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BREDIN PRAT
HENGELER MUELLER
SLAUGHTER AND MAY

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BUSINESS TRANSFERS AND COLLECTIVE AGREEMENTS

Introduction

Collective agreements can be concluded between an employer and its trade union to provide for collectively agreed terms for certain categories of employees. Collective agreements are very common in many European jurisdictions, including France (*conventions collectives*) and Germany (*Tarifverträge*). They are much less common in the UK. However, with trade union activism on the increase, collective agreements may also become more widespread in this jurisdiction.

When a business transfer takes place, there will be implications for any collective agreement which is in place between the transferor and its recognised trade union, in relation to the transferring employees. This briefing considers those implications via a number of practical scenarios, which highlight some interesting contrasts between the position in the UK, France and Germany.

Scenario One

A company (A) buys the business of another company (B). There is a collective agreement in force between B and a union (CBA 1) which governs various terms and conditions of transferring employees, including holidays and the procedure for handling redundancies. The relevant contracts of employment contain no mention of the collective agreement.

Following the business transfer, must A continue to observe the terms of CBA 1?

In the UK, the answer is *"not necessarily"*. Under Regulation 5 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), any collective agreement made between the transferor with a recognised trade union in respect of any transferring employees has effect post-transfer as if made by the transferee. Therefore, A would be treated as a party to CBA 1.

However, in the UK there is a presumption that collective agreements are not legally enforceable by the employer or the trade union (unless they expressly state that they are intended to be legally binding, which is very rare in practice). This means that A would be free to terminate CBA 1, and

need not continue to observe its terms (although there may be industrial relations consequences if it fails to do so). The position would be different if the terms of CBA 1 were incorporated into individual employment contracts, either expressly or impliedly (see Scenario Two below).

In **France**, the answer is "*yes, although potentially only for a limited period*". Under Article L. 2261-14 of the French Labour Code, any collective agreement in force at the transferor at the time of the transfer continues to apply to the transferred employees for a 15 month transition period. This means that during that period, the transferred employees have the benefit of any provisions of CBA 1 which are more favourable than the provisions of any collective agreement which A would otherwise apply. A must also use that transition period to negotiate a new collective agreement for the transferred employees with union representatives. If at the end of the 15 month period no agreement has been reached, the transferred employees benefit from so-called "individually acquired rights" ("*avantages individuels acquis*") in relation to any provisions of CBA 1 which the employees in fact benefited from in the past, and can reasonably expect to benefit from in the future. This would include for example provisions of CBA 1 relating to bonuses or holidays, but would not include termination rights.

In **Germany**, the answer is "*it depends*". Under Section 613a German Civil Code (*Bürgerliches Gesetzbuch – BGB*), the position depends on whether the transferee has concluded a collective agreement on the same issue(s) with a competent trade union, or is a member of an employers' association that has done so. To the extent that this is the case, the collective agreement binding A will replace CBA 1 in relation to the transferred employees with effect from the time of the transfer and A will not need to observe the terms of CBA 1.

If however A is not bound by a collective agreement, or that agreement does not cover the same issues as CBA 1, the terms of CBA 1 will apply at A after the transfer. However, they will not apply on a collective basis, rather its terms are transformed into individual rights, which cannot be amended unilaterally to the employees' detriment for one year from the date of the transfer. A must therefore

observe the terms of CBA 1 for at least a one year period.[1] However, this only applies in relation to those of the transferred employees who are union members; those who are not union members will not have such individual rights[2].

Scenario Two

A company (C) buys the business of another company (D). There is a collective agreement in force between D and a union (CBA 2) which governs various terms and conditions of transferring employees, including holidays and the procedure for handling redundancies. This time, the relevant contracts of employment expressly incorporate the provisions of CBA 2.

Following the business transfer, must C continue to observe the terms of CBA 2?

In **the UK**, the answer is "*yes, although there is scope to change after one year, normally subject to employee consent*". Unlike in Scenario One, the terms of CBA 2 are incorporated into individual contracts. This means that those incorporated terms may be legally enforceable by the transferred employees against their employer. This applies to all transferred employees who are covered by the collective agreement, not just union members.

