ALLEN & OVERY

Employment Reorganisation Roadmap

Belgium

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Contents

1. Employee representation

1.1. What are the main forms of employee representation involved in restructurings?

The main forms of employee representation involved in restructurings are:

– the works council (in companies with 100 or more employees)

– trade union representatives (if there is no works council), or

– the health and safety committee (in the absence of a works council or trade union representatives).

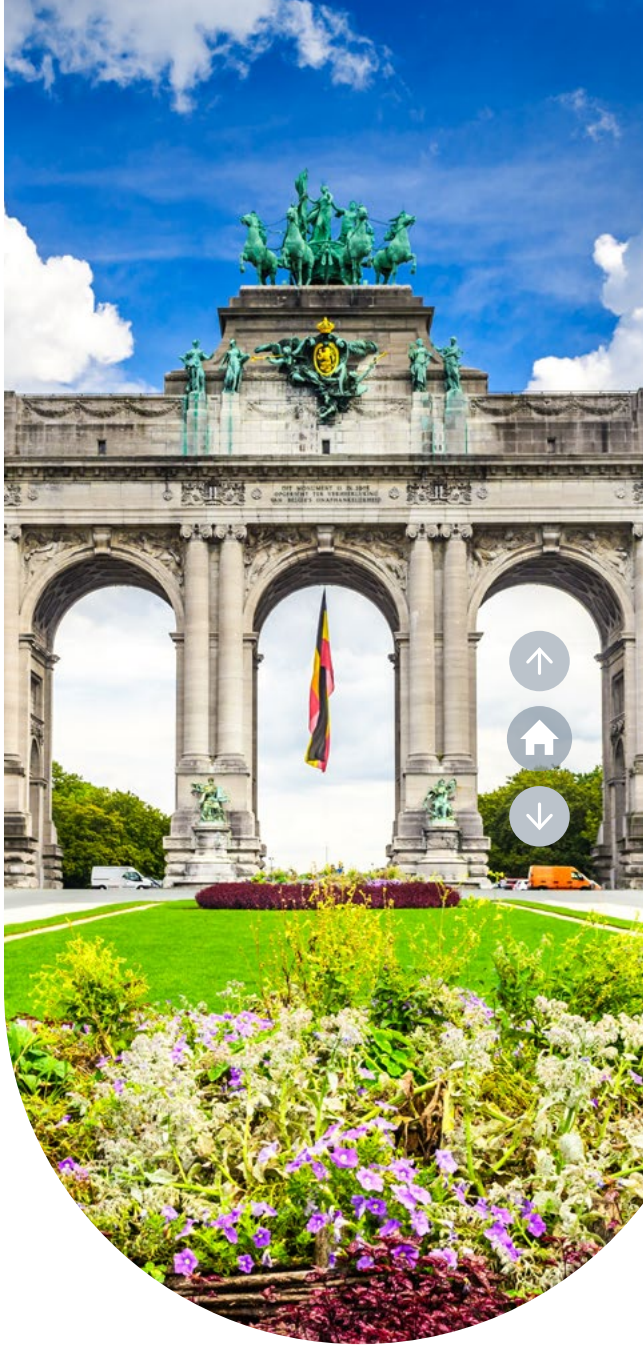
1.2. Is there a system of employee participation rights?

Employees are not represented at board level in the private sector. However, in some publicly-owned companies employees are represented at board level.

2. Process on business sales

2.1. Are employees automatically transferred to a buyer by operation of law on a business sale?

Employees are automatically transferred on the sale of a business or undertaking (or part of one) to a buyer where there is a transfer of an economic entity that retains its identity after the transfer by reference to its workforce, management, organisation of work and operating methods. Merely carrying out a similar activity is insufficient. All relevant factors are considered (and their relative importance will vary according to the type of business). These factors include, in particular, whether customers, assets and employees have transferred, and how similar the activities are before and after the transfer.



2.2. If so, in broad terms, what is the legal test for identifying which employees transfer?

Employees employed by the seller immediately before the transfer and who are mainly or wholly assigned to the business or undertaking (or part) will transfer to the buyer. Whether an employee is "assigned" depends on factors such as the percentage of time they spend working in the business or undertaking, the strength of their connection with it, and whether they work for it only temporarily.

2.3. Can employees object to the automatic transfer of their employment and what are the consequences of an objection?

Belgian courts generally accept that a transferring employee has the right to object to the transfer of their employment contract. In this case, however, they must bear the consequences of a refusal and resign. Hence, the refusal of the employee to transfer will not, in principle, result in any dismissal cost liabilities for the transferor or the transferee.

