time table. The works council must be provided with all information required to subsequently enter into negotiations with the employer about the implementation of the operational change and about a social plan by which the detrimental effects for the employees shall be mitigated or compensated.

4.4. What is the consultation process?

Information to Employees:

The information required by Section 613a para. 5 German Civil Code must be given by the current or the future employer before the transfer takes place. The information must be provided in text form which includes electronic means of communication. Employees are usually informed through an information letter which is prepared by the seller, the purchaser or both parties together.

Information to the Economic Committee:

The German Works Constitution Act does not provide for a special form of the information to be given to the Economic Committee. Usually, a written information letter (sometimes together with oral information) is provided.

Only in case of Operational Change - Information / Consultation with the Works Council and Negotiation of a Compromise of Interests:

As explained above, the transfer of a business as such is not subject to any co-determination rights of the works council. In many cases however, particularly if only part of a business is being transferred, the transfer will constitute an operational change under section 111 German

Works Constitution Act, resulting in a right of the seller's works council to negotiate with the seller a compromise of interests (*Interessenausgleich*) in order to structure the measures to be taken in the course of the transaction, and a social plan (*Sozialplan*) under which adverse effects for the employees concerned are financially compensated or mitigated.

If no agreement can be reached between the employer and the works council on the compromise of interests, a conciliation board (*Einigungsstelle*) has to be established, consisting of an equal number of employer and employee representatives with a neutral chairman. The chairman can either be appointed by mutual selection of the parties or by a labour court upon the motion of one party. The appointment of the chairman by a labour court is subject to an appeal procedure so that the works council has ample opportunities to delay the conclusion of a compromise of interests and social plan although it cannot prevent the operational change, since any suggestion of the conciliation board concerning the compromise of interests is not binding on the employer. After the employer has exhausted the various procedural steps concerning the compromise of interests, the suggestions of the conciliation board can therefore be ignored and the original plan can be maintained. In practice, legitimate delaying tactics are frequently used to improve the works council's bargaining position in relation to the social plan negotiations. If no agreement can be reached on the social plan, the conciliation board determines a social plan which is then principally binding to both parties.

4.5. How long will the process take and when should it be completed?

Information to Employees:

Since the employees have to be informed in detail about the transaction and their transfer to the purchaser, the time required for the preparation of the information letters depends on the complexity of the transaction and the complexity of the existing terms and conditions of employment (e.g. existence of collective bargaining agreements / company pension schemes). A minimum of one to two weeks is typically considered necessary to draft the information letters.

According to Section 613a German Civil Code, the employees have to be informed in text form *prior to the transfer of business or part of the business* but the law does not define an exact point in time for providing the information. The current and the future employer, however, have to consider that the receipt of the information letters triggers the one-month period during which the employees can object to their transfer to the new employer. Therefore, it is typically advisable to deliver the information letter to the employees at least one month prior to the transfer date.

Information to the Economic Committee:

The Economic Committee has to be informed about the intended transaction during the planning phase. The information has to be given in a timely manner before the transfer is effected.

Only in case of Operational Change - Information / Consultation with the Works Council and Negotiation of a Compromise of Interests:

The information and consultation with the works council about a social compromise and plan of interests have to be conducted prior to the actual implementation of the operational change. The operational change must not be implemented before the statutory procedure is completed. The duration of the information and consultation process is not determined and depends on the complexity of the intended operational change, the willingness of the works council to cooperate and whether or not a conciliation board has to be established. A typical time frame is two to six months.

4.6. What are the sanctions / penalties for non-compliance?

Information to Employees:

There is no sanction as such if the employer does not properly inform the employees about their transfer within the framework of the asset sale. However, as explained, the receipt of a proper information letter triggers the one-month period during which the employees can

object to their transfer to the new employer. This one-month period does not start to expire if the information provided by the employer is incorrect or incomplete. Instead, for employees who have not been properly informed about the transfer, there is no concrete time limitation for exercising their right to object against the transfer to the new employer. They may object to their transfer until the right to object is considered forfeited (*Verwirkung*). This issue of purported improper information is regularly raised when an employer plans redundancies or other measures which are detrimental to the employees, or falls insolvent after a transfer of business and the employees, by objecting to the transfer, try to become employees of the seller again.

Information to the Economic Committee:

Non-compliance with the obligation to inform the Economic Committee about an intended asset deal is subject to an administrative fine of up to €10,000 (Section 121, para. 2 German Works Constitution Act). The failure to inform the Economic Committee would not, however, not affect the validity of the acquisition agreement.

Only in case of Operational Change - Information / Consultation with the Works Council and Negotiation of a Compromise of Interests:

Depending on the competent court, the works council in some regions of Germany can stop the implementation of measures which are considered as an operational change by court order if the employer has not completed the required consultation process with the works council beforehand. Non-compliance with the obligation to inform and consult with the works council about an operational change can also be subject to an administrative fine of up to €10,000 (Section 121 para. 2 German Works Constitution Act). Furthermore, in case of a gross infringement of the works council's co-determination rights, the works council can file a claim at the labour court requesting a fine up to €10,000 on the employer.

4.7. What is the position on a share sale?

No Information Obligation towards Employees:

If an acquisition is structured as a share transaction, the identity of the employer remains unchanged. This is true for the acquisition of both shares in a corporation and interests in a partnership. A share deal will neither affect existing employment relationships, nor any of the mutual rights and duties under existing labour contracts. Therefore, there is no statutory obligation to inform the employees about share sales.

Information to the Economic Committee:

A share transaction is, in general, not subject to any co-determination or participation rights, except for an obligation to inform the Economic Committee in due time before the transaction is completed (Section 106 para. 2 German Works Constitution Act). Non-compliance is subject to an administrative fine of up to €10,000 (Section 121 para. 2 German Works Constitution Act), but the failure to inform the Economic Committee would not affect the validity of the acquisition agreement.

