Transferring Employees on an Outsourcing in Belgium: Overview

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A Q&A guide to outsourcing in Belgium.

This Q&A guide gives a high-level overview of the rules relating to transferring employees on an outsourcing, including structuring employee arrangements (including any notice, information and consultation obligations) and calculating redundancy pay.

Transfer by Operation of Law

1. What is an outsourcing?

Belgian (employment) law does not provide a specific definition of an outsourcing. In general, an outsourcing refers to a situation in which one company (the customer) transfers an activity that was traditionally performed in-house, to a service provider.

Outsourcing is a broad concept. The approach of the service provider and location of the service provision do not have an effect on whether or not the operation would be considered an outsourcing. However, not all outsourcing operations will trigger a transfer of employees by operation of law. A transfer of employees by operation of law will only be the case if the outsourcing operation qualifies as a transfer of undertaking (see *Question 2, Initial Outsourcing of Service Provision*).

2. In what circumstances (if any) are employees transferred by operation of law?

Initial Outsourcing of Service Provision

The national collective bargaining agreement 32bis (CBA 32bis) implements the Transfer of Undertakings Directive (*2001/23/EC*) (TUPE) into Belgian law. If the outsourcing qualifies as a transfer of an undertaking as defined in CBA 32bis, the employees attached to the undertaking transfer by operation of law. There is a transfer of employees by operation of law if the following conditions are (cumulatively) fulfilled:

- Change of employer.
- Following a transfer of an undertaking.
- Pursuant to an agreement.

Conditions one and three are, in principle, quickly met. The second condition is more complex:

- There must be a transfer of an undertaking, a business, or part of an undertaking or a business. In practice, an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective is required (*Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice (Case C-13/95) EU:C:1997:141*).
- The (part of the) transferred undertaking or business must keep its identity after the transfer. The Court of Justice of the European Union (CJEU) decided that this is the most important element in determining whether an undertaking is transferred (*Temco Service Industries SA v Samir Imzilyen and Others (Case C-51/00) EU:C:2002:48, Oy Liikenne Ab v Pekka Liskojärvi and Pentti Juntunen (Case C-172/99) EU: C: 2001:59, Carlito Abler and Others v Sodexho MM Catering Gesellschaft mbH. (Case C-340/01) EU:C:2003:629*). To decide whether an undertaking retains its identity it is necessary to consider whether the undertaking was disposed of as a "going concern".
- Case law has developed several criteria to assess whether an undertaking keeps its identity after the transfer (the "Spijkers-test" (*Jozef Maria Antonius Spijkers v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV (Case C-24/85) EU:C:1986:127)*) including (but not limited to):
    - the type of undertaking;
    - whether or not the business' tangible assets are transferred;
    - the value of its intangible assets at the time of the transfer;
    - whether or not the majority of its employees are taken over by the new employer;
    - whether or not customers are transferred;
    - the degree of similarity between the activities carried on before and after the transfer; and
    - the duration of any interruption.

    No single factor is decisive. All the concrete facts must be considered before characterising the transaction.

If the three conditions are met, all employees attached to the undertaking, business or part of the undertaking or business transfer by operation of law. No minimum threshold applies.

An outsourcing operation typically implies that only a part of an undertaking or business is to be transferred. For employees performing activities in several divisions of a company, it can be difficult to assess whether they belong to the transferred part.

If the outsourcing does not qualify as a transfer of an undertaking, the employees attached to the undertaking do not transfer to the supplier by operation of law.

The application of CBA 32bis cannot be contractually excluded between the supplier and the customer.

Change of Supplier or Service Provider

It is possible that a change of supplier qualifies as a transfer of an undertaking (second generation outsourcing). The same conditions as for an initial outsourcing apply, including the condition of a transfer "in going concern". If the conditions are met, the employees attached to the undertaking transfer from the old supplier to the new supplier by operation of law.

Service Provision Returning In-house

It is possible that on termination or expiry of the outsourcing contract, the customer decides to insource the business again. In this case, and provided that the criteria for a transfer of an undertaking are met, the employees attached to the undertaking transfer from the supplier to the customer by operation of law.

3. If employees transfer by operation of law, what are the terms on which they do so?

General Terms

All rights and duties arising from the employment contracts existing on the date of transfer are automatically transferred from the transferor to the transferee. The transferee must take over the employees with all existing employment conditions. It is not necessary to sign a new employment contract.

After the transfer date, the transferee must comply with all essential employment conditions (for example, wage, seniority, work time regulation and function). The transferee cannot amend essential employment conditions unilaterally after the transfer date (see *Question 5*).

Length of Service

All rights linked to the length of service in the employment contract with the customer, transfer to the service provider. Length of service entitles employees to many rights, including rights concerning remuneration, outplacement, non-statutory benefits such as seniority leave, and dismissal (among others).

