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Netherlands: Employment protection in relation to business transfers

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Netherlands

Phase:

Management

Type: Employment protection in relation to business transfers

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Native name:

Wet Overgang Ondernemingen in Burgerlijk Wetboek; Wet op de collective arbeidsovereenkomst; Wet op de Ondernemingsraad; Wet op de Algemeen Verbindend Verklaring

English name:

Law on business transfers in civil code; Collective labour agreements act; Works council act; Act on declaring a collective agreement binding

Article

Section 7: 662-665, 6:248, 6:258 of the Civil code; article 14a of the Collective labour agreements act; article 25, 26, 31, 35 of the Works council act; article 2a of the Act on declaring a collective agreement binding

Description

Business transfers in Dutch law

The Dutch legislation on business transfers is based on the EC Directive PbEg 5 March 1977/L61/26), replaced by Directive 2001/23 of 12 March 2001. These directives concern the maintenance of the rights and obligations arising from the employment contract at the time of the transition. From that moment on, the previous employer is jointly liable for one year. The Dutch legislation on business transfers also concerns the rights and obligations arising from company-related employment conditions and the Collective labour agreement (CAO in Dutch).

Dutch law defines a transfer of undertaking in line with decisions of the European Court of Justice (ECJ) and of the Dutch courts. In the Spijkers/Bendik/Abattoir case in 1986, the ECJ held that the identity of the enterprise must be preserved for a transfer of undertaking to have occurred. Dutch case law states that at least the main activities of the undertaking should be transferred, and the seven principles outlined by the ECJ shall be utilised to determine, if an enterprise has retained its identity. Moreover, the determination of what is considered an 'economic entity' is aided by an examination of the following elements:

- the enterprise must be an organised whole consisting of persons and business assets which have the objective of pursuing an economic activity;
- entrepreneurs who are engaged in a joint activity may be regarded as an economic entity even if the enterprise has no significant assets (e.g. not-for-profit organisations);
- the relevant provisions of the Civil code do not apply if a single activity of the business is continued without any of the employees and/or assets being transferred;
- if all the employees of an enterprise who independently perform a specific activity, for example, cleaning or kitchen staff, are transferred, this can constitute a transfer of undertaking under certain circumstances;
- if a substantial proportion, in size and expertise, of the staff was hired by the transferor for a specific activity and this group carried out this shared activity over a period of time, the transfer of this activity may constitute the transfer of an undertaking, even without the transfer of assets.

The transfer of stock alone will not count as a transfer of undertakings. Moreover, insolvent companies are also exempt from such obligations. Since the ruling of the ECJ of 22 June 2017 on FNV/SmallSteps about the pre-pack system, companies agreeing on business transfer prior to being declared bankrupt should be considered not-bankrupt in the context of employee protection (see also comments under '[Rescue procedures in insolvency](#)'). From 10 October 2017 and onwards, seagoing vessels that are part of the transition of a company are no longer excluded.

Partially transferring businesses and employee's rights

The main objective of the Law on business transfers is to protect the position of employees when the enterprise in which they work is transferred to another owner or entrepreneur. As a rule, changing the terms of employment requires the

employee's consent. The law is also applicable if not the whole company, but just one or more departments are transferred. A condition for the applicability of the law when a component of an enterprise is transferred is that it has to be determined that 'durable economic activity is being transferred'. Relevant factors in determining the applicability in these cases are:

- the nature of the activities that are to be transferred;
- whether or not material assets have been transferred;
- the value of any immaterial assets that are being transferred;
- whether or not the transferred activities are the same before and after the transfer;
- whether or not the activities have been interrupted due to the transfer and, if so, the length of the interruption.

These factors cannot be seen independently but are rather judged as a whole in determining whether a company's component has been transferred in such a way that activities can be continued.

