

Transfer of Undertaking - Information and Privacy
Aspects

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Recently the Dutch Supreme Court rendered a judgment addressing the scope of the obligation to provide employees with information in the event of a transfer of undertaking. On the basis of this judgment, the conclusion must be that this is a far-reaching obligation. In this article the authors will discuss the right of employees to information in the event of transfer of undertaking, in the situation where a works council has been established within the undertaking and in the situation where there is no works council. The rights of employees to privacy, which are often neglected, in the event of a transfer of undertaking will also be discussed in this article.

Introduction: Right to Information pursuant to the Directive

Council Directive 2001/23/EC 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 ("the Directive") has four chapters. Chapters I and II, concerning the definitions of a transfer of undertaking and the safeguarding of employees' rights in a transfer of an undertaking, are the topic of many publications. Chapter III is about information and consultation in a transfer of undertaking and consists of only one article, Article 7.¹ This article contains regulations on the way in which employees and their representatives have to be informed and consulted in the event of a transfer of undertaking. Paragraphs 7(1) up to and including (5) concern an undertaking with representatives of employees. Since the amendment of the Directive in 1998, a sixth subparagraph has been added, which concerns the undertaking without representatives of employees. Both situations will be explained below.

The Right to Information of Representatives of the Employees

Article 7(1) up to and including (5) of the Directive provides that the transferor and transferee are required to inform the representatives of their respective employees affected by the transfer of undertaking of the (proposed) date of the transfer, the reasons for the transfer, the legal, economic and social implications of the transfer for the employees, and any measures envisaged in relation to the employees. Where the transferor or the transferee envisages measures, he shall consult the representatives in good time on such measures with a view to reaching an agreement.

¹ In Directive 77/187/EC of 14 February 1977, the right to information and consultation was described in another form in Article 6. This article was amended in Directive 98/50/EC of 28 June 1998 and was transferred, since Directive 2001/23/EC, to Article 7.

Article 7(1) up to and including (5) of the Directive thus contains a right to be informed and consulted. When the Directive was amended in 1998, the Dutch legislator considered that only the new Article 7(6), concerning a situation without employee representation, needed to be implemented.² According to the legislator, paragraphs 7(1) up to and including (5) had already been implemented in the Dutch Works Councils Act (*Wet op de Ondernemingsraden*, “WOR”), namely in Article 25(1) under a and b of the WOR.³ Although the legislator has not mentioned this, we think that Section 25(1) subsections c, d and e of the WOR, which subsections – in summary – concern the amendment or termination of part of the activities of an undertaking, may also apply in the case of a transfer of undertaking. By merely referring to Section 25 of the WOR, we think that the right to information in an undertaking with a works council is insufficiently safeguarded in the WOR. After all, the question as to whether a decision is covered by Section 25 of the WOR, for example because the decision is not ‘significant’ is open to discussion. If no right to consultation applies, the employer is not obliged to provide the works council with information and may escape the obligation from the Directive. The obligation to provide information does not follow either from any other sections of the WOR. Although the works council’s right to general information is extensively described in the WOR, the employer is only obliged – apart from situations where the works council has a right to consultation and apart from the obligation to provide financial information⁴ twice per year, as well as annual data on the staff policy and social policy⁵ – to provide such information to the works council as the works council explicitly requests, and then only if the works council reasonably requires such information for the performance of its duties.⁶ If the decisions are not subject to the right to consultation, the employer also does not have to mention such projected decisions to the works council pursuant to e.g. Section 24 or Section 31a (6) of the WOR, the obligation to discuss any projected decisions subject to consultation with the works council.⁷ Moreover, these sections do not contain a sanction.⁸ It is therefore our conclusion that, because the legislator decided not to implement Article 7 (1) up to and including (5) of the Directive, a lacuna has arisen if no right to consultation applies. After all, in that case there is no article comparable to Section 7:665a of the Dutch Civil Code (the “BW”) which gives the works council the right to information or the right to be consulted in the event of a transfer of undertaking.

Even if there is a right to consultation, it is still doubtful whether the obligation set out in the Directive is really given its due. If a projected decision for a transfer or undertaking is subject to a right to consultation, as will usually be the case, the works council is entitled to all information it reasonably needs in order to give its advice.⁹ This right to information is stronger than the right

² Article 7 (6) of the Directive was implemented in the Netherlands in Section 7:665a of the Civil Code, which entered into force on 1 July 2002.

³ Lower House of Parliament, Session Year 2000-2001, 27 469, nr. 3 p. 12.