In order for the terms of CBA 2 to be binding on C, they must be 'apt' for incorporation. This will usually be the case for terms which are individual in nature (such as holiday), but may not be the case for terms which are more collective in nature (such as redundancy procedures).

1 Thereafter, these can be amended by mutual agreement between employee and transferee or – subject to the strict general requirements of German labour law – by notice of termination with the option of altered conditions of employment (*Änderungskündigung*).

2 In practice, this situation is rather rare. Commonly, employers who are bound by collective agreements will regularly provide in their employment agreements that collective agreements binding the employer will also be applicable vis-à-vis employees who are not union members. This is because employers may not ask their employees whether they belong to a union. Without such contract clause, an employer would legally have to distinguish between union and non-union members , but in fact cannot do so, unless employees voluntarily inform him that they are (or are not) union members.

C will only be able to avoid the terms of CBA 2 by which it is bound if it can vary the terms of the employment contracts which incorporate CBA 2. This may be difficult, given that Regulation 4(4) of TUPE renders void any purported variation of a contract of a transferred employee where the sole or principal reason for the variation is the transfer.

That said, Regulation 4(5B), which has recently been added to TUPE, disapplies this restriction in relation to contractual terms which are incorporated from a collective agreement, provided that the variation takes place more than one year after the transfer, and it does not render the employee's rights and obligations (when considered together) any less favourable. The change would also need to be made in accordance with normal contractual principles, which means that employee consent would be needed in most cases. The employer must also navigate separate restrictions which prevent an employer trying to circumvent its collective bargaining arrangements by agreeing revised terms directly with employees.

So C may potentially be able to avoid the terms of CBA 2, but only if a number of conditions are satisfied.

In **France**, the answer is also "*yes, although potentially only for a limited period*". The position is essentially the same as that under Scenario One above. In addition, the provisions of CBA 2 relating to holiday could become "individually acquired rights", but the provisions relating to redundancy procedures could not.

In **Germany**, the answer is "*it depends*". The position is essentially the same as that under Scenario One above. However in this situation, if C is not bound by collective agreements, the terms of CBA 2 apply to all the transferred employees, not just the union members. This is because the terms of CBA 2 have been declared applicable by the individual contracts of employment.

Scenario Three

A company (E) buys the business of another company (F). There is a collective agreement in force between F and a union (CBA 3) which governs various terms and conditions of transferring employees. This time, the relevant contracts of employment expressly incorporate the provisions of "such collective agreements between [F and the union] as are agreed or amended from time to time .

Following the business transfer, F and the union agree an amendment to the provisions of CBA 3 (CBA 3.A). E is not a party to the negotiations which led to the amendment, or to the amended CBA 3.A itself.

Must E observe the terms of CBA 3.A?

In **the UK**, the answer is "*no*". Until recently, the answer would have been "*yes*", as the UK courts would have enforced this type of "dynamic" clause in the employment contract, which incorporates post-transfer collective agreements or post-transfer changes to the collective agreement. However, the position has changed following the recent European Court of Justice (ECJ) decision in **Alemo-Herron and ors v Parkwood Leisure Ltd**. The ECJ held that the EU Acquired Rights Directive, from which TUPE is derived, prevents any contractual term referring to post-transfer collective agreements being enforceable against the transferee, where the transferee does not have the possibility of participating in the negotiating process for the new agreement.

Following the **Alemo-Herron** decision, a new Regulation 4A has been added to TUPE, which provides that the transferee will not be bound by any provision of a collective agreement which is agreed after the transfer, if the transferee is not a participant in the collective bargaining for that provision. This means that E would not be bound by the provisions of CBA 3.A. Equally, E would not be bound by the provisions of a new collective agreement entered into by F and the union post-transfer.

E would continue to be bound by the provisions of CBA 3 (the collective agreement in force at the date of the transfer), as noted in Scenario Two above.