If an Economic Committee has not been established at the company, although the company employs more than 100 employees, the works council has to be informed instead.

Only in case of Operational Change - Information / Consultation with the Works Council and Negotiation of a Compromise of Interests:

If the share sale is accompanied by an operational change, the employer has to inform the competent works council for the respective operation and has to enter into a consultation and negotiation process with it, as for an asset deal.

5. ITALY

CONTACT: MARCO MANISCALCO
Bonelli Erede Pappalardo
Via Barozzi, 1
1-20122 Milano
Tel: **00 39 02 771 131**
Email: **marco.maniscalco@beplex.com**

5.1. Is there an obligation to inform / consult and when is it triggered?

Information and consultation obligations are provided for by Section 47 of Law 428/1990, on a transfer of business (or transfer of part of a business) which employs more than 15 employees (irrespective of the number of employees who are actually transferred).

A transfer of business is defined by the Italian Civil Code as: "*any transaction which, upon execution of a sale agreement or of a merger, results in the change of ownership of an organised economic activity*". This definition is applicable regardless of the kind of agreement or provision pursuant to which the transfer is executed.

The subject matter of the transfer must be an organised economic activity; or, in the case of a transfer of part of a business, a functional and autonomous part of an organised economic activity which can be identified as such by the transferor and the transferee at the moment of the transfer.

The information and consultation obligations must also be fulfilled in the event that the decision concerning the asset sale is taken by a parent company. The failure by the parent company to provide the necessary information on the transfer of business does not justify the breach of the information and consultation obligations carried out by the transferor and the transferee.

5.2. Who must the company inform / consult?

Both the transferor and the transferee must provide, in writing, certain information to work councils and to the trade unions that signed the collective agreements enforceable within the companies. If there are no work councils, information must also be given to the most representative among the general trade unions.

Usually, the transferor and the transferee deliver a joint letter to communicate the transfer to all the relevant work councils/trade unions.

5.3. What information must be provided?

The information which must be given is as follows:

(A) the fact that a relevant transfer is to take place;

(B) the date or proposed date when the transfer is to take place;

(C) the reasons for it;

(D) the legal, economic and social implications of the transfer for the affected employees; and

(E) the measures that the employer will take in relation to those employees.

5.4. What is the consultation process?

The consultation process is a joint examination concerning the transfer of a business, which takes place between the work councils/trade unions and the transferor/transferee.

The procedure aims to inform works councils/trade unions of the actual consequences of the transfer on the employees and the future business strategies of the transferee.

The Italian legislation does not provide specific indications as to the object of the consultation process. However, it is generally recognised that the consultation must cover all the issues related to the effects of the transfer of the business on the affected employees. In particular, the parties could discuss any suggestions and alternative options, proposed by the work councils/trade unions, capable of affecting in a less severe way the conditions of the involved employees.

5.5. How long will the process take and when should it be completed?

According to Article 47 of Law 428/1990, the consultation procedure will be as follows:

(A) at least 25 days before the deed of transfer is executed or, if earlier, before a "*binding agreement*" between the parties is reached, both the transferor and the transferee must provide, in writing, the above-mentioned information to the work councils/trade unions;

(B) within seven days from the receipt of the information, the works councils/trade unions are entitled to request a joint examination to discuss the matter;

(C) within seven days from the receipt of the request, negotiations must begin; and

(D) ten days after the beginning of negotiations, the joint examination is considered complete, even if the parties have not agreed upon the terms of the transfer.

5.6. What are the sanctions / penalties for non-compliance?

Once the transferor and the transferee have performed their information obligations, the work councils/trade unions have no right to question the transfer.

If however the transferor or the transferee fail to inform or consult the works councils/trade unions, they might be subjected to anti-union behaviour. This might lead to an injunction to terminate the unlawful behaviour, to halt the effects of the transfer on the affected employees

and/or to pay compensation for damages (a few decisions of the employment courts have also deemed the entire transfer as invalid or totally/partially ineffective).

5.7. What is the position on a share sale?

The above-mentioned Italian employment law provisions concerning the transfer of business do not apply in case of share deals (e.g. purchase/acquisition of shares).

However, national collective bargaining agreements may provide specific obligations and procedures for the purchaser and the seller. For example, according to Article 17 of the national collective bargaining agreement for credit and financial companies, in the event that the controlling shares are sold, the parties to the transaction shall immediately inform the trade unions and verify with them whether the operation has an impact on the working conditions of the affected employees. If so, the parties must fulfil certain information and consultation obligations according to a procedure which is different in terms of duration, but similar in terms of scope and structure to the one provided by law in case of transfer of business. Once the transferor and the transferee have performed the information and consultation obligations, the work councils/trade unions have no right to question the share sale.

There may also be other information or consultation obligations which arise, as a result of circumstances directly or indirectly linked to the share sale. The main examples are:

(A) Collective redundancies: information and consultation obligations are triggered when an employer, who employs more than 15 employees, proposes to dismiss as redundant at least five employees in the same establishment or in the same jurisdiction of a given province, within a period of 120 days, giving as a reason the reduction or transformation of the business or the intention to cease carrying on the business. In these circumstances, the employer must follow a specific consultation procedure which starts with a written notification to the work councils and to the trade unions of the relevant sector, providing specific information. Within seven days from the date of receipt of notice, if requested by the trade unions representatives, the parties must meet to discuss the reasons for the redundancy and the possible alternatives to the envisaged collective dismissal.

Consultation can last up to approximately 90 days (worst case scenario), after which the company may notify the redundant employees of the termination of their contracts, regardless of whether an agreement has been reached by the end of the consultation procedure.