⁴ Section 31a of the WOR.

⁵ Section 31b of the WOR.

⁶ Section 31 of the WOR.

⁷ For more extensive information on the right to information, see C. Nekeman and E. Knipschild “*Het recht op informatie en de plicht tot geheimhouding van de ondernemingsraad*” in *ArbeidsRecht* 2007, 11

⁸ For example, the Court of Appeal of Amsterdam (Enterprise Section) judged on 8 February 2007, JAR 2007/67, that the violation of Section 24 WOR as such does not make the decision manifestly unreasonable.

⁹ Article 31 (1) of the WOR and the Court of Appeal of Amsterdam (Enterprise Section) of 23 December 2003, JAR 2004/26.

which Section 7:665a of the BW offers to individual employees, also because the works council may influence policy decisions with the help of this information. However, experience in practice shows that works councils do not always request all information, and that not all information finds its way to the rank and file, for example because an obligation of confidentiality has been imposed on the works council or because the works council is not in the habit of consulting the rank and file. Furthermore, the works council represents the collective interest, which is not always equal to the individual interests of certain employees or groups of employees. In brief, the mere reference by the legislator to Section 25 of the WOR may lead to it that the employees will be informed correctly about their individual legal position. By not implementing Article 7 (1) up to and including (5) of the Directive, an even bigger lacuna has developed for undertakings having an employee representative body (*Personneelsvertegenwoordiging* or PVT). After all, the right to consultation of the employee representative body is more limited than that of the works council. The employee representative body only has a right to consultation if the projected decision will result in a loss of jobs or in a major change in the work or employment conditions of at least one fourth of the persons employed by the undertaking.¹⁰ However, the fact that an employee representative body has been established means that the employees do not have the right to receive information pursuant to Section 7:665a of the BW. Here too, if there is no right to consultation, it is not possible to enforce a right to information. In practice the problems observed above are solved through good employment practices pursuant to Section 7:611 of the BW. We will come back to this later.

The Right to Information of the Individual Employee

Article 7(6) of the Directive provides that where there are no representatives of the employees in an undertaking or business through no fault of their own, the employees concerned must be informed in advance of the date or proposed date of the transfer, the reason for the transfer, the legal, economic and social implications of the transfer for the employees, and any measures envisaged in relation to the employees. Article 7(6) of the Directive was implemented in the Netherlands in Section 7:665a of the Civil Code, which entered into force on 1 July 2002.¹¹ This Section provides that if neither a works council nor a staff representation has been established in an undertaking, the employer shall notify his own employees involved in the transfer of the undertaking in good time of the projected decision for the transfer, the projected date of the transfer, the reason for the transfer, the legal, economic and social consequences of the transfer for the employees, and the measures considered with regard to the employees. This Section does not provide that this stipulation applies only when there are no representatives of the employees in an undertaking or business through no fault of their own. The employer must also notify the employees of the projected transfer in the event that the employees have not realized the right of representation. We agree with Hustinx that this choice by the legislator is a correct choice that is permitted by the Directive.¹²

¹⁰ Section 35c (3) in conjunction with Section 35b (5) of the WOR.

¹¹ Added to the Act of 18 April 2002, Bulletin of Acts and Decrees 2002, 215 and entered into force on 1 July 2002.

¹² A.L. Hustinx, *'Informatievoorziening aan werknemers bij overgang van onderneming'*, *ArbeidsRecht* 2009, 40.

Although Article 7 (6) of the Directive does not prescribe by whom the employees involved should be notified, the legislator chose to follow Article 7 (1) of the Directive when implementing Article 7 (6) of the Directive. Both the transferor and the transferee are subject to the obligation to provide information set out in Section 7:665a of the BW. They shall both notify their own employees, i.e. the employees with whom they have concluded employment agreements. The group of employees is not limited to the employees who are being transferred. An employee who is not transferred may still be involved if the transfer has considerable implications for him.¹³ Besides, the notification has to be made in time, the decision for a transfer may not have been taken yet, and the date of transfer may not have been determined yet. These conditions are apparent from the term “projected decision”, which is used in the WOR as well as in Section 7:665a of the BW. In the event that the transferor or the transferee does not comply with the obligation to provide information, this constitutes an unlawful act vis-à-vis the employees.¹⁴ The employer is liable for damages if the prescribed information is not provided or not provided in time. The transfer as such is not affected by this failure.¹⁵ Incidentally, employees have a right to information, but not a right to give advice.