Employee Benefits

The transferee must continue the transferred employees' benefits after the transfer. This includes end-of-year premiums, variable pay, meal vouchers and company cars. If specific benefits cannot be provided, for example participation in a stock option plan, the transferee must provide an equivalent benefit or compensation.

Pensions

CBA 32bis explicitly excludes from its scope of application old age, invalidity or survivors' benefits under supplementary company or intercompany pension schemes. Therefore, the transferee is not bound by the transferor's obligations arising from those supplementary schemes, except when they are provided for by a collective bargaining agreement (CBA) applicable to the transferor.

The transfer of the assets of a pensions scheme to another employer generally requires a specific agreement. In practice, it is advisable to provide for specific rules regarding the supplementary pension schemes, since pension regulations are complex.

The transferee cannot modify the acquired rights and reserves. It must respect the employment conditions after the transfer and must provide for the same (or at least similar) benefits for the transferred employees, for example by providing coverage through its own pension scheme (financed through an insurance or a pension fund), or by compensating for the loss of the pension scheme by a salary increase or other benefit.

Other Matters

Following the transfer, the transferee must continue to comply with the terms of all CBAs applicable to the transferor. There is debate on the application of this principle for industry-level CBAs if the transferor and the transferee belong to different industry sectors.

The transferor's actual work rules do not transfer to the transferee. However, the transferee must still comply with individual and collective rights laid down in those work rules.

The transferor and the transferee are jointly liable (*in solidum*) for debts already existing and arising from the employment contracts on the date of the transfer. After the date of transfer, the transferee becomes liable for all debts resulting from the transferred employment contracts, including the payment of severance indemnities when terminating the employment contract of any of the transferred employees

> 4. If the employees do not transfer by operation of law but there is a commercial agreement in place for them to be transferred, what employment rights, obligations, and terms must the parties to the agreement adhere to or are common practice to honour? Is the position only governed by the commercial agreement between the parties?

Not applicable.

Harmonisation

> 5. Is a transferee required to harmonise the terms and conditions of transferring employees with those of its existing workforce? If so, what does it mean to harmonise terms in your jurisdiction? What are the risks for the transferee of not harmonising terms, or failing to do so correctly?

Belgian legislation does not provide for a specific legal requirement to harmonise the terms and conditions of transferring employees with those of its existing workforce.

However, Belgian legislation contains several provisions which prohibit discrimination.

Therefore, if the customer chooses not to harmonise the terms and conditions of the transferring employees with those of its existing workforce, it risks equal treatment claims by employees who may believe they are subject to discrimination (see *Question 6, Choosing Not to Harmonise*).

> 6. If there is no legal requirement to harmonise terms and conditions of transferring employees with those of its existing workforce, what are the risks and challenges for the transferee of harmonising, or choosing not to harmonise, the terms and conditions of transferring employees with those of its existing workforce?

Harmonisation with Other Employees (Risks and Challenges)

The transferee cannot unilaterally amend essential employment terms and conditions after the transfer date. This includes terms and conditions relating to remuneration, but generally also in relation to work function and work schedule. The transferee can only unilaterally change non-essential employment conditions (*ius variandi*).

Given that harmonisation typically requires modifications to essential employment terms and conditions, the transferee cannot, in principle, unilaterally harmonise the terms and conditions post-transfer. In this context, it should be noted that modifications are assessed in relation to each specific aspect individually. Improved terms and conditions do not compensate for the introduction of any less favourable terms and conditions. Therefore, only a full levelling-up for all employees can be done unilaterally.

When the transferee unilaterally modifies an essential element of the employment contract, it will be presumed to have unilaterally and immediately terminated the employment contract (constructive dismissal). In this case, the employee would be entitled to a severance indemnity (see *Question 10*) and an indemnity for violation of the protection against dismissal (see *Question 7*).

However, the above does not prevent the transferee from renegotiating the transferred employees' wages and conditions of employment after the transfer has taken place, provided the transfer is not the only reason for the renegotiation. Renegotiation requires the approval of each employee or the approval of a union (through a CBA). Therefore, in this context, renegotiation is not limited to non-essential elements only but is possible for essential elements. The transferee can realise a harmonisation by signing a new employment contract with every transferred employee or a CBA at company level.

Choosing Not to Harmonise

Although CBA 32bis does not provide for a specific legal obligation to harmonise, transferring employees or the existing workforce can be triggered to file an equal treatment claim if one group of employees notices that comparable employees in the other group have other (better) employment terms and conditions.