(B) **Specific agreements at company level**: information and consultation obligations may also arise if an agreement with a trade union or works council exists to that effect.

6. THE NETHERLANDS

CONTACT: EVERT-JAN HENRICHS
De Brauw Blackstone Westbroek
Claude Debussylaan 80
P.O. Box 75084
1070 AB Amsterdam
Tel: **00 31 20 577 1550**
Email: **evertjan.henrichs@debrauw.com**

6.1. Is there an obligation to inform / consult and when is it triggered?

Business transactions which involve an asset deal are subject to the Dutch Civil Code (the "**DCC**"), as well as the Works Council Act (*Wet op de ondernemingsraden)* (the "**WCA**").

Dutch Civil Code

The DCC applies to a "transfer of undertaking" i.e. if: *"an economic unit arising from a contract, merger or division transfers from the transferor to the transferee; provided that the economic unit retains its identity (after the transfer)"* (Article 7:662).

A share acquisition that does not change the identity of the employer is excluded from the applicability of the DCC. The same applies if the employing undertaking merges with another undertaking by means of a legal merger. See further section 6.7 below.

There are no separate information and consultation provisions under the DCC. Information and consultation on an asset deal is instead prescribed by the WCA.

Works Council Act

According to the WCA, an entrepreneur maintaining an enterprise in which at least 50 persons are employed is obliged to establish a Works Council for the purposes of consultation with and representation of the employees of the enterprise. The obligation to establish a Works Council may also result from a provision to this effect in a Collective Bargaining Agreement ("**CBA**"), in which case the WCA will remain applicable.

An entrepreneur who maintains more than one enterprise may establish a Central Works Council for all the enterprises, and is obliged to establish one if this is demanded by the majority of the Works Councils in the enterprises involved. The Central Works Council only deals with those matters which are "of common interest" to all or the majority of the enterprises for which it has been established.

6.2. Who must the company inform / consult?

The members of the Works Council are elected directly by the persons employed in the enterprise from among their own ranks. The number of members will depend on the number of employees in the enterprise and will vary from three members to a maximum of 25 members,

6.3. What information must be provided?

The Works Council is entitled to receive all information (if it so requests in writing) which it reasonably needs to properly perform its duties. The entrepreneur is required to provide the Works Council at the beginning of its session with general information on subjects such as the legal and organisational structure of the enterprise. The entrepreneur must also provide the Works Council with information on a long-term plan, if any. The (consolidated) annual accounts and the annual report of the company must be submitted to the Works Council as soon as possible after they have been adopted.

Furthermore, the entrepreneur must provide the Works Council at least twice a year with:

(A) oral or written information regarding the activities and the results of the enterprise in the preceding period (especially referring to those matters on which the prior advice of the Works Council is required and on his expectations for the activities and the results of the enterprise and all investments in the Netherlands or abroad in the next period); and

(B) written information on the composition of the work force and on the social policy of the enterprise in the preceding year as well as on the expectations on the development of the staff.

6.4. What is the consultation process?

Under the WCA the Works Council has three separate rights: a right of consultation, a right to render advice, and a right of approval.

(A) Right of consultation

The entrepreneur and the Works Council must hold a consultation meeting within two weeks after a request by either the entrepreneur or the Works Council. Furthermore, at least six general consultation meetings per year must be held in order to discuss matters on which consultation is mandatory by virtue of the WCA. The Works Council is entitled to submit proposals on these matters and to present its views.

At least twice a year the general course of business must be discussed during a consultation meeting. If the enterprise is a public limited company (*naamloze vennootschap* or N.V.) or private limited company (*besloten vennootschap met beperkte aansprakelijkheid* or B.V.) the supervisory board (if any) (or a representative thereof) must also be present at the meetings. If at least half of the share capital of the company is held directly or indirectly by another company, the managing board (or a representative) of the parent company must also be present.

(A) Right to render advice

An entrepreneur must request the prior advice of the Works Council regarding specific proposed decisions (and the implementation thereof) on such "business" matters as, for example:

(A) the transfer of control of the enterprise or any part thereof;

(B) the establishment, takeover or disposal of control over another enterprise;

(C) the termination of the activities of an enterprise or a substantial part thereof;

(D) a substantial reduction, expansion or other change in the activities of the enterprise; and

(E) a substantial change in the organisation of the enterprise or in the allocation of the authority within the enterprise.

The request for advice should describe the proposed decision and the reasons for it, as well as the anticipated consequences of the decision for the employees working in the enterprise and the measures which the entrepreneur intends to take to mitigate such consequences. The proposed decision should be the subject of discussion in at least one consultation meeting.

After advice has been rendered, the entrepreneur is free to make a decision either following the advice or not. The entrepreneur should, as soon as possible after the decision has been made, give written notice of his decision to the works council. If the decision is not (completely) in conformity with the Works Council's advice, the entrepreneur must explain to the Works Council in writing why he has deviated from the advice, and cannot implement the decision during a waiting period of one month from the date of the decision.

(A) Right of approval

An entrepreneur should request the prior approval of the Works Council in respect of specific proposed decisions concerning the introduction, modification or repeal of "social" regulations within the enterprise, such as regulations on pension schemes, on profit sharing or saving plans, on working hours or holidays and on salary or job classification systems. The entrepreneur must submit the proposed decision in writing, presenting a summary of the reasons for the decision as well as the anticipated consequences for the employees in the enterprise. The proposed decision should be the subject of discussion in at least one consultation meeting. Prior approval of the works council is not required if and to the extent that the subject concerned has already been dealt with in a CBA.

If the entrepreneur does not obtain the approval of the Works Council he can request permission from the Subdistrict Court to make the proposed decision. The Subdistrict Court will give this permission only if the decision of the Works Council to refuse its approval is unreasonable or if the proposed decision of the entrepreneur is based on important organisational, economic or social reasons.