Section 7:665a of the BW sets no further requirements for the quality of the information that has to be provided. It is possible, however, on the basis of Section 7:611 of the BW to give substance to the scope of the employer's obligation to provide information and the quality of the information. In the *Rabobank/Allard* judgment¹⁶ an employee relied on Section 7:611 of the BW, arguing that the employer had not acted as a good employer by the attitude he had taken during the process of sale and transfer of the business unit. This case was about Rabobank, which intended to cease the activity “travel” and introduced OAD/Globe Reisbureaugroep (“Globe”) as a prospective buyer. Rabobank offered its employees either i) to be transferred to Globe and to accept the employment conditions of Globe, which were less favourable than those of Rabobank, but they would receive financial compensation in return, or (ii) to remain employed by Rabobank and accept a search plan for another job. If no other job would be found, the employee's employment contract would be terminated. The employee concerned chose to enter the service of Globe, as a result of which the less favourable employment conditions of Globe became applicable to her and she lost almost 30% of her income. The Supreme Court held that a good employer may be expected to provide sufficient openness and clarity in information sent to the employees about the choices they have to make, and to provide them with full information about the legal position and the applicable statutory provisions and provisions of the collective labour agreements in the event of a transfer of undertaking. The Rabobank had not fulfilled these requirements. In both cases where a choice had to be made, the employee had been proposed a drastic change to her legal position, which was in breach of Section 7:663 of the BW, and the employer had intended to deprive her of the legal protection offered by that Section.

¹³ Lower House of Parliament, Session Year 2000-2001, 27 469, nr. 3, p.14 and EM, 27 469 p.14.

¹⁴ Parliamentary Records II, 2000/0127, 469, nr. 5, p. 9.

¹⁵ NVII, 27 469, p. 9. According to the Subdistrict Court of Utrecht, 16 May 2007, JAR 2007/191, the circumstance that the former employer has not informed its employees in good time may also be taken into account in the assessment of whether there is a transfer of undertaking.

¹⁶ Netherlands Supreme Court, 26 October 2007, JAR 2007/285.

According to the Supreme Court, the employee had therefore been induced to make a choice on incomplete and inaccurate grounds, which is in violation of the behaviour a good employer is obliged to show in similar situations.

The Supreme Court has recently confirmed this position.¹⁷ In the *Bos/Pax* judgment, the employer had incorporated a new company (Pax) for the purpose of outsourcing the logistics work to this company. The employees had been requested to agree to enter the employment of a subsidiary of the employer (Detrex). As a result, the employees could not be transferred to Pax as part of a transfer of undertaking. When one employee was dismissed by Detrex many years later, he still relied on the transfer of undertaking. The Supreme Court emphasized first that the purpose of the law and the Directive is to protect employees. This protection is a matter of public order and it is mandatory; it cannot be deviated from to the detriment of the employee, not even if the employee consents. This protection does not apply if the employee personally decides, after the transfer, not to continue his employment with the transferee. In that case the employee must have decided of his own accord or the agreement must have been concluded freely. The Supreme Court held that as the employee had broken the employment at the invitation of the original employer, and had entered the employment of Detrex, there seems to have been no formal transfer of undertaking within the meaning of the law. However, the construction of the special incorporation of Pax, the transfer of the employees to Detrex in order to second them subsequently with Pax, and finally their dismissal by Detrex and hiring by Pax is, in the opinion of the Supreme Court, definitively aimed at a transfer of undertaking within the meaning of the law. The abandoning by the employees of their employment with the original employer at the initiative of the original employer while simultaneously entering the employment of Detrex was an “essential link” in this process. On the basis of good employment practices, the employer should have given the employees full information in 2003 on their choice either to remain with the employer and then enter the service of Pax as a result of the transfer of undertaking, or to enter the service of Detrex and receive compensation. Only then the employees would have been capable of abandoning the protection the Directive offers them of their own accord. The Court of Appeal should therefore have investigated whether the employee’s expression of consent met these conditions. As the Court of Appeal has failed to do so, its judgment was set aside.

It is a remarkable fact that both judgments discussed above do not explicitly address the question of whether the undertaking had a works council or employee representative body in place, and if yes, what the role of this employee participation body was. Not only judging from the size of the undertakings in these judgments, but also from the fact that in both judgments the employer’s obligation to provide information arises from Section 7:611 of the BW rather than Section 7:665a of the BW, we think that it can be concluded that a works council or an employee representative body were active within the undertakings. The subsequent conclusion is that the employees are entitled to information, while the employer is also obliged to inform his works council or employee representative body. We consider this conclusion to be correct, and it offers a solution

¹⁷ Netherlands Supreme Court, 26 June 2009 JAR 2009/183

in situations where no right to consultation applies although there is a works council or employee representative body.