However, if the employee objects to the transfer because it involves a substantial change to their terms and conditions of employment which is to the employee's detriment, the employee will be able to claim constructive dismissal and obtain indemnities on this basis.

2.4. Do obligations to inform and consult employees or employee representatives arise on a business sale?

The information and consultation process should be complied with before signing. This is because the transaction documentation often already provides for measures that have an impact on the employees (eg arrangements regarding transferring employees, and occupational pensions and other benefits that are to be transferred for certain employees).

Under exceptional circumstances, the information and consultation process can start just before or just after signing, but before any public announcement of the sale and before any actual transfer of assets (ie before closing).

2.5. What are the penalties for non-compliance with information and consultation obligations on a business sale?

Failure to inform and/or consult employee representatives is a criminal offence. Sanctions include criminal fines (EUR400-4,000 per employee, up to a maximum of EUR400,000) or administrative fines (EUR200-2,000 per employee, up to a maximum of EUR200,000). Damages may also be awarded to individual employees.

3. Process on share sales

3.1. Do obligations to inform and consult employee representatives arise on a direct share sale (ie on the sale of the company itself)?

A seller/buyer must inform employee representatives where a sale of shares is proposed and consult where measures are envisaged in relation to affected employees. The timing of information and consultation obligations remains subject to debate as the applicable regulations are unclear.

However, most legal commentators currently consider that the information and consultation obligation must be complied with before the signing of the share purchase agreement.

In practice, however, employers often only begin informing and consulting the works council on or immediately after signing if the transaction has no impact on employees, employment or terms and conditions. Doing so is not without risk. The information and consultation process must still begin before any public announcement of the transaction and must be completed before the share sale actually occurs (ie before closing).

3.2. Do obligations to inform and consult employee representatives arise on an indirect share sale (on the sale of a company's direct or indirect holding company)?

There is an obligation to inform the works council of a share sale of the parent company.

Depending on the facts and the consequences of the parent company share sale for the local entity, the works council may also have to be consulted. This is the case if the share sale entails measures that may affect:

– the organisation of work

– the employment prospects of the personnel, or

– the employment strategy in general within the Belgian entity.

In the event that there is an obligation to consult, consultation should take place before any decision is taken regarding the measures envisaged that affect the employees of the local entity. As a result, the information and consultation process may have to take place before signing of the transaction agreements relating to the share sale of the parent company.

Where there is no obligation to consult, the obligation to inform can be complied with after signing, but before closing and before the public announcement of the transaction relating to the parent company.

4. Process on outsourcings

4.1. Are employees transferred by operation of law in the following scenarios: (i) on an initial outsourcing of processes/services; (ii) on a change of supplier; or (iii) on an insourcing of processes/services?

Employees are automatically transferred on a service provision change in any of these scenarios if the outsourcing operation constitutes a transfer of an undertaking (see **section 2 – Process on business sales**).

4.2. Do obligations to inform and consult employees or employee representatives apply in any of these scenarios?

Obligations to inform/consult apply in relation to a service provision change as they do on a business sale (see **section 2 – Process on business sales**).

5. Process on collective dismissals

5.1. Is a "collective dismissal" (or "mass layoff") defined by law?

A collective dismissal arises where dismissals are proposed within a 60-day period affecting:

– ten or more employees in an undertaking (or in a part of an undertaking) with 20-99 employees

– at least 10% of employees in an undertaking (or in a part of an undertaking) with 100-299 employees, or

– 30+ employees in an undertaking (or in a part of an undertaking) with 300+ employees.

For the purposes of reducing the early retirement age, a collective dismissal arises where dismissals are proposed within a 60-day period affecting:

– 10% of employees in an undertaking (or in a part of an undertaking) with at least 100 employees

– ten or more employees in an undertaking (or in a part of an undertaking) with 21-99 employees

– six or more employees in an undertaking (or in a part of an undertaking) with 12-20 employees, or

– at least 50% of employees in an undertaking (or in a part of an undertaking) with fewer than 12 employees.

The relevant workforce consists of employees with a minimum of two years' service at the time of announcement of the intended collective dismissal.

5.2. Do obligations to inform and consult employee representatives arise on a collective dismissal?

Consultation must take place before any decision to proceed with dismissals and before any public announcement concerning the dismissals. In practice, the consultation period typically varies from one to four months. However, the process is open-ended: the law does not provide for a maximum term. A collective dismissal will, to some extent, require an employer to negotiate a social plan with (external) trade union representatives.

