NEWS

NO 13/ DECEMBER 2015

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BUSINESS TRANSFERS EMPLOYEE INFORMATION REQUIREMENTS IN THE UK, FRANCE AND GERMANY

Introduction

Business transfers play a prominent role in the M&A practice of all EU Member States. In all such transfers, the employer must inform its affected employees and/or their representatives of certain factual and legal items. The applicable requirements and the consequences of non-compliance, however, vary significantly between the countries.

The information requirements are contained in the EU Acquired Rights Directive (the "**Directive**"). It applies to transfers of undertakings, businesses or parts thereof (for ease of reference, in this briefing, all of these are referred to as a "**business**") within the territory of the EU to another employer as a result of a legal transfer or merger, provided the transferred economic entity retains its identity following the transfer.

The Directive requires that the transferor and transferee inform the representatives of their employees affected by a business transfer of the (proposed) **date of the transfer**, the **reasons for the transfer**, its **legal, economic and social implications for the employees** and any **measures envisaged** in relation to the employees. The information must be provided in good time and in any event before the employees are directly affected by the transfer as regards their conditions of work and employment (art. 7 para. 1).

The information obligations apply on all transfers to which the Directive applies, irrespective of whether the decision resulting in the transfer is taken by the employer or an undertaking controlling the employer. If it is the latter, the fact that the controlling entity does not provide the required information to the employer to enable it to be passed on to employee representatives is no defence (art.7 para 4).

Where a business has no employee representatives through no fault of its employees (typically because the business does not fulfil the legal requirements for establishment of an employee representative body), the information must be provided to employees themselves (art. 7 para. 6).

A business transfer may also trigger a requirement to consult with (not just inform) employee representatives. Such a requirement exists under the Directive where the transferor or transferee envisages 'measures' in relation to its employees. It may also exist under national law or an agreement with a works council or trade union. Further detailed consideration of consultation requirements is outside the scope of this briefing.

This briefing summarises the different approaches taken to the Directive's employee information requirements in Germany, France and the UK.

Implementation of the Directive in national law

The legislation implementing the Directive in **Germany** is sec. 613a German Civil Code (*Bürgerliches Gesetzbuch* – "**BGB**"). It provides that transferor or transferee of a business transfer must notify the affected employees in writing of the transfer, its reasons and its consequences prior to the transfer taking effect. In **the UK**, the Directive's information requirements are implemented via the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("**TUPE**"). Regulation 13 of TUPE requires the employer of any employees affected by a business transfer to inform appropriate employee representatives of specified items. In **France**, it was decided that pre-existing law under the French Labour Code was sufficient to satisfy the Directive's requirements.

1. Provider and recipient of employee information

Each country has a different approach as to who has to be informed and who has to provide the information on a business transfer:

Under **UK law**, the primary obligation is to inform employee representatives, who will either be trade union representatives (if present), or other types of employee representatives with sufficient authority, who may need to be specifically elected if not already in place. The employer is only permitted to inform employees directly if it invites affected employees to elect employee representatives but they fail to do so within a reasonable time, or if the employer is a "micro-business" which employs fewer than 10 employees.

'Affected employees' for these purposes are any employees of the transferor or the transferee

who may be affected by the transfer or measures taken in connection with it. This may be wider than the transferring employees, and may include other employees of the transferor or transferee whose positions will be affected in some way by the transfer. There does however need to be some direct effect on retained employees of the transferor in order for them to be classed as affected employees; it may not be enough that the transfer has left the retained part of the business less viable, leading to potential redundancies.

The **French Labour Code** does not provide employees with a right to be informed about the transfer. However, despite the lack of a legal obligation to do so, it is common practice to inform affected employees of their transfer. Further, if a works council exists at the transferor, the transferor has a legal obligation to consult with such council after providing full and complete information on the transfer and its consequences.

German law, on the other hand, requires that the employees affected by a transfer themselves be informed of the transfer, its reasons and consequences. Unlike in the UK, 'affected employees' are only those who transfer to a new employer due to the business transfer.