For the sake of completeness, we would like to remark that employers also have to inform their employees on a transfer of undertaking in the case of bankruptcy. Section 7:666 (1) of the BW contains a list of provisions that do not apply in the case of bankruptcy; Section 7:665a of the BW is not on that list. The obligation pursuant to Section 7:665a of the BW applies also in the case of a merger. Although the law did not contain such an obligation, the merger has now been mentioned explicitly in Section 7:662 ff of the BW. In this connection, we would like to point out the SER Merger Code 2000 on account of which the employees' associations have a right to information.¹⁸ Article 3(1) of the Code provides that the employees' associations shall be informed about the contents of any public announcement concerning the preparation or implementation of a merger before such announcement is made. A transfer of undertaking may be covered by the definition of a merger. In addition, before agreeing to a merger, the parties have to inform the employees' associations that a merger is in preparation.¹⁹ The employees' associations have a right to know, among other things, the reasons why a merger is considered and the (direct and indirect) social, economic and legal consequences the merger will have for the employees.²⁰

The Right to Information if a Works Council Should Have Existed

As has been indicated above, if a right to consultation is in place the works council has a stronger right to information than the right to information of the individual employee pursuant to Section 7:665(a) of the BW. Although the individual employee does have an individual right to information pursuant to Section 7:611 of the BW, only the works council has the possibility of influencing the decision-making process. If an undertaking does not have a works council although it should have one, this could be a reason for the individual employees to claim a court order for the establishment and maintenance of a works council, and for a suspension, in anticipation thereof, of the projected decisions. The Subdistrict Court of Amsterdam has rejected such a claim because the transfer had meanwhile been realized and the relevant employees had no more interest in their claim. However, had the transfer not taken place yet, the Subdistrict Court stated that the claim would most likely have been allowed, as it was an established fact that the relevant employer was obliged to establish a works council.²¹ In a similar situation, the court found partly for the individual employees of the Tap Tromp van Hoff civil law notaries firm in Zutphen. This firm of civil law notaries that wanted to carry out an reorganization and did not have a works council, although it should have had one under the WOR, was ordered by the court

¹⁸ For an extensive article on the SER Merger Code 2000, see: S. Schijf, *'De SER Fusiegedragsregels 2000 anno 2008: de beslissingen van de Geschillencommissie'*, *ArbeidsRecht* 2008, 48.

¹⁹ Article 4 (1) of the SER Merger Code 2000.

²⁰ Article 4 (2) of the SER Merger Code 2000.

²¹ Subdistrict Court of Amsterdam, 30 August 2002, JAR 2002/265. See for other case law on this topic J. Dop and E. Knipschild "*Besluitvorming (1) bij een gebrekkige OR en (2) zonder een OR*" in *Arbeidsrecht* 2005/4.

to call a staff meeting at which the intended reorganization had to be presented to the staff for advice.²²

The Right to Privacy in a Transfer of Undertaking

The right of employees to privacy is directly connected to their right to information. In the event of a projected takeover, outsourcing, merger or division, the employer will want to know who the employees are that will enter his service by operation of law. However, the options for employers to provide a potential buyer with concrete data on the employees possibly to be transferred are subject to restrictions. The *Registratiekamer*, the predecessor of the Dutch Data Protection Authority (the “Dutch DPA”), was of the view that aggregated data usually suffice for potential buyers and that the provision of personal data is only necessary occasionally. If there is a necessity to provide such data, the group of persons to whom the data are provided should be as small as possible, and no more data should be provided than strictly necessary.²³ Moreover, it is important to mention that not only it is not permitted to process directly identifying data – such as *NAW details*²⁴ – but that the processing of indirectly identifying data is also prohibited. Indirectly identifying data are data from which the name has been removed, but which may be deduced to a specific person through combination with other data. For example, this may happen in a small company where the mere mentioning of an employee’s sex and age may lead to the identification of that employee. As a result, providing data to a potential buyer in the context of a due diligence study is subject to great restrictions. However, this has the advantage that it is not required to notify employees of the data processing already at the due diligence stage, which would otherwise have been compulsory on the basis of the principle of transparency. The principle of transparency is set out in Sections 33 and 34 of the Dutch Personal Data Protection Act (the “PDPA”). Where personal data are obtained, there is a distinction between the situation where personal data are obtained from the data subject personally and the situation where the controller obtains the data in a different way. In the former case, Section 33 of the PDPA applies; in the latter case, Section 34 of the PDPA applies. In the case of a due diligence study, the data are not obtained directly from the data subject. This means that pursuant to Section 34 (1) of the PDPA, the data subject must be notified at the time when the data are being recorded, or, when it is intended to supply the data to a third party, at the latest on the first occasion that the said data are so supplied. The provision of information to the data subject must include in any case the identity of the controller and the purposes of the processing. Further information must be provided if this is necessary in order to guarantee with respect to the data subject that the processing is carried out in a proper and careful manner.

