

ITALY

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Corporate and M&A law managing the conflict between confidentiality and industrial democracy in the context of M&A transactions

The need of confidentiality versus the right of information

It is generally accepted that in a merger or acquisition transaction, compliance with the employment and industrial relations legislation is a hot topic that frequently is of crucial importance to the successful completion of the deal.

Such principles apply also to one of the most delicate issues that the parties have to deal with from the early stages of the negotiation; the need to keep the negotiation itself confidential. The reasons for that are obvious; the need to inform the competitors and the market only at a stage of the negotiation when it is clear that the transaction will take place and the need to ensure that there is no confusion amongst the customers, the suppliers and, last but not least, the employees.

It is a common experience that as soon as the rumours of a possible M&A transaction start circulating amongst the employees of the target company (and frequently, as well as amongst those of the buyer), the main activity carried out by said employees is wondering who will benefit from, and who will be damaged by, such a transaction. Frequently the activity is seriously hindered and we have the personal experience of deals that were not completed because the workers of the target company discovered the proposed acquisition too early and they were able to discourage the buyer from finalising the transaction.

However, such need conflicts, *inter alia*, with the right of the employees to understand how the proposed merger or acquisition will affect their job. This right is established at the EU level.

How the matter is regulated in Italy

In Italy, the topic is regulated by a set of rules that derives from the Directive 77/187/EEC of 14 February 1977 '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 Member States have produced measures at the national level to broadly implement Directive 98/50/EC amending Directive 77/187/EEC and consolidated by Directive 2001/23/EC which contributed to promote the harmonisation of the relevant national laws ensuring the safeguarding of the rights of employees and requiring transferors and transferees to inform and consult employees' representatives in due course. This last goal was expressly regulated under section 7 of the Directive 2001/23EC, according to which:

'the transferor and transferee shall be required to inform the representatives of their respective employees affected by the transfer of the following: (i) the date or proposed date of the transfer, (ii) the reasons for the transfer, (iii) the legal, economic and social implications of the transfer for the employees, (iv) any measures envisaged in relation to the employees. The transferor must give such information to the representatives of his employees in good time, before the transfer is carried out. The transferee must give such information to the representatives of his employees in good time, and in any event before his employees are directly affected by the transfer as regards their conditions of work and employment.'

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Although the Directive provides for a common approach, Member States have considerable flexibility in the implementation of the Directive.

In Italy, the matter is regulated by section 47 of Law No 428 of 1990. Such provision states that, in case the transfer of the undertakings (or a part of undertaking) involves more than 15 employees:

- 25 days before the transfer is carried out, the transferor and the transferee must communicate in writing to the Work Council and to trade unions that have executed the collective bargaining agreements applied in the undertaking, the following information:
 - the date or the envisaged date of the transfer;
 - the reasons for the transfer;
 - the legal, economic and social implications of the transfer for the employees; and
 - the envisaged measures for the employees;
- within seven days from the receipt of the above mentioned formal communication, the trade unions' representatives may request a meeting with the transferor and the transferee. Needless to say, such a request is always filed; and
- within seven days from this request, a meeting with the trade unions' representatives has to take place. Please note that there is no obligation to reach an agreement with, or to obtain a clearance by, the unions; if the parties do not find an agreement, the procedure shall be considered terminated after ten days. As a matter of fact, the only obligation cast upon the transferor and the transferee is to provide the above mentioned information, and to provide them in good faith.

It is our personal experience that the concept of good faith sometimes may appear vague to a foreign reader who is not familiar with the Italian legal system. For the purpose of this article, said concept may be summarised with the following three statements:

- the information must be true;
- the information must be sufficiently complete to give the other party enough elements to evaluate the transaction; and
- the information must not omit to provide information that, if known, would influence the evaluation of the transaction by the unions.

Although Article 47 lists all the information to be provided without establishing different

levels of importance, the experience teaches us that the employees are far more interested in having a clear vision on the last two items rather than on the first two.

In particular, the third item covers any information that may enable the employees to evaluate if the transfer of undertaking (or its parts) is a genuine one (see below) or, on the contrary, is aimed at achieving a de facto (and, therefore, illegal) collective dismissal. It also enables the employees to know in advance if the place of work or the working time or any other relevant terms of employment will change after the transaction is consummated or if the applicable Collective Bargaining Agreement will be changed.

Under the fourth item it is normally described what measures are envisaged in order to soften the negative impact (if any) of the transaction, for instance, a significant change of the place of work that might involve an increase in the time needed to arrive at the office might be softened by the introduction of a flexible working time or of a partial reduction of the working hours.