Sec. 613a BGB contains no general duty to inform employee representatives on a business transfer. However, separate obligations to inform (and consult with) employee representatives, such as an economic committee (*Wirtschaftsausschuss*), or a works council may apply if the transfer is combined with an operational change (e.g. a split of business (*Spaltung*)).

As for the provider of the information, **in France**, the transferor has to provide the information on a business transfer. **In the UK**, it is the employer of affected employees (which can be the transferor and the transferee, each in relation to their own employees) whereas **in Germany** the information has to be provided by transferor or transferee, and in practice will commonly be provided by both acting jointly because both will be held responsible for the entire information.

2. Form and timing

While in **all three jurisdictions** the information must be provided in writing (although in Germany, text form is also permitted, *i.e.* for example, provision by email is permissible), the timing requirements differ.

French law requires that consultations with the works council are completed before a "decision in principle" is taken on the transfer. In practice, this usually means that, prior to completion of such consultations, any document triggering a business transfer may not be signed. In any case, the requisite information has to be provided and consultations need to be held in good time before the employees are directly affected by a transfer.

In the UK, information must be provided long enough before the transfer to enable consultation (even if none is required). There is no minimum prescribed time limit. However, as an example, it has been held that providing the information ten business days before the transfer was insufficient. In practice, the information is usually provided once a binding agreement for the transfer has been signed, but before completion takes place.

Under **German law**, information must be provided prior to the business transfer taking effect. In practice, information will commonly be provided shortly before or upon signing of a binding agreement, and the parties to a transaction will frequently aim to inform no later than one month before the transaction is completed, in order to ensure that by completion employees can no longer object to their transfer, allowing the parties to know which employees effectively transfer.

3. Standard of detail and accuracy

Under **German** law, the notification must be in plain language and understandable to non-lawyers. The information must be correct, complete and accurate, although in respect of complex legal questions, the standard is slightly more generous: if the provided information is based on a justifiable legal position at the relevant time this suffices, even if that position is later overridden by legal precedent. The information requirements under sec. 613a BGB are one of the key elements of legal advice in Germany in this context since legal precedent has refined such requirements to the point where they are almost impossible to fulfil.

The level of detail and accuracy prescribed **in the UK** is generally less than is required in Germany. That said, the information must be accurate and disseminated carefully; the UK employer owes a duty of care to the employees and is obliged to take reasonable steps to ensure that the information provided is accurate. On the other hand, the employer is only required to turn its mind to the legal implications and inform employee representatives of

its genuine belief. There is no requirement to warrant the accuracy of any legal information provided (although there has been some suggestion that the employer should seek a legal opinion on the implications of the transfer in order to fulfil this requirement).

French law requires that the consultations with the works council take place on the basis of "full and complete" information provided by the transferor. There is no legal definition of "full and complete" for these purposes; in practice the works council will request additional information until it considers the requisite level of information to have been provided.

Information letters in **the UK** are commonly no longer than two pages whereas in **Germany** they often exceed ten pages and in **France** their length varies substantially depending on the number of employees affected, the consequences of the transfer and the sophistication of the works council involved.

4. Mandatory content

There are certain core items on which information has to be provided in all three jurisdictions, namely information on the (envisaged) date of the transfer, the rationale for the transfer, and its consequences for the employees. However, the exact requirements differ substantially, as set out below.

Under **French** law, the transferor must provide "full and complete" information on the transfer to the works council. Though not specified by law, in practice, key elements include the date of the transfer, the rationale for the transfer, and the consequences for the employees. A detailed presentation by the future employer will also regularly be included.

The description of the consequences of the transfer for the employees would typically consist of two parts, namely a description of the consequences (i) on the individual employment contracts (which should be limited to the mere change of employer, the transfer being supposed to not trigger any changes in the contractual terms of employment), and (ii) on the employees' collective status (such as the applicable collective bargaining agreement, which will usually transfer without change, but can be replaced by the transferee's agreement). French works councils will frequently request thorough information on any possible changes

to their pre-transfer collective status. At times this will go into significant detail, for instance by requesting a concise comparison of pre- and post-transfer healthcare benefits.