Also during a transfer of undertaking, the privacy of the employees must be taken into account. The Dutch DPA takes the position that the HR records may be handed over in the case of bankruptcy, merger or takeover.²⁵ The employer that intends to hand over the HR records has to ensure that the interests of the relevant employees in their privacy are safeguarded by

²² Subdistrict Court of Zutphen (in preliminary relief proceedings), 20 May 2009, JAR 2009/158.

²³ Registratiekamer, 2 November 1998, ref. 98 V 052501.

²⁴ Name and address details.

²⁵ ‘Personeelsdossiers’, Informatieblad 27A, November 2007.

announcing the handover in a suitable information medium, by allowing the employees to have certain data removed and to object to the handover, and by not providing any more data than necessary for the performance of the employment agreement. This last condition implies, according to the Dutch DPA, that all HR records should be cleared and that all old and irrelevant data – such as a report of a performance interview of ten years ago – should be removed from them.

After the HR records have passed to the new employer, the transferee will in many cases intend to place the new employees with its own *arbodienst* (occupational health and safety service) after the transfer of undertaking has been completed. Since data relating to health are subject to even stricter rules than the ‘non-special’ personal data, the transfer of one *arbodienst* to another is not a simple operation. First and foremost, the works council will have to agree to the transfer to another *arbodienst* pursuant to Section 27(1) part d of the WOR. Secondly, all data that are not subject to doctor-patient confidentiality, like administrative data, feedback to the employer and reports to the Employee Insurance Agency (the “UWV”), can be transferred to the successor *arbodienst*. Data that are subject to doctor-patient confidentiality may only be transferred on strict conditions. First of all, there has to be a necessity to provide these data as part of absence counselling, for example because the illness of the relevant employee is still ongoing. In addition, the relevant employees must have been notified in advance of the provision of data, and must have been given the opportunity to lodge an objection. It is up to the transferring doctor to check whether this obligation has been fulfilled before he or she transfers the records to another certified company doctor. These conditions have been elaborated by the Dutch DPA in a decision from 2007.²⁶ In this decision, the Dutch DPA reconsidered its earlier position that it is not lawful to transfer medical files to the new *arbodienst* without the permission of the relevant employees, or on the basis of a statutory regulation. Had the Dutch DPA not adjusted its position, this would have been undesirable also from a practical point of view. After all, this would have led to the impossibility of changing to another *arbodienst*, especially since the Dutch DPA uses the principle that this must be done with unambiguous consent, which, in the opinion of the Dutch DPA, basically cannot exist in an employment relationship as it is a relationship of authority.

Conclusion

All things considered, our conclusion is that the fact that Article 7(1) up to and including (5) of the Directive have not been implemented into Dutch law has specifically given rise to a lacuna in situations where the works council or employee representative body do not have a right to consultation. After all, in such situations the employer is not obliged by law to inform the works council or employee representative body. Section 7:665a of the BW also does not apply in such situations, as it only relates to undertakings where neither a works council nor a staff representation has been established. Even if there is a right to consultation, we have to conclude that through Section 25 of the WOR employees will not be informed as a matter of course of their legal position in the event of a transfer of undertaking. However, case law of the past years

²⁶ Dutch DPA, 18 June 2007, 2006-00918 BA2075.

may give rise to the conclusion that this lacuna does not lead to insurmountable problems, as Section 7:611 of the BW also obliges the employer to inform the individual employees in the event of a transfer of undertaking, and to provide them with complete and accurate information at that. With regard to the right of employees to privacy in the event of a transfer of undertaking, the conclusion is justified that this right is safeguarded, at least on paper. However, it remains doubtful whether in actual practice employers are aware of the laws applicable in this respect and/or whether they adhere to these laws.

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