General discrimination legislation is based on protected criteria and aims at direct and indirect discrimination. The protected criteria are nationality, national or ethnic origin, race, skin colour, cultural background, gender, disability, religious or ideological beliefs, sexual orientation, age, wealth, civil status, political beliefs, trade union beliefs, health status, physical or genetic characteristics, birth, social background and language. Taking into account these criteria, the risk of direct discrimination

due to non-harmonisation is very low. However, indirect discrimination based on age is not inconceivable if, for instance, many years after the transfer, a closed group of transferred employees still have different employment terms and conditions to the existing and newly-hired workforce.

Supplementary pension legislation provides for an open discrimination prohibition (no limited list of protected criteria). This can increase the need to harmonise. However, at the time of writing and based on the specific factual circumstances of the cases, published case law has always accepted the continued application of different pension schemes after a transfer.

Dismissals

7. To what extent can dismissals be implemented before or after the outsourcing?

Employees involved in a transfer of an undertaking benefit from protection against dismissal. The protection against dismissal applies before, during and after the transfer. CBA 32bis does not cap the duration of the protection.

The transfer cannot in itself constitute grounds for dismissal. However, CBA 32bis provides that protection does not apply to:

- Dismissal for serious cause (serious fault of the employee that makes any further professional co-operation between the two parties immediately and permanently impossible).
- Dismissal due to economic, technical or organisational (ETO) reasons entailing changes in the workforce. ETO reasons can be broad, meaning many dismissals may fall within this exception.

ETO reasons can be applied by both the transferor and the transferee. Therefore, the transferor and the transferee can agree that the transferor should dismiss certain employees pre-transfer provided that the transferee has valid reasons for the dismissals.

CBA 32bis does not provide for a lump sum sanction for non-compliance with the protection against dismissal. Employees dismissed due to a business transfer, if made without serious cause or ETO reasons, can claim compensation for damages incurred following the violation of the dismissal protection, in addition to legal severance payment. The employee can also seek compensation for any manifestly unreasonable dismissal.

8. What liability could arise for the transferor or the transferee for any dismissals before the transfer?

According to the CJEU case law, workers employed by the company whose employment contract has been terminated with effect prior to the transfer date (contrary to their protection against dismissal) would still be regarded as being employed by the company on the date of the transfer, with the result being that, in particular, the employer's obligations towards them are automatically transferred from the transferor to the transferee.

The question arises as to how the CJEU's position must be translated into Belgian employment law, as Belgian employers have absolute dismissal power (that is, court judges cannot prevent employers from terminating an employment contract and cannot undo dismissals). Logically speaking, the CJEU's case law does not undo the employee's dismissal when they are dismissed prior to the transfer, but instead creates the possibility for the dismissed employee to address their claims (see *Question 7*) against both the transferor and transferee. The transferor and transferee can therefore address this issue by making specific arrangements in their commercial agreement (for example, in relation to which party will bear the economic cost of any illegal dismissal made prior to the transfer). Such arrangements are not enforceable against the employee.

According to a minority position, any dismissal carried out prior to the date of transfer would be considered non-existent, so therefore only the transferee would be able to terminate the employment due to a business transfer, without serious cause or for ETO reasons.

9. What liability could arise for the transferor or the transferee for any dismissals after the transfer?

If dismissals are made in violation of the dismissal protections after the transfer, the dismissed employees can only address their claims (see *Question 7*) against the transferee, and no longer to the transferor.

It is advisable that transferor stipulates in the commercial agreement an exoneration from liabilities in relation to any existing employment contracts on the transfer date (and new employment contracts after the transfer date).

Redundancy Pay

10. How is redundancy pay calculated?

If an employment contract is terminated with immediate effect, without giving notice, a severance indemnity is due. This indemnity equals the salary and other benefits the employee was entitled to at the end of the employment contract, multiplied by the number of months' notice the employer did not observe. The notice period depends on the employee's seniority. In addition to the severance indemnity, an indemnity for violation of the protection against dismissal may be due (see *Question 7*).

Secondment

11. In what circumstances (if any) can the parties structure the employee arrangements of an outsourcing as a secondment? What are the risks of doing so?

CBA 32bis cannot be contractually excluded between the supplier and the customer.

However, where the conditions of a transfer of an undertaking are not met, CBA 32bis does not apply (see *Question 2*). Therefore, employees can be seconded from one company to another. In principle, the lending of personnel is unlawful, but not all secondment arrangements qualify as unlawful lending of personnel. Unlawful lending of personnel is subject to criminal and administrative sanctions for both companies.

As a civil sanction, it is possible for a seconded employee to claim to be an employee of the secondee organisation (the customer) from the date of commencement of their employment with them. If the secondee organisation does not agree, court proceedings would be the logical result.

Information, Notice and Consultation Obligations

12. What information must the transferor or the transferee provide to the other party in relation to any employees? Are there any time limitations or requirements?