It is relevant to underline that in the event that the transferor and transferee do not comply with the procedure provided for by law for the transfer of an undertaking or do not abide by the above mentioned principle of good faith, they could be subject to legal action under the Worker's Statute for anti-trade union behaviour. This would allow the unions to seek for a preliminary injunction to cease at once the non-compliance with the Law and to provide the requested information.

The injunction may not be revoked prior to the final decision of the case by the court. An appeal against the court injunction may be filed within 15 days from the date of notification of the injunction to the parties.

The possible criminal law implications in case of violation of the Law

If, despite such an injunction, the parties do not abide by the court order, they may be held criminally liable under section 650 of the Criminal Code which states that 'anyone who fails to observe a provision made by a judicial authority for judicial, emergency, public order or hygiene reasons will be punished, unless the fact does not constitute a more serious crime, with imprisonment of up to three months or with a fine of up to €206'. Furthermore, the judicial authorities will order the decision

to be published, as provided for in section 36 of the Criminal Code.

According to consolidated case law of the Italian Supreme Court, failure of the employer to comply with the procedure provided for by the Law will not affect the validity of the transfer itself.

As explained in the next paragraph, although the above mentioned rules apply to the vast majority of the cases, they do not apply to all the cases where an undertaking is going to be transferred.

The definition of 'transfer of undertaking'

Under Italian law, the transfer of an undertaking (or one of its parts) is currently regulated by section 2112 of the Italian Civil Code as amended by Law No 30 of 14 February 2003.

As a matter of fact, section 32 of such Law has changed the Italian practice on transfers of undertakings by amending paragraph 5, section 2112 of the Italian Civil Code. A transfer may be defined as any transaction which, by means of 'a transfer of contract or a merger', transfers the ownership of an undertaking (or a part thereof) 'regardless of the type of legal procedure or legal act by which the transfer is made, including "usufruct" or lease of the undertaking'. Moreover, such provision qualifies an undertaking as 'an organised economic activity, with or without the aim of profit, which pre-exists the transfer and conserves its identity upon the transfer'.

Consolidated Italian case law has tried to define some criteria based on which it is possible to identify a transfer of an undertaking and the consequent application of the above mentioned rules. These criteria are as follows:

- when the undertaking (or part thereof) is an independent and organised economic entity;
- the undertaking continues to retain its identity as an organised economic entity even after following the transaction; and
- tangible assets and/or employees are transferred.

As anticipated, the jurisprudence developed such concepts and it is now generally accepted that the rules governing the transfers of undertakings (inclusive of the aforementioned obligation of information) applies not only to what, from a corporate law perspective, would be defined as such.

In fact, a corporate law expert would be (at least) surprised in acknowledging that, for the purpose of the Law, a transfer of undertaking includes:

- the purchase and sale of undertakings;
- the lease of undertakings; and
- the contribution-in-kind of undertakings.

Most likely, they would be even more surprised in understanding that, inconsistent with the just described extension of the concept of 'transfer of an undertaking', the most common M&A transaction, namely the acquisition of shares, is not included in said concept (Supreme Court, 6 September 1993, No 9339).

The consequence of the abovementioned situation is that the obligation to inform the Works Council and the trade unions does not apply to the takeovers and this could contribute to the parties deciding to opt for structuring a change of ownerships of a business as a share deal instead of as a transfer of the undertaking.

The Collective Bargaining Agreement and Directive 2002/14/EC

Finally, it is worth mentioning that the obligation to provide information concerning an M&A transaction to the Work Council and/or the trade union representatives is underlined by D Lgs 25/2007, which implements EU Directive 2002/14/EC and establishes 'a general framework for informing and consulting employees in the European Community'.

Such obligation is confirmed and expanded by many National Collective Bargaining Agreements ('NCBA') and by some Collective Bargaining Agreements negotiated at the company level. Pursuant to these obligations, the employer must inform the unions and the Work Council of any significant fact that is capable of having an impact on the general conditions of the employees. In these cases, it is generally accepted that an M&A transaction (even if structured as share deals) falls into this category.

By way of an example, Article 3 of the NCBA for employees of the commercial enterprises (one of the most applied NCBA in Italy) confirms the duty of the employer set forth by Article 4 of the above mentioned Directive by envisaging a consultation procedure between the employer and the trade unions concerning, inter alia, the 'reorganisation procedures, outsourcing processes' and 'the foreseeable future of the employment level, the possible risk of its decrease and the envisaged measure to contrast said decrease... (and) the decision of the employer that may involve significant change in the work organisation and in the employment contracts'.