Notices of dismissal cannot be given until at least 30 days after completion of the information/consultation process and after a formal decision to proceed with dismissals has been taken and notified. This may be extended to 60 days at the request of the trade union representatives (except in the case of a business closure).

5.3. Do obligations to inform and consult the competent authorities arise on a collective dismissal?

At the start of the procedure, and as soon as the employer has notified the employee representatives during a meeting and in writing about the intended collective dismissal, the employer must send a copy of this written notification to the director of the regional office of the State Employment Agency and to the president of the management board of the Federal Public Service Employment, Labour and Social Dialogue.

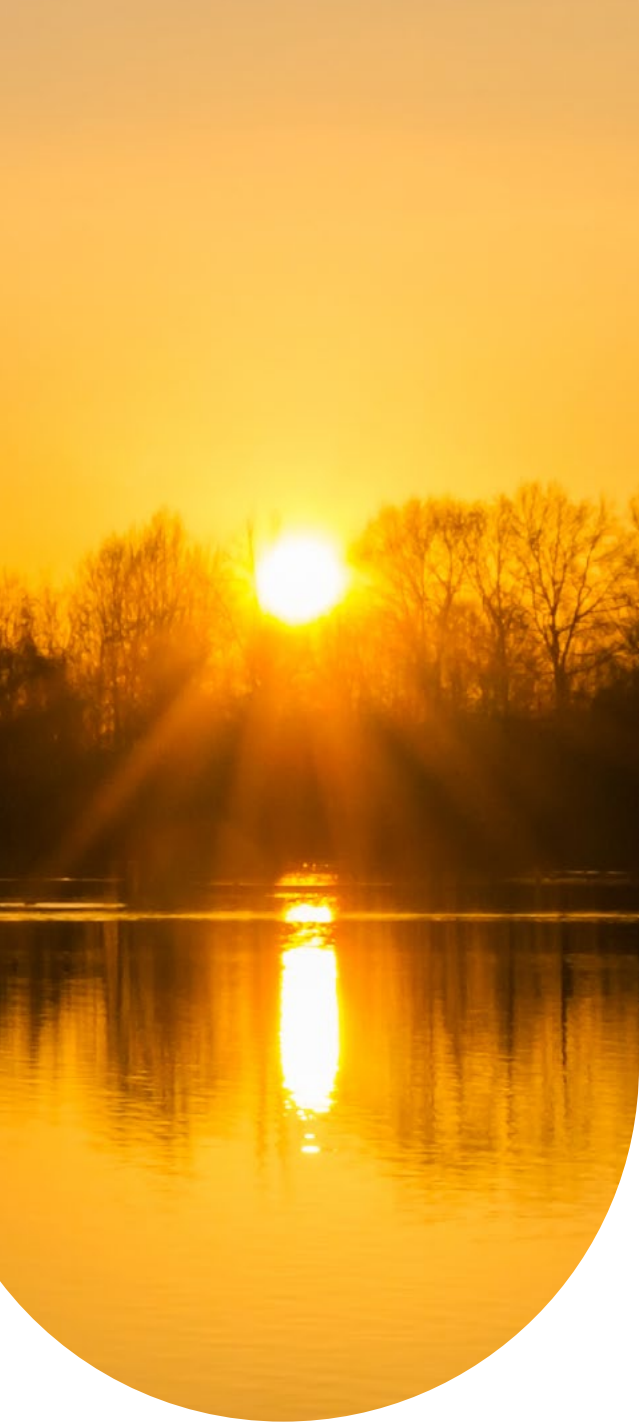
During the procedure, further regulatory notifications will be needed.

Additional rules apply on any proposed closure of a business.

This will not impact the timeline or ability to make a decision.

5.4. When are these obligations triggered?

The official announcement of an intention to carry out a collective redundancy triggers the formal start of the collective consultation process. The trigger point is not defined, but is generally accepted as being when the employer's redundancy plan is precise enough (ie the employer has formed a specific intention to make the number of terminations meeting the thresholds (see answer to **5.1**)).