The transferor has no specific obligation (towards the transferee) to provide information about the transferred employees. However, in practice, the customer and service provider will set out the process for providing information in the outsourcing contract. Including an information provision in the outsourcing contract is important given that the transaction would involve the transfer of all rights and duties arising from the employment contracts existing on the date of transfer to the service provider (and the transferee requires information to ensure compliance with these duties). In this context, specific attention must be paid to data protection legislation (see *Question 13*).

As there is no legal obligation to provide information, there are no specific time limitations or requirements.

13. Are there any restrictions or limitations on the personal data of employees that can be shared between the transferor and the transferee?

Prior to the transfer/closing of the transaction, it is permissible for the transferor to transfer and make available to the transferee certain HR-related documents and personal data of employees under specific conditions and in accordance with General Data Protection Regulation (*(EU) 2016/679*) (GDPR) requirements. The type of personal data that would be disclosed will largely depend on the stage of the proposed outsourcing.

It is generally accepted that during the exploratory phase, the personal data of employees cannot be disclosed and any sharing of such data must, at the very least, be shared on an anonymised and aggregated basis (which means that GDPR will not apply).

The Belgian Data Protection Authority has confirmed that, from the formal due diligence phase onwards, more personal HR-data may be disclosed based on the transferor's and transferee's legitimate interests (as a legal basis), but must be limited to certain conditions (minimisation, information of concerned employees, sufficient security measures and contractual safeguards should be put when working with a data processor and so on).

After transfer, the transferee will, in principle, become the new employer and from then onwards will act as (the new) data controller responsible for complying with GDPR. This means that all concerned employees should receive proper information with regards to the processing of their personal data and that their data protection rights should be guaranteed by the transferee.

The type of data that would be transferred to the transferee (the new data controller) would generally include, among other things:

- Originals of the employment contracts.
- Individual accounts.
- All relevant databases containing the personal data of employees.

With regards to post-transfer obligations, the transferor and transferee could decide to continue to work together during a certain time after transfer (for integration purposes). The transferor can, for instance, continue payroll administration until a new service provider has been found. If so, the terms of data processing and any appropriate adequate safeguards should be clearly set out in a transitional services agreement and/or a data processing agreement.

14. What are the notice, information and consultation obligations that arise for the transferor or the transferee in relation to employees, employee representatives, trade unions, works councils, or local authorities?

Before taking the decision to transfer an undertaking, the transferor and the transferee must provide specific information about the transfer to the employee representative body in their company (that is, the works council, trade union delegation or health and safety committee) or, in the absence of an employee representative body, the employees. The information that must be provided is:

- The (proposed) date of the transfer.
- The reasons for the transfer.
- The legal, economic and social consequences of the transfer for the employees.
- Any measures envisaged in relation to the employees.

If the transferor and/or the transferee have an employee representative body, they must also consult with this body. In the absence of an employee representative body, no consultation is required.

The consultation must include the repercussions of the transfer on employment, the work organisation and the general employment policy.

The consultation must be completed before the decision to transfer is made. However, there is no specific duration for the consultation. Consultation must enable the employee representative body to expertly conduct discussions during which the members can advise and make suggestions or objections. Two or three meetings are generally sufficient. The employee representative body does not have any power to approve or veto the transfer.

It is not possible to contract out of the information and consultation obligations.

A specific set of information and consultation obligations applies where there also is a European works council or the transfer of an undertaking is accompanied by a collective dismissal.

Failure to comply with the information and consultation obligations can trigger administrative or criminal sanctions and claims for damages by employees or their representatives. Although very unusual, the employees or their representatives can also ask the labour court to suspend the transfer until information and consultation takes place.

There is no specific obligation to notify the local Belgian authorities in relation to the transfer. However, several local authorities and administrations will nevertheless have to be informed about the transfer for administrative purposes (for example, the National Social Security Office, the relevant insurance companies (covering industrial accidents, supplementary pensions, hospitalisation), the external service for the prevention and protection at work and so on).

Employee Objection to Transfer

15. What action can an employee take if they object to transferring on an outsourcing and what effect does their objection have?

Belgian case law provides that the CBA 32bis only protects the employee and that the employee can choose not to rely on this protection.

If an employee objects to transferring on an outsourcing, this employee must resign. As with the case in a dismissal by the employer, the employee can resign by serving a period of notice or terminating the contract with immediate effect (in which case a termination indemnity would be due). In such case, there are no further liabilities for the transferor and/or transferee.

Alternatively, the employee could reach agreement with the transferor (and transferee) that they would remain employed by the transferor. However, discussion on whether it would be possible for such an agreement to be validly signed before the normal transfer date cannot be excluded.

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