6.5. How long will the process take and when should it be completed?

There are no strict time periods under the WCA. In terms of the right to render advice, the advice must be requested at such a time that the advice can still substantially influence the decision to be made. The Works Council must be given a reasonable period to render its advice, which in practice may vary from a few weeks to several months. Delay is caused in most cases by the Works Council asking for more information or proposing alternatives.

6.6. What are the sanctions / penalties for non-compliance?

The Works Council may institute legal proceedings against the entrepreneur to enforce its rights.

In terms of the right to render advice, the Works Council may lodge an appeal with the Enterprise Chamber of the Amsterdam Court of Appeals (*Ondernemingskamer*), within one month after it has been notified of the entrepreneur's decision, if the decision deviates from its advice or if facts or circumstances have become known which, had they been known to the Works Council at the time it rendered its advice, might have led to different advice. The Enterprise Chamber may suspend the decision of the entrepreneur pending the proceedings. The Enterprise Chamber may order the entrepreneur to undo the decision if:

(A) the entrepreneur, in balancing the interests involved, has taken a decision which no reasonable entrepreneur could have taken;

(B) the decision is based on factual assumptions which are clearly erroneous, or if circumstances which are clearly relevant have not been taken into consideration;

(C) on procedural grounds, for example if material information was withheld from the Works Council, if advice was requested too late, if the Works Council was not given sufficient opportunity to consider the matter, or if the entrepreneur has not sufficiently explained in detail why the arguments raised by the Works Council have not led to a different decision.

Where the right of approval applies, any decision made by the entrepreneur without the prior approval of the Works Council or without the permission of the Subdistrict Court is null and void. The Works Council can request the Subdistrict Court to order the entrepreneur to refrain from actions involving the implementation of a decision which is null and void.

6.7. What is the position on a share sale?

A share acquisition does not constitute a transfer of undertaking, and therefore the Dutch Civil Code will not apply. However, the provisions of the Works Council Act (as set out above) apply equally to share sales and asset sales.

In addition, the Merger Code (*SER Fusiegedragsregels*) is a code of conduct which establishes rules for the protection of the interest of employees during merger negotiations. A "merger" is defined as: *"the direct or indirect acquisition or transfer of the control over an enterprise or part of an enterprise, as well as the formation of a group of enterprises".* The Merger Code is applicable if the merger involves at least one business that is established in the Netherlands and normally employs at least 100 employees, although a CBA may render the Merger Code applicable in any case.

The Merger Code requires that the employer must inform the trade unions and the Social and Economic Council (in writing) of the intended merger. The trade unions must then be given the opportunity to express their opinion with regard to the employees interests involved in the intended merger. The involvement of the trade unions should be sought at such time that the judgement of the unions can still significantly influence the decision, whether the merger will be realised and if so, the conditions of the merger. The rules must be complied with before the acquirer and the seller reach a final agreement.

7. PORTUGAL

CONTACT: FILIPE FRAÚSTO DA SILVA
Uría Menéndez
Edificio Rodrigo Uría
Rua Duque de Palmela, 23
P-1250-097 Lisboa
Tel: **00 351 21 030 8600**
Email: **filipe.frausto@uria.com**

7.1. Is there an obligation to inform / consult and when is it triggered?

If a business of an employer (the "**Transferor**") is sold to another entity (the "**Transferee**") as an on-going concern, a transfer of establishment may arise, as set forth in the Portuguese Labour Code and in European Council Directive 2001/23/CE, of March 12, 2001, regarding the safeguarding of the employees' rights in the event of a transfer of undertaking or establishment ("**TUPE Directive**").

The triggering of these rules implies that the Transferee will automatically assume the legal position of the Transferor in all labour and social security-related matters and agreements of the employees engaged in the transferring business. Nonetheless, the Transferor will remain jointly and severally liable for all labour related obligations that became due prior to the date of the transfer of establishment, for a one-year period, and without any term in respect of social security obligations.

The transferring employees will be those who are exclusively or mainly engaged in the business. Employees may however oppose the transfer of their employment agreements, provided that their objection is communicated to the Transferor prior to the date of the transfer of establishment. It is not yet clear whether an objecting employee has the right to: (i) terminate the existing employment agreement with or without compensation for the termination; (ii) maintain his/her employment agreement with the Transferor, should the latter maintain

activities in Portugal; or (iii) force the Transferor to dismiss him/her through a redundancy procedure.

According to section 498 of the Portuguese Labour Code, the collective agreements applicable to the Transferor will bind the Transferee until the end of the relevant term or at least for 12 months following the transfer date, unless a new collective agreement enters into force within the Transferee.

Both the Transferor and the Transferee will also have to inform (and potentially consult) employee representatives in connection with the transfer, as set out below.

7.2. Who must the company inform / consult?

Both the Transferor and the Transferee will have to inform employees' representatives (i.e. works councils, trade union committees or union delegates) or, in their absence, each affected employee.

It is currently unclear whether information and consultation duties arise in respect of target employees alone, or in respect of the Transferee's existing employees as well.

The Transferee is required to communicate the admission of the transferring employees to the Social Security Services within 24 hours preceding the commencement of their activity. The Transferor has ten business days to communicate to the same services that the transferring employees have ceased their relationship with the latter. The transfer of the establishment must also be communicated to the Portuguese Labour Authorities, by both the Transferor and Transferee, within 30 days from the date of the transfer.

7.3. What information must be provided?

The employee representatives must be informed of the date, grounds and legal, economic and social implications of the transfer. In addition, any measures envisaged regarding the transferring employees have to be disclosed.