5.5. What are the penalties for non-compliance with information and consultation obligations on a collective dismissal?

Failure to inform/consult employee representatives is a criminal offence. Sanctions include criminal fines (EUR400-4,000 per employee, up to a maximum of EUR400,000) or administrative fines (EUR200-2,000 per employee, up to a maximum of EUR200,000). Non-compliance may also result in significant financial liabilities. The court may order suspension of employees' notice periods for 60 days and/or reinstatement (in each case, employees must be paid during the relevant period). It may also order that new procedures be commenced.

Failure to inform the director of the regional office of the State Employment Agency is a criminal offence. Sanctions include fines of EUR80-800 per employee, up to a maximum of EUR80,000.

5.6. Do obligations to inform and consult employee representatives and/or competent authorities arise in the context of multiple dismissals, which do not qualify as a collective dismissal, as defined by law?

In the event of multiple dismissals on economic grounds which do not qualify as a collective dismissal, the works council will in principle need to be informed, but there is no duty to consult. Note, however, that the works council has decision-making authority with respect to the general criteria for recruitment and layoffs.

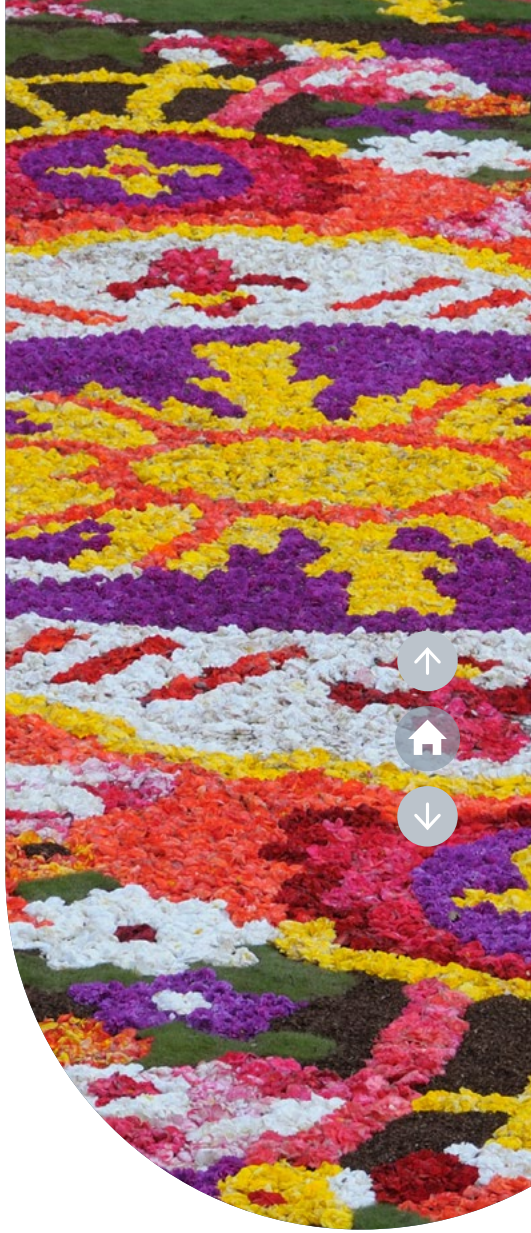
At industry or company level, specific rules (in terms of both the procedural and the substantive aspects of the dismissals) may apply in the case of multiple dismissals.

5.7. Does an employer have options/alternatives when it has been unable to reach agreement with employee representatives during the negotiation period?

A social plan is typically negotiated which will contain measures for compensation and post-redundancy assistance over and above the legal requirements. Nevertheless, generally speaking there is no formal legal obligation to negotiate a social plan. This means that if no agreement can be reached, the employer is in principle free to carry on with the dismissals on the expiry of the standstill period and to pay normal severance packages. However, when dismissals for economic reasons trigger a collective dismissal and a formal restructuring process (in particular a "Renault-Act process" and/or activation measures under the Generation Pact Act), it will in practical terms be very difficult or impossible to implement this without a social plan collective bargaining agreement.

Moreover, from an industrial relations perspective, proceeding wihout a social plan in this way will carry a high risk of strikes and other industrial action.

6. Process on individual dismissals



6.1. Are employees entitled to a minimum period of notice on dismissal on redundancy or economic grounds?

Notice periods are fixed by law for all employees. These apply as a minimum. Arrangements that are more beneficial to the employee can be agreed on an individual basis or at the company level. An employer that does not give the required notice must pay compensation in lieu of notice.

New dismissal rules entered into force on 1 January 2014. For employees who entered into service before 1 January 2014 specific transitional rules apply.