In **France**, the answer is *"no"*. Even before the **Alemo-Herron** decision, French courts would have applied a "static" interpretation to this type of clause. The position is therefore unchanged following **Alemo-Herron**. E would not be bound by the provisions of CBA 3.A. Equally, E would not be bound by the provisions of a new collective agreement entered into by F and the union post-transfer.

E would continue to be bound by the provisions of CBA 3 (the collective agreement in force at the date of the transfer), as noted in Scenario Two above.

In **Germany**, the answer is currently "*unclear*". Before **Alemo-Herron**, like the UK, German courts would have enforced this type of "dynamic" clause in the contract of employment, which incorporates post-transfer collective agreements or post-transfer changes to the collective agreement. This means that E could be bound by the provisions of CBA 3.A; the position would be essentially the same as that under Scenario Two above.

However, this approach was subject to two exclusions:

(i) The wording of the clause and/or the circumstances of conclusion of the contract of employment must not indicate that the parties intended the dynamic effect of the clause to end upon occurrence of a certain event (such as a business transfer to an employer not bound by collective agreements).

(ii) There is a separate exclusion for contracts of employment concluded before 1 January 2002 which incorporate the terms of certain collective agreements as applicable from time to time with the aim to ensure that the terms of collective agreements binding the employer would also be applicable in relation to those employees who are not union members or where the employer is unsure whether they are (*Gleichstellungsklausel*).

Where either of these exclusions apply, a "static" interpretation would have been applied, and E would not be bound by the provisions of CBA 3.A.

Following **Alemo-Herron**, it is not yet clear what approach will apply in Germany. There is an ongoing debate about whether the "dynamic" approach can be sustained or whether the Federal

Labour Court needs to change its approach in favour of a static application of collective agreements for cases similar to Scenario Three. This is therefore an area of uncertainty for German employers and will remain one until the Federal Labour Court takes a decision on the issue or refers the matter to the ECJ for a preliminary ruling. It is impossible to predict with certainty what either court may decide since good arguments can be made either way.

In the meantime, employers concluding new employment agreements should consider drafting explicit statements into clauses incorporating the terms of collective agreements as applicable from time to time, to the effect that the dynamics of the incorporation shall end upon occurrence of a business transfer (and possibly other events).

Scenario Four

A company (G) buys the business of another company (H). There is a collective agreement in force between H and a union (CBA 4). The relevant contracts of employment expressly incorporate the provisions of CBA 4.

CBA 4 contains a three-year pay deal, with employees receiving a pay rise each year, calculated as 1% above inflation. The business transfer takes place in the second year of the pay deal.

Following the transfer, must G observe the terms of CBA 4, and award the third year pay rise?

In **the UK**, the answer is "*yes*". The position differs from Scenario Three as CBA 4 is agreed before the transfer (even if some of its terms only take effect after the transfer). The position is therefore essentially the same as that under Scenario Two. G is bound by the terms of the three-year pay deal under CBA 4, and must award the third year pay rise.

What if the three-year pay deal, instead of providing for fixed pay rises of 1% above inflation, provided for additional amounts to be agreed between H and the union? Would G be bound by the agreement which H reaches with the union, after the transfer, about the amount of the third year pay rise?

The answer is currently "*unclear*". Arguably G would be bound in these circumstances. The **Alemo-Herron** decision does not strictly apply, as it concerns future collective agreements entered into after the transfer (which is not the case here). The same can be said of Regulation 4A of TUPE, as it applies to provisions of collective agreements which are agreed after the transfer (as opposed to agreements which are envisaged by (and within the terms of) the collective agreement before the transfer).

On the other hand, G could argue that the rationale underlying the decision in **Alemo-Herron** applies here; that is, the transferee must be in a position to make the adjustments and changes necessary to carry on its operations, and its fundamental right to conduct a business under Article 16 of the EU Charter would be adversely affected if it cannot take part in a bargaining process to negotiate working conditions for its employees with a view to its future economic activity.