7.4. What is the consultation process?

If the Transferee envisages the adoption of measures affecting the situation of the transferring employees (such as the transfer of a work place, change of working schedules, change of work position) a consultation phase may be required with a view to reaching an agreement in that respect. Consultation is only mandatory if any such measures are envisaged in respect of the transferring employees. If no such measures are envisaged, no consultation is required and mere information will suffice.

7.5. How long will the process take and when should it be completed?

The information notice must be provided in writing, with "sufficient anticipation" in respect of the transfer date. Although the Portuguese Labour Code does not define the concept of "sufficient anticipation", this information procedure should usually be fulfilled at least ten days before the date of the transfer (or 30 days in advance if the work place is expected to change).

When consultation is required, the information notice must be served at least ten days prior to consultation. Although that is the only rule set forth by the Portuguese Labour Code in this respect, consultation should take place before the transfer and may last for a number of days. Disclosure of the information notice should be made bearing this in mind, and is normally made at least 15 days before the transfer date or even longer than that if the envisaged measures towards the transferring employees are relevant and/or there are works councils or union reps to consult with. If, for example, a significant change of work place is envisaged, it is advisable for the disclosure of information to be made at least 45 days prior to the anticipated transfer date, so that consultation on that material change of work conditions may take place.

7.6. What are the sanctions / penalties for non-compliance?

Failure to comply with the information and consultation notices is considered a light infringement under Portuguese law and may lead to the payment of a penalty between €204 and €1,530, depending on the Transferor's and Transferee's turnover in the preceding year and degree of guilt (i.e. negligence or wilful misconduct).

The absence of an agreement with the employees following consultation will not block the transfer of the establishment (without prejudice to the right of each employee to oppose the transfer if the measures intended are deemed to be significantly detrimental to his/her employment conditions).

Failure to comply with the communications to the Social Security Services may lead to the payment of penalties between €50 and €2,400 per employee, with a maximum limit of €4,800.

7.7. What is the position on a share sale?

Share deals will not normally entail consultation obligations. A company's works council ("**WC**"), if one exists (which is not very frequent and only happens normally in large companies), would be entitled to receive information on general activity plans and budget, but this does **not** include details on specific transactions such as share deals. They should also be informed (but no consultation is required) should the activity plans involve any change in the company's capital, purpose or activity, which would normally not be the case with a share deal.

In general, a company would have to consult its WC in respect of certain matters or intended measures such as personal data treatment, changes to work schedules or holidays, professional classification and promotions, changes to work places, temporary shutdowns, transfer of undertakings, reduction and suspension of work, collective dismissals, winding up and liquidating, filing for bankruptcy, and any other measure that could materially affect the number of employees or work conditions or that could introduce material changes to work organisation or discipline in the parent company itself - but **not** acquisitions through share deals. WCs also have the right to exercise management control and to participate in a company's restructuring, but this does **not** relate to share deal acquisitions.

If, further to a share deal, collective dismissals are planned, then separate consultation duties would arise. These would involve a number of phases, which begin with consultation with the WC (which then issues an opinion on the proposals). Written intention to dismiss must then be communicated to the WC or, in the absence of a WC, to the inter-unions committee, or in the absence of either, to each of the potentially affected employees. Notification must

also be filed with the proper services of the Ministry of Labour and Social Security, including prescribed information. The affected employees then appoint, amongst themselves, an ad hoc representative committee.

There follows a consultation and negotiation phase between the employer and the employees' representative structure (works council, inter-unions committee, unions committee or ad hoc committee, if any), with the intervention of an officer from the Portuguese Ministry of Labour and Social Security. Consultation and negotiation should start within five days following the initial communication, but this will normally depend on the Ministry's officer availability. The purpose of this phase is to try to reach an agreement on the nature and effects of the measures to be adopted and aims to limit, if possible, the harmful social effects of the collective dismissal procedure. The employer's failure to schedule and hold the consultation and negotiation meetings is grounds to hold the collective dismissal procedure void.

Once an agreement is reached or, in the absence of an agreement within the consultation and negotiation phase, the employer is required to communicate, in writing, to each target employee, the dismissal decision. Such communication cannot however be made sooner than 15 days from the date of the initial communication. On the date the dismissal decision is notified to the affected employees, the employer must send the Ministry of Labour and Social Solidarity copies of the same and of the minutes of the consultation and negotiation meetings, as well as a list of all targeted employees including certain specified data.

8. SPAIN

CONTACT: LOURDES MARTIN
Uría Menéndez
c/Principe de Vergara, 187
Plaza de Rodrigo Urfa
E-28002 Madrid
Tel: **00 34 915 860 400**
Email: **lourdes.martin@uria.com**

8.1. Is there an obligation to inform / consult and when is it triggered?

Under Spanish labour law, a transfer of undertaking ("**TUPE transfer**") takes place when a group of organised assets that qualify as an autonomous production unit (i.e. with sufficient autonomy to continue functioning independently) is transferred. As a consequence, many asset sales fall within the scope of article 44 of the Statute of Workers (the "**SW**"), which implements Council Directive 2001/23/EC 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.

A TUPE transfer can take place by means of a single transaction or a series of transactions between the parties. Whether or not property is actually transferred from seller to purchaser is irrelevant (for instance, the assets could be transferred by means of a lease agreement).

If a TUPE transfer takes place, the transferor and the transferee must provide, in the terms mentioned below, specific information to the employee representatives (or, if none exist, to the employees themselves).

Specific consultation duties will also be triggered if certain employment measures are to be taken as a consequence of the TUPE transfer. Labour measures include, among others,

employment contract terminations, substantial modifications of employment conditions and geographical mobility of employees.

8.2. Who must the company inform / consult?

The information must be provided to the employee representatives or, if none exist, directly to the employees affected by the TUPE transfer.