For employees who entered into service on or after 1 January 2014 the notice periods are fixed terms, expressed as a number of weeks, the length depending solely on the employee's length of service (referred to as "seniority"). The terms increase gradually according to the employee's length of service:

Length of service (seniority)	Notice
< 3 months	1 week
Between 3 months and < 4 months	3 weeks
Between 4 months and < 5 months	4 weeks
Between 5 months and < 6 months	5 weeks
Between 6 months and < 9 months	6 weeks
Between 9 months and < 12 months	7 weeks
Between 12 months and < 15 months	8 weeks
Between 15 months and < 18 months	9 weeks
Between 18 months and < 21 months	10 weeks
Between 21 months and < 24 months	11 weeks
Between 2 years and < 3 years	12 weeks
Between 3 years and < 4 years	13 weeks
Between 4 years and < 5 years	15 weeks
From 5 years < 20 years	15 weeks + 3 weeks per additional year of service commenced
Between 20 years and < 21 years	62 weeks
From 21 years	63 weeks + 1 week per additional year of service commenced

In principle, the duration of the notice is unrelated to the reason for the dismissal. However, in specific circumstances shorter notice periods apply if termination is for certain specific reasons (eg retirement).

6.2. Does any special procedure apply when proposing to implement an individual dismissal on redundancy or economic grounds?

There is a general obligation for employers to provide a justification for dismissal on the employee's request. The reason may relate to the competencies of the employee or the needs of the company. The grounds given must in any event be reasonable. In a few circumstances there is no obligation to provide a justification for dismissal (eg in the first six months of employment, collective dismissal, plant closure etc). Also, specific transitional regulations apply when justifying the dismissal of (former) blue-collar employees.

No statutory selection criteria apply in a redundancy situation, but a works council is entitled to set the selection criteria to be applied if it wishes to.When serving notice, there are strict formalities to be observed. If an employer fails to comply with these, the employee is considered to have been dismissed with immediate effect, in which case a payment in lieu of notice is due.

In some industries, certain procedural requirements need to be complied with (eg specific justification requirements, informing employee representative bodies etc).

6.3. Does special dismissal protection apply where dismissals are to be implemented following or in connection with a business transfer?

In the case of a transfer of undertaking, dismissals by the transferor or the transferee are only allowed for serious cause or for economic, technical or organisational reasons.

If an employee is dismissed because of a transfer, and therefore in breach of Belgian regulations, that employee may bring a claim for damages against the transferee and/or the transferor in criminal or civil proceedings.

6.4. Are employees entitled to a minimum severance payment on dismissal for redundancy or economic grounds?

In principle, if notice is worked, no severance payment is due. However, if an employer does not serve the required notice of termination, or terminates the employment with immediate effect during the notice period, the employer will have to make a payment in lieu of notice.

In the event of a collective dismissal or plant closure additional termination payments are due.

In certain cases of company restructuring, employees are entitled to a redeployment allowance when taking part in a "redeployment cell" (ie an ad hoc body offering redeployment and outplacement assistance to the dismissed employees). Participation in such a cell is for a period ranging from three to six months, depending on whether the employee is aged over or under 45 years.

Payments upon termination can be enhanced by collective agreement or under a social plan.

6.5. What are the penalties for non-compliance with individual dismissal procedure?

With regard to the obligation to justify the dismissal, if a (former) employer fails to provide proper reasons for the employee's dismissal upon the employee's request within the applicable timeframe, that employer must pay the employee a civil fine equal to two weeks' remuneration. If the court finds the grounds for dismissal are manifestly unreasonable , the employer will have to pay the (former) employee damages equal to between three and 17 weeks' remuneration. A breach of the transitional justification arrangements for (former) blue-collar employees also gives rise to additional payments to the employees. If the dismissal is found to be discriminatory, the employee may claim damages of up to six months' salary.

In some industries, certain procedural requirements need to be complied with (eg justification requirements, informing employee representative bodies etc). In the event of a breach of these provisions, the employer must often pay additional compensation to the employee.

If the strict formalities for serving notice are not complied with, the employer will have to make a payment in lieu of notice.

6.6. Is there any special legal protection or does any special treatment apply for particular groups of workers?

Employee representatives or candidates of a works council or prevention committee are highly protected under Belgian law. They may only be dismissed:

– for serious cause, as acknowledged in advance of the dismissal by the labour court in "summary" proceedings, or

– for "economic or technical reasons" as acknowledged in advance of the dismissal by the joint committee.