The **UK** information requirements are more closely prescribed. Firstly, the information must include the fact of the transfer, the (proposed) date of the transfer and the reason for the transfer. Where there is more than one reason for the transfer, all reasons should be included (even if they are already known to the appropriate representatives).

The employer must also provide information regarding the legal, economic and social implications of the transfer for the affected employees. As regards the legal implications, the effects of TUPE on the employees' legal rights (contractual and statutory) must be described – although there is no obligation to inform individual employees about their right to object to the transfer. As regards the economic implications, there must be sufficient information about the transferee to enable the affected employees to assess the transferee's strength as an employer. It should also cover any potential effects on the employees' pay or benefits. Information about social implications may for example include information about a change in working hours or shift patterns.

The employee representatives must be informed about measures which are envisaged in connection with the transfer and the affected employees. "Measures" is quite widely interpreted and includes any actions, steps or arrangements taken in connection to the transfer (other than necessary legal consequences). If the measures are envisaged by the transferee in connection with the transferring employees, the transferee must provide the transferor with the necessary information regarding these, so that the transferor can pass this information on to its employee representatives.

Finally, and uniquely among these three jurisdictions, UK law requires the employer to provide information regarding its use of agency workers, including information regarding the number of agency workers, the parts of its business in which they are engaged, and the type of work which they carrying out. This information must refer to the whole of the employer's business, not only to the (part of the) business which is affected by the transfer.

The **German** law requirements are the strictest of the three jurisdictions. They define the purpose

of the notification as to brief the affected employees about the transferee and the circumstances of the transfer, give them a sound basis for seeking legal advice in this context, and/or to allow them to decide whether to object to the transfer. The content and degree of detail required in a proper information letter are closely prescribed. Consequently, the relevant requirements have become one of the key elements of legal advice in the context of a business transfer in Germany.

Firstly, the notification must specify the time of the transfer. If the date is explicitly referred to as *envisaged* date, the validity of the notification will not be impaired if, in fact, the transfer is delayed or takes place early. It must also specify the reasons for the transfer, meaning that employees must be informed of the nature of the underlying legal transaction (whether it is, for example, a purchase or a rental agreement). In practice, the entrepreneurial reasons behind the transfer are usually described as well, mostly on a rather general level (although in certain cases they must be described specifically).

The notification must set out the legal consequences for the transferring employees. In particular, it must accurately set out and describe:

- the transferring business, *i.e.* what exactly forms part of the transfer,
- the transferee (name, seat and address, as well as the name/s of its legal representative/s. Stating a similar but wrong first name of a managing director may cause the entire notification to fail the requirements);
- the post-transfer liability regime in respect of employer obligations;
- the continuation of, and/or changes to, rights and obligations relative to the affected employment relationships (particularly the fate of collective agreements[1]). This must include a statement that detrimental changes to working conditions prescribed by collective agreements at the time of the transfer may not be individually agreed for one year following the transfer;
- the prohibition on terminations of employment relationships because of the transfer (it also needs to explain that terminations for other reasons remain permissible);

1 For more information on the consequences of a business transfer on the application of collective agreements, please refer to our joint briefing on "Business Transfers and Collective Agreements" published in February 2014. If you did not receive a copy at the time, please let us know and we will gladly provide one to you.

- the right to object to the transfer, the formal requirements for and the consequences of its exercise (If employees object, they remain employed by the transferor (unless the latter ceases to exist, e.g. due to a merger (*Verschmelzung*)). This is quite unique in Europe);

- the indirect consequences of the transfer; particularly those that become relevant on an employee's objection to the transfer (for example the transferor's intention to terminate objecting employees, the existence of or plans to conclude a social plan benefitting objecting employees).