Employee's rights

Whenever the Law on business transfers is applicable, it entails that employees retain their rights and duties when they work for their new employer after the business is transferred. As mentioned, changing the terms of employment requires the employee's consent. There is some room for unilateral amendment clauses. Furthermore, the standards set by Civil code 7: 611 for good working practices for employers and employees should be considered. Finally, the Civil code sets (general) limits regarding reasonability and fairness and unforeseen circumstances.

Under article 25 of the Works council act, an employer is obliged to give the works council the opportunity to advise on each proposed decision concerning, for example, a significant change in the organisation, a change in the allocation of internal powers, or a transfer of control of part of the enterprise or a part of it. If the employer does not follow the advice given by the works council, it must suspend the implementation of the proposed plan for a month or until the works council has agreed to the measures. Furthermore, the Works council act sets rules on information provision and the possibility for a works council to go to court.

All employees are considered to be protected in the transfer, including those on leave or currently inactive. However, civil servants, former employees, and temporary or contracted workers are not considered employees for the purpose of this regulation. If a single department of a company is transferred, only the employees whose primary activities are performed within that department will be considered.

Employees are not obliged to agree to the transfer, however, if they object, it will be considered as a notice of employment termination by the employee.

All terms and obligations included in the employment contracts agreed upon by the employee and transferor must carry over to the transferee. This includes most benefits. However, the transferee can argue that justifiable conditions prevent certain benefits from transferring. Dutch law allows minor amendments to be made to employment contracts, but only with the express agreement of the employee. If negotiations in this regard result in the employee accepting a contract which is less beneficial than what was offered by their previous employer, the onus is on the transferee to prove that no pressure was placed on the employee. In all other circumstances changes to the employment contract will be void.

Accumulated pension rights and business transfers

Under section 7: 664 of the Civil code, existing pension schemes must remain in force after a transfer of undertaking. However, the following situations can occur:

- The transferor's enterprise does not have a pension scheme and the transferee's does. In that case, the pension scheme of the transferee automatically applies to the transferred employees.
- The transferor's enterprise has a pension scheme, and the transferee's does not. In that case, the transferee is obliged to continue with the pension scheme of the transferor, but only for employees who were transferred.
- The transferor's and the transferee's enterprises both have a pension scheme in place. If the transferee offers the transferred employees the same pension scheme as it has offered to its own employees before the transfer, the transferee's pension scheme applies to all employees, regardless of the possibility that the former pension scheme was more beneficial.

The transferee and transferor are jointly liable for all rights and obligations arising from employment contracts for a period of one year following the transfer. The transferor is relieved of such obligations following this period. According to article 14a of the Collective labour agreements act, all rights and obligations pursuant to a Collective labour agreement (CLA) are transferred until the date of its expiry. However, if the transferee enters into a new CLA prior to this date, or if the CLA is declared 'generally binding' by the Minister of Social Affairs, then the CLA of the transferee will apply to the transferred employees.

Comments

The Law on business transfers is seen, by some employer organisations, as hampering economic activities, as business transfers are made significantly more difficult when employers are bound to evaluate the risk of taking on new employees and their contractual conditions. This regulation is said to be conducive to bankruptcies, especially in cases in which businesses are transferred from a failing company to a more successful enterprise.

As included in '[Rescue procedures in insolvency](#)', the ECJ ruling on FNV/SmallSteps creates a rather unclear situation for business using pre-packs and for businesses that did so in the past.

Cost covered by

Employer

Involved actors other than national government

Employer organisation
Works council

Thresholds

No, applicable in all circumstances

Sources

-  [Civil code book 7 \(Burgerlijk Wetboek Boek 7\)](#)
-  [Act on declaring a collective agreement generally binding \(Dutch\)](#)
-  [Law on collective labour agreements \(Dutch\)](#)
-  [Implementation directive seafarers](#)
-  [ERM - Netherlands: Rescue procedures in insolvency](#)
-  [Ius Laboris \(2009\), Transfers of undertakings guide](#)

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