The employee representatives must also be consulted if the consultation obligation exists. If there are no employee representatives, the employees must appoint *ad hoc* representatives to carry out the consultation.

In certain cases, the representatives of trade unions in a company (known as *secciones sindicales*) may represent the employees during the consultation period.

8.3. What information must be provided?

The following information must be provided:

(A) the expected date of the transfer;

(B) the grounds for the transfer (i.e. the business reasons);

(C) the legal, financial and social consequences of the transfer for the employees; and

(D) the measures expected to be applied with respect to the employees.

8.4. What is the consultation process?

As previously mentioned, consultation obligations will only be triggered if labour measures are adopted as a consequence of the TUPE transfer.

It is important to point out that the law has not established specific consultation obligations in the framework of a TUPE transfer. Instead, the rules governing the labour measures to be adopted will apply. Most of the measures imply a consultation period with the employee representatives commencing with a written communication. Following the consultation period, or once an agreement is reached, the measures must be communicated in writing to the affected employees, who may bring a challenge in labour courts.

The information that must be provided during the consultation period will depend on the nature of the measure; however, in general, the information will be that required for the employee representatives to be in a position to negotiate effectively.

8.5. How long will the process take and when should it be completed?

In an asset deal, information must be provided "in good time" before the TUPE transfer. This is usually interpreted as a period of 15 to 30 days and is submitted through a letter. It is a single-step process.

When a consultation obligation exists, the consultation must be started "in good time" before the employment measures are adopted. Hence, this could even take place after the transfer. In general terms, these procedures require a negotiation period (normally 15 to 30 days).

8.6. What are the sanctions / penalties for non-compliance?

If the information or consultation obligations are not fulfilled, a fine of up to €6,250 could be imposed for each infringement.

The completion of the transfer is not subject to the fulfilment of these obligations.

8.7. What is the position on a share sale?

Share sales do not fall within the scope of a TUPE transfer and there are no specific information or consultation obligations applicable to a share sale. However, if the share sale will have an

impact on the "volume of employment" (i.e. the number of employees in the company), the employee representatives will be entitled to issue a prior non-binding report (the report must be issued in a 15 day period). However, in practice, the report is not usually issued given that the reduction of the workforce, as mentioned subsequently, has its own consultation and information duties.

In addition, there may be other information or consultations duties that could arise as a result of circumstances in connection with a share sale, including in the following examples:

(A) **Collective redundancies**: the Law 3/2012 of 6 July (the "**Labour Reform**") significantly amended the previous legal framework for collective redundancies, having an important impact on staff restructurings, which are often contemplated in the wake of acquisitions.

A collective redundancy will take place if employers decide to carry out terminations based on economic, technical, organisational or production reasons, if they affect at least: (i) 10 employees in companies with fewer than 100 employees; (ii) 10% of the workforce in companies with 100 to 299 employees; or (iii) 30 employees or more in companies that employ 300 or more employees.

Collective redundancies require that the employer follows a specific procedure. As per the Labour Reform and the Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, the most relevant milestone in a collective dismissal is the consultation period (between 15 and 30 days, depending of the number of employees in the company) with the employee representatives (or the employees themselves), for which the employer must provide thorough information (e.g. audited annual accounts, official tax or accounting documents, technical report and information about the group to which the company belongs). In addition, the parties should negotiate measures to mitigate the adverse impact of the collective redundancy.

(B) **Collective modification of working conditions (e.g. salary, working time)**: if the employer decides to modify the working conditions of its employees on a collective basis (the

same thresholds mentioned in connection with collective redundancies will apply) a consultation and negotiation period with the employee representatives (or the employee themselves) must be held for 15 days. During that period, the employer must provide the employee representatives with information justifying the proposed modification.

(C) **Public offering**: if the share deal affects a listed company, employee representatives (or if none exist, the employees themselves) must be informed immediately by the company of such offering and must be provided with the prospectus of the offering.

(D) **Other**: Information and consultation obligations may also arise if corresponding obligations are established in the collective bargaining agreements applicable to the company.

9. SWEDEN

CONTACT: HENRIC DIEFKE
Mannheimer Swartling
Norrlandsgatan 21
Box 1711
SE-111 87 Stockholm
Tel: **00 46 8 595 060 00**
Email: **die@msa.se**

9.1. Is there an obligation to inform / consult and when is it triggered?

The consultation obligation is always triggered if a transfer of assets and/or liabilities is considered a transfer of business or part of a business according to the EU Transfer of Undertakings Directive (2001/23/EC), which has been implemented in the Swedish Employment Protection Act and the Co-determination in the Workplace Act.

In order for the transfer of undertakings rules to be applicable it is necessary that (i) it is a "transfer" and (ii) it is "an undertaking, a business or part of a business" that is transferred. In the assessment of whether a transfer of assets shall be regarded as a transfer of business, it is crucial whether the business, after the transfer, has kept its identity or not. It is not sufficient that all assets in a current business are included in the sale. A more detailed assessment must be made of whether it is a financial unit still in operation – a "going concern" – which is sold. This may be the case mainly when the buyer in practice continues or resumes the operation of the same or corresponding financial units. In accordance with the EC Court's practice, which has been adopted in Swedish case law, an overall assessment of all circumstances around the transfer must be made (the *Spijker criterias*).

The consultation obligation triggered by a transfer of business applies to both the seller and the purchaser, in respect of their own affected employees. In addition, an employer bound by collective agreement is always obliged to initiate consultations with the trade union before

making a decision which involves a significant change in the business. An asset sale could be considered a significant change even if the transfer does not constitute a transfer of business.

