ALLEN & OVERY

Employment Reorganisation Roadmap

Netherlands

1 January 2024

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:

– trade union representatives

– the works council (in companies with 50+ employees)

– the personnel representative body (in companies with fewer than 50 employees), or

– personnel in a meeting (if there is no works council or personnel representative body).

1.2. Is there a system of employee participation rights?

Yes. Employee participation rights are generally exercised through works councils and trade unions.

Works councils have certain information and consultation rights, such as the right of advice in relation to proposed important business decisions, a right of consent in relation to employment related regulations and policies and various information rights. Also, works councils have the right to give their advice on a proposed decision regarding the appointment or dismissal of a director or a member of the company's management board.

In addition, works councils have the right to nominate up to one-third of the members of supervisory boards in larger companies (ie companies with issued capital of more than EUR16 million, at least 100 employees and a works council, provided proper registration has occurred).

Trade unions also have various information and consultation rights, including in relation to proposed mergers and acquisitions and collective redundancies.

2. Process on business sales

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

This depends. A business sale may trigger an automatic transfer of employees if it qualifies as a transfer of an undertaking under Dutch law. This is the case if there is a transfer of a stable economic entity that retains its identity after the transfer. Whether this test is met is determined by reference to various factors, in particular whether customers, assets and employees have transferred, and the degree of similarity of activities before and after the transfer.

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

Employees who are considered to be dedicated to the transferring economic entity will transfer by operation of law. Normally this is the case if the employees work predominantly for, and in, that economic entity. Under Dutch law there is no clear threshold or strict guidance on how to analyse which employees meet this test.

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

Employees who refuse to transfer must do so unambiguously. The employee must be informed of the consequences of, and of their rights in relation to, the transfer in advance of it. The employer must fully inform employees about the choice between transferring to the buyer and refusing such transfer, and about the consequences of each option. If the employee unambiguously refuses to transfer, such refusal is considered to be a resignation, as a result of which the employment agreement terminates by operation of law at the time of transfer and the employee has no entitlement to severance.

Note that an employee who resigns due to a “substantial change in working conditions to their detriment” will be treated as dismissed on the initiative of the employer and will be entitled to a statutory severance payment.

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

The seller/buyer must seek their respective works council's advice regarding a proposed business transfer in sufficient time to enable the works council to substantially influence the decision whether to proceed with the transfer or connected measures. The works council must give an opinion within a reasonable time. There must be at least one consultation meeting.

The Social and Economic Council (SEC) Merger Code 2015 has a separate obligation to inform and consult any trade union (where a Netherlands-based enterprise employs 50 or more employees or belongs to a group that employs 50 or more employees) in respect of a proposed "merger", which comprises a business sale. The relevant trade unions must be informed and consulted in sufficient time and ahead of a works council's advice so that their opinion can still influence the proposed decision.

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

If the seller/buyer does not obtain or follow their respective works council's advice (and the works council is opposed to the transfer), the implementation of the decision must be suspended for a one-month period, within which time the works council can appeal to the court on the ground that management could not have reasonably reached its decision. If the appeal is successful, remedies given by the court may include an order requiring that the decision be withdrawn (wholly or partly) and that the consequences of the decision be reversed.

Where there is non-compliance with the SEC Merger Code 2015, the Dutch SEC may issue a (public) statement concerning non-compliance.

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)?