If such a protected employee representative is dismissed in breach of these specific procedural rules, they are entitled to protection compensation.

Some categories of employees (eg those on maternity leave, pregnant employees, members of the trade union delegation, internal heath and safety advisers, employees who have filed a complaint based on the anti-discrimination regulations, or who have filed a formal complaint regarding moral or sexual harassment, violence or psychosocial risks, etc), benefit from specific protection against dismissal and may only be lawfully dismissed for reasons unrelated to their specific situation. Failure to comply with the restrictions will render the dismissal unlawful and the employer will have to pay an additional protection indemnity (the amount depending on the type of protection), in addition to the mandatory notice or severance.

7. Process when implementing alternatives to redundancy

7.1. Can changes to employment terms be made with or without express employee consent?

According to the strict interpretation principles of the Belgian Supreme Court, the employer may only unilaterally change:

– non-agreed terms and conditions, and

– agreed, but non-essential, terms and conditions if a "modification clause" has been agreed.

Whether or not a unilateral change may actually lead to a constructive dismissal (or a claim for damages) must be assessed on a case-by-case basis, taking into account all the facts of the case in question.

An employee's place of work, function and salary are generally considered to be essential terms of the employment contract.

If an employer signs an agreement with the affected employees in which they expressly agree to the change, this will not be treated as a unilateral change to the terms and conditions of employment.

7.2. Must an employer consult individually or collectively with affected employees or their representatives (if any) before making changes to employment terms?

Depending on the type and significance of the proposed changes to employment terms, prior consultation with the trade unions may be needed (eg in the case of a change of workplace).

Although there is no strict requirement to consult with individual employees, it may nevertheless be advisable to do so.

7.3. Do additional restrictions apply if changes are proposed in connection with or following a business transfer?

The transfer cannot be the reason for amending employment terms. The transferee must respect the transferring employees' existing terms and conditions, which may make it difficult for the transferee to harmonise the terms and conditions of the transferred employees with those of its own existing employees.

7.4. What are the penalties for non-compliance with these procedures?

If the intended change is considered to be a significant change to an essential employment term or condition, the affected employee could argue that the employment contract has been terminated and claim compensation (constructive dismissal).

Alternatively, the employee may claim that, by changing their terms and conditions of employment the employer has breached the employment contract, such that they may claim compensation. In this situation, the employee will not claim that the contract has been terminated, but will instead claim damages for breach of contract.

7.5. Do national laws promote or permit any alternatives to redundancy (eg layoff or short-time working)?

The system of economic unemployment allows employers, under certain conditions, to address a shortage of work in the business by allowing them to temporarily suspend the employment agreements of part of their workforce. The employer may suspend these employment agreements in full for a certain period, or may opt for a system of partial employment. Employees are not dismissed and will receive unemployment benefits from the state during the period of suspension.

End-of-career (garden leave) arrangements are generally perceived as an attractive system by unions, but are also expensive due to high social security contributions.

8. Process on insolvency

8.1. Do obligations to inform and consult employee representatives arise on the sale of an insolvent business (whether share sale or business sale)?

On most occasions, the same obligations apply as in the case of the sale of a solvent business (see **section 2 – Process on business sales**). In exceptional cases, specific (but similar) obligations under insolvency legislation apply.

8.2. Does the buyer of an insolvent business inherit employees and/or employee liabilities by operation of law?

This will depend on the type of insolvency proceedings. Three regimes exist:

– the common law regime applicable to business transfers

– the regime applicable to asset transfers following a bankruptcy decision, and

– the regime applicable to business transfers under court supervision.

The common law regime applicable to business transfers (which provides for an automatic transfer of employees and employee liabilities to the buyer) will apply unless:

– the business transfer occurs following a bankruptcy decision - a specific regime applies in that case; there is no automatic transfer of employees and the buyer is not liable for pre-transfer employee liabilities, or

– the business transfer occurs under court supervision - ie a specific regime under insolvency legislation, in which case there is an exceptional regime with respect to pre-transfer employee liabilities.

As from 1 September 2023, a new law also provides for the possibility of a confidential court-supervised reorganisation as well as confidential pre-pack proceedings in preparation for bankruptcy.

8.3. Do obligations to inform and consult employee representatives arise where collective dismissals are to be implemented in an insolvent business?

In some cases, the same obligations apply as for collective dismissals in a solvent business (see **section 5 – Process on collective dismissals**). Otherwise specific information and consultation obligations under insolvency legislation will apply.

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