The seller may make or implement a decision before he has fulfilled his consultation obligation, in the case of extraordinary reasons. The consultation obligation can thus be limited or exempted, for instance if there is an extraordinary need for secrecy regarding information that would harm the seller significantly or have a significant effect on the market, provided that this need for secrecy cannot be satisfied with a confidentiality undertaking from the union representatives. The exemption rule shall be applied very restrictively and must not be used in order to circumvent the regulation. It is assessed on a case-by-case basis whether exceptional reasons are at hand. The seller must in order to justify the exemption show wherein the damage would lie and how significant the damage would be, had he fulfilled his consultation obligation.

9.2. Who must the company inform / consult?

If the transaction is regarded as a transfer of business, both the buyer and the seller must consult either with the trade unions which are parties to the applicable collective bargaining agreement(s) or, where there is no collective bargaining agreement, with every trade union which has a member in the workplace affected by the transfer.

9.3. What information must be provided?

There is no formal requirement regarding what information must be provided to the trade union. However, all the information the trade union needs to be able to give its opinion on the subject in a meaningful way must be provided. The trade union may require a list of the employees who will be affected. Which employees will be affected if only a part of the business is transferred is a complex assessment that has to be done in each specific case. The main issue is to decide where the employee mainly performs the work. Documentation that generally has to be prepared comprises:

(A) a request for consultations;

(B) information about the transfer to the employees and the trade union(s);

(C) a list of the employees who will be affected by the transfer (and how they will be affected); and

(D) minutes from consultations.

The parties may request a confidentiality agreement regarding the information that is to be provided. Any party shall have the right to negotiate in respect of a duty of confidentiality. If an agreement on confidentiality is not reached during the negotiations, a party may commence proceedings in court. The court can issue an order concerning a duty of confidentiality if it is deemed that there would otherwise be a danger of substantial injury to one of the parties concerned. During the court proceedings confidentiality shall be observed.

9.4. What is the consultation process?

In summary, the consultation process is the following:

(A) The company calls for consultations with the affected trade union(s).

(B) The first meeting may generally be held within two weeks.

(C) During the meeting the company presents and justifies its position.

There is only one meeting, unless the meeting is adjourned, which often is the case. Even if the meeting is adjourned and the parties meet several times, it still counts as one consultation. There is no obligation to reach an agreement with the trade union. However, the employer is obliged to give motivated reasons for the positions taken. The trade union can refer the consultations to its central organisation if no agreement is reached. If that is the case,

consultation has to be commenced with the central organisation as well, which delays the process. Consultations may be conducted by telephone, if the trade union agrees.

9.5. How long will the process take and when should it be completed?

It is not specified by law when the consultations must be initiated. However, the consultations must commence at an early stage of the decision-making process and be finalised before the decision is made. The trade unions should have a fair chance to influence the decision. Thus, the consultations must commence before, for instance, a seller has become too engaged with a certain buyer. This is normally as early as when the parties sign a letter of intent. A guideline is that the consultations must be initiated as soon as the seller has had reasonable time to investigate and evaluate different action alternatives. It is obviously too late to begin consultations after the signing of the asset transfer agreement.

There is no prescribed time or duration for the consultations under Swedish law or practice. The time needed to conclude the consultation varies in each specific case. The consultations shall however be conducted in a "speedy manner". If the consultation is not referred to central organisations, it can normally be concluded within four to eight weeks. The consultations must be carried out and finalised before the employer makes a final decision.

Unless otherwise agreed by the parties, consultations shall be deemed to be finalised when a party who has fulfilled his duty to consult, has given the other party notice in writing that he is withdrawing from the consultations.

9.6. What are the sanctions / penalties for non-compliance?

If a company neglects to consult or commences the consultation too late, a duty to pay damages is the only remedy. The union cannot delay or veto, for instance, a sale, and agreements already signed and entered into will remain valid.

In practice the financial penalties often amount to approximately SEK 100,000 (€1 = around SEK 9, in June 2014) to be paid out to each affected trade union.

However, the Labour Court has in one case from 1987 ruled that damages of up to SEK 300,000 (equivalent to around SEK 550,000 in today's money) had to be paid to every union concerned at the place of work, when consultations were commenced too late. It cannot be ruled out that even higher damages can be imposed under severe circumstances. Aside from damages, neglecting the consultations may also cause bad will and deteriorated relations with the unions.

9.7. What is the position on a share sale?

A sale of shares does in principle not constitute a transfer of business and will thus not trigger the automatic transfer of employees and the consultation obligation connected to it. However, if the seller of the shares is bound by a collective agreement, the seller is obliged to initiate consultation with the union, if the transfer of the shares will have a significant effect on the seller's business. The same goes for the buyer of the shares. The consultations shall proceed as explained concerning the transfer of assets. However, it may be noted that the target company will not be obligated to initiate consultations since the mere transfer of the shares will not have an impact on the business of the target company. Naturally, a share transfer may involve pre- or post-closing measures which will have a significant effect on the target company's business (e.g. redundancies, reorganisations) and/or will constitute a transfer or business, which in such case will trigger the consultation obligation.

10. THE UNITED KINGDOM

CONTACT: CHARLES CAMERON / ROLAND DOUGHTY
Slaughter and May
One Bunhill Row
London EC1Y 8YY
Tel: **00 44 (0)207 600 1200**
Email: **charles.cameron@slaughterandmay.com**, **roland.doughty@slaughterandmay.com**

10.1. Is there an obligation to inform / consult and when is it triggered?

Most asset sales will come within the scope of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("**TUPE**"). TUPE applies to a "relevant transfer", which is a transfer from one person to another of an undertaking or business (or part of one) situated in the UK, where there is a transfer of an economic entity which retains its identity. An "economic entity" is defined in TUPE as "an organised grouping of resources which has the objective of pursuing an economic activity".