The solution in practice would be for G to contractually agree with H, as part of the business transfer documentation, what approach would be taken in relation to the third year pay rise (for example, that H would only agree any additional amounts with the union, in respect of the transferring employees, where this is approved by G).

In **France**, the answer is "yes". Since the provisions of CBA 4 have been incorporated into the contract of employment, and since they are applicable whithout any need for further negotiations, they will be regarded as contractual rights, binding on G.

Even if the provisions of CBA 4 had not been incorporated into the contract of employment, G would have been obliged to implement the pay rise since CBA 4 was entered into for a limited duration. In such a case, it applies to the transferred employees until the end of its term. This is an exception to the principle of temporary survival of CBAs in case of a business transfer.

If CBA 4 had provided for additional amounts to be agreed between H and the unions for the pay rise to be effective, the situation would be different since the incorporation into the contract of employment would have been incomplete. In such case, the consequences would be the same as in Scenario Three, i.e. CBA 4 would not have been binding on G.

In **Germany**, before **Alemo-Herron**, the situation would have been the same as in Scenario Two. The fixed pay rises agreed in a collective agreement concluded before a business transfer would have been applicable after the transfer since they formed part of the terms of the collective agreement in force at the time of the transfer. However, the rationale underlying **Alemo-Herron** could also be raised in a German context. Therefore, the answer currently is "*unclear*" pending further decision by the Federal Labour Court and/or the ECJ.

The situation is different if a collective agreement provides for payment of additional amounts to be agreed at a later time between the employer('s association) and the union. The answer to that is the same as in Scenario Three.

It should be noted in this context that different from the UK approach, in Germany, G cannot agree with H on how to treat such pay rises. Its alternatives are between paying the pay rises or not paying, thereby taking the risk that a court faced with the question decides that he is bound by such rises.

Conclusion

The purchaser on a business transfer would be well advised to ascertain at an early stage what collective agreements are in place in relation to the transferring employees, in order to assess his exposure. The following general principles can be stated:

- The purchaser will often be bound to some extent by the provisions of a collective agreement which applies to transferring employees.
- It will be important to ascertain what those terms are, and (particularly in the UK) whether they are incorporated into individual contracts of employment.
- Following the transfer, the purchaser may need to observe the terms of that collective agreement, for at least one year, before it can think about negotiating changes.

- The purchaser will not be bound by the terms of any future collective agreement entered into by the seller, or by any amendments to the collective agreement which is in force at the time of the transfer which are made post-transfer by the seller.
- There is still a grey area in respect of provisions of a collective agreement in force at the time of the transfer, which provide for changes to terms and conditions after the transfer, via a mechanism which will only be operated after the transfer (and therefore the change is not known at the time of the transfer).
- What is clear is that provisions of a collective agreement in force at the time of the transfer, which provide for a known change to terms and conditions to take place after the transfer (for example, a multi-year pay deal) will bind the purchaser.

Further information

If you would like to find out more about any of the issues raised in this briefing, or require advice in relation to a specific matter, please contact:

BREDIN PRAT

www.bredinprat.com
Paris, Brussels

Pascale Lagesse (Partner, Paris)
Email: pascalelagesse@bredinprat.com
Tel: + 33 1 44 35 35 35

HENGELER MUELLER

www.hengeler.com
Berlin, Düsseldorf, Frankfurt, Munich, Brussels, London

Dr Hans-Joachim Liebers (Partner, Frankfurt)
Email: joachim.liebers@hengeler.com
Tel: +49 69 17095 154

Dr Christian Hoefs (Partner, Frankfurt)
Email: christian.hoefs@hengeler.com
Tel: +49 69 17095 643

SLAUGHTER AND MAY

www.slaughterandmay.com
London, Brussels, Hong Kong, Beijing

Roland Doughty (Partner, London)
Email: roland.doughty@slaughterandmay.com
Tel: + 44 207 090 5422

Charles Cameron (Partner, London)
Email: charles.cameron@slaughterandmay.com
Tel: + 44 207 090 5086