With respect to the social consequences of the transfer, the notification needs to explain:

- the consequences of the transfer for employee representation (individual works councils, works council structures, representation on advisory or supervisory boards etc.);

- any envisaged changes to working conditions (for example changes to a shift work system);

- a potential financial vulnerability of the transferee. This can, for example, be information on the transferee's foreseeable insolvency, a significant decrease of the liquidable assets of the business, or payment of a negative purchase price for the transferring business. In the famous Siemens/BenQ Case in 2009, the 3,500 transferring employees were not informed that the key patents of the business did not transfer to the acquirer. When BenQ fell insolvent a year later, approx. 1,500 employees objected to their transfers and thereupon returned to Siemens;

- if the transferee is a newly founded company (NewCo), the fact that it is not subject to the obligation to conclude a social plan in case of an operational change (regardless whether an operational change is planned at the time of the notification).

- Finally, the notification must describe measures planned by the transferee in respect of the transferring employees that have reached a stage of specific planning. Examples are training measures, operational changes and plans to conclude a social plan or compromise of interests.

5. Consequences of a failure to comply with the information requirements

In France, if the transferor does not properly inform and consult with the works council, or the provided information turns out to be wrong, the works council can request a court injunction asking for suspension of the transfer until the obligations have been fulfilled. If the transfer has already taken place, the works council may request the cancellation of the "effects of the transfer". This usually means that the transferor is held liable to the employees for the payment of their remuneration, and for ensuring that the employees are employed under exactly the same terms and conditions as before their transfer.

If it transpires after completion of a transfer that the information provided was wrong, this typically will not impact the transfer, but it will allow the works council to bring legal action for obstruction or request damages. There is no right of employees to object to their transfer.

Under UK law, a failure to comply with the information requirements of Regulation 13 of TUPE does not affect the transfer of the employees. It may however allow employees to exercise a right to object to the transfer after the transfer has taken place. Unlike in Germany, this right is only likely to subsist until the identity of the transferee is known to the employee. Further, any objection to the transfer results in the employment terminating; the objecting employee has no right to return to employment with the transferor.

The primary remedy for a failure to inform is a claim for punitive compensation payments under Regulation 15 of TUPE. Where a tribunal finds a complaint well-founded, it will make a declaration to that effect and may award appropriate compensation of up to 13 weeks' actual pay per affected employee. The employer may have a partial defence if there are special circumstances which render it not reasonably practicable to comply with its information obligations. However, this defence is narrowly construed; the circumstances must be genuinely exceptional and unforeseeable.

Under Regulation 15 the transferor and transferee are jointly and severally liable for any compensation. In practice, it is usual for contractual provisions to place this liability solely on the transferor, except where the failure is caused by the transferee's failure to provide measures information to the transferor.

Under **German law**, an employee may object to the transfer of his employment relationship in writing within one month from receipt of the notification on the transfer (sec. 613a para. 6 BGB). An objecting employee remains employed by the transferor who may, in principle, terminate the employment relationship for overriding operational reasons if it can no longer offer the employee a job and if it has no other comparable employees enjoying less social protection.

However, the one-month objection period is only triggered if the relevant employee notification satisfied all legal requirements. If that was not the case, objections may be made for as long as the right to object cannot be considered forfeited (verwirkt). While there is no general rule how much time may pass, objections so far have been declared permissible as late as 13 months after notification on a transfer. In principle, the time will usually be longer the worse the discrepancies in the notification.

Conclusion and practical guidance

The legal requirements on employee information in the event of a business transfer differ substantially between the jurisdictions of France, Germany and the UK. Key differences exist in respect of virtually all aspects of the requirements, as summarised in the table below. These differences, as well as the particularly strict requirements in Germany, make timely legal advice invaluable.

Summary of key differences

	France	Germany	UK
Provider of information	Transferor	Transferor or transferee	Transferor and/or transferee
Recipient of information	Works council of the transferor (if any)	Transferring employees	Employee representatives of the affected employees
Timing	Must be before signing	Can be after signing	Can be after signing
Content	See section 2.4	See section 2.4	See section 2.4
Consequences of non-compliance	Possible suspension of the transfer or of its effects Legal action by works council for obstruction and/or damages if information later turns out to be wrong Employees cannot object to their transfer	Employees can object to their transfer for substantially longer than one month, with the consequence that they remain employed by the transferor	Punitive compensation payments of up to 13 weeks' actual pay per affected employee Employees can object to their transfer (to a limited extent)

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:

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