It is a question of fact as to whether there is a relevant transfer. In the great majority of commercial transactions it will be clear that a business is being transferred; for example, the acquisition of customers, work-in-progress and goodwill will be a strong indication that an ongoing economic entity is being transferred. However, sometimes whether there is a transfer may be an issue, and the employment tribunal will need to consider all the relevant facts, including the extent of the assets transferred, and whether the same economic activities are carried on after the transfer.

Where TUPE applies, there will always be an information obligation. The employer of any employee who may be affected by the relevant transfer (or measures taken in connection with it) must inform "appropriate representatives" of certain information.

There is in some cases a separate consultation obligation, which is only triggered if it is envisaged that "measures" will be taken in relation to the affected employees. The term "measures" is not defined. It will apply to matters such as redundancies, changes in working conditions, shift patterns and changes to pension arrangements or other benefits.

The obligations to inform and consult apply to both the seller and the purchaser, in respect of their own affected employees.

10.2. Who must the company inform / consult?

The information must be provided to "appropriate representatives" of the affected employees. These same appropriate representatives must also be consulted, if the obligation to consult arises.

"Appropriate representatives" are determined as follows:

(A) If there is a recognised independent trade union, the employer must consult the trade union representatives and cannot choose to consult other representatives.

(B) If there is no recognised independent trade union, the employer may choose to consult with either:

(i) employee representatives who have been appointed or elected by the affected employees for some other purpose, but who have authority from those employees to receive information and be consulted about the proposed transfer on their behalf; or

(ii) employee representatives elected by them for the purposes of informing and consulting about the transfer in an election satisfying the requirements set out in TUPE.

10.3. What information must be provided?

The information which must be given to appropriate representatives is as follows:

(A) the fact that a relevant transfer is to take place;

(B) the date or proposed date when the transfer is to take place;

(C) the reasons for it;

(D) the legal, economic and social implications of the transfer for the affected employees;

(E) the measures that the employer will take in relation to those employees or, if it envisages that no measures will be taken, that fact should be stated;

(F) if the employer is the seller, the measures which he envisages the purchaser will take in relation to the transferring employees. Again, if it envisages that no measures will be taken, that fact should be stated. The purchaser must give the seller the information it needs to comply with this obligation; and

(G) "suitable information relating to the use of agency workers" by the employer (i.e. the number of agency workers working for the employer, the parts of the employer's undertaking in which they are working, and the type of work they are carrying out).

10.4. What is the consultation process?

If the duty to consult arises, the employer must enter into consultations with the appropriate representatives of those employees. The consultation must be conducted by the employer with a view to seeking the appropriate representatives' agreement to the measures to be taken (but need not necessarily result in agreement). The employer must consider any representations made by the appropriate representatives, and reply to those representations. If any representations are rejected, the employer must explain why.

The employer is also under an obligation to allow the appropriate representatives access to any affected employees, and give the representatives appropriate accommodation and other facilities.

10.5. How long will the process take and when should it be completed?

The required information must be provided "long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives". There is no prescribed duration for the information and consultation process. Depending on the extent of measures proposed and the consultations which take place, the process would usually last at least two to three weeks, but would usually take longer if significant measures are envisaged. The process must be completed before the relevant transfer takes place.

10.6. What are the sanctions / penalties for non-compliance?

If the employer fails to inform or consult, financial penalties may be imposed. The tribunal may award compensation to each affected employee, of up to a maximum of 13 weeks' actual pay. As the award is penal, the tribunal will take account of the extent of the employer's default in setting the award.

An employer may rebut an allegation of a failure to inform or consult by showing that there were special circumstances rendering it not reasonably practicable for him to do so, but that he took all steps which were reasonably practicable in those circumstances. The need for confidentiality will not normally be enough.

Liability for failure to inform or consult is joint and several under TUPE, other than in respect of any failure by a purchaser to provide the seller with details of the measures which it intends to take. Specific indemnifies may be negotiated between the seller and purchaser to apportion any liability for failure to inform or consult.

There is no scope for the sale to be delayed or vetoed on the grounds of failure to inform or consult.

10.7. What is the position on a share sale?

Share sales do not fall within the scope of TUPE. However, any pre- or post-sale reorganisation of the businesses of the target, the seller or the purchaser, may amount to a relevant transfer.

There are no specific information or consultation obligations which apply on a share sale. There may nonetheless be other information or consultation obligations which arise, as a result of circumstances linked to the share sale. The main examples are:

(A) **Collective redundancies**: Information and consultation obligations are triggered when an employer proposes to dismiss as redundant 20 or more employees within a period of 90 days or less. In those circumstances the employer must inform and consult the appropriate representatives of any affected employees. Consultation must begin "in good time" and there are prescribed minimum periods before the first of the dismissals takes effect (30 days where there are between 20 and 99 proposed dismissals, and 45 days where there are over 100 proposed dismissals).

(B) **Pension changes**: Consultation may also be required if the employer proposes certain "listed changes" to occupational or personal pension scheme arrangements. Employers with at least 50 employees are required to consult all active and prospective members or their representatives about the proposed changes, for a minimum 60-day period.

(C) **Takeovers**: Where there is a public offer to purchase all the shares of a listed company, there is an obligation to provide information and documents about the offer to employee representatives (or if there are none, to the employees themselves) in both the bidder and the target. There is no obligation to consult in these circumstances.

(D) **Other**: Information and consultation obligations may also arise if an agreement with a trade union, works council or other employee representative body exists to that effect. Such agreements are rare in the UK; however, if they do exist, any obligation to inform and consult would be governed by their terms.

(E) It should be noted that these additional obligations at (A) to (D) above may also apply as a result of circumstances arising from an agreed sale in addition to the process required by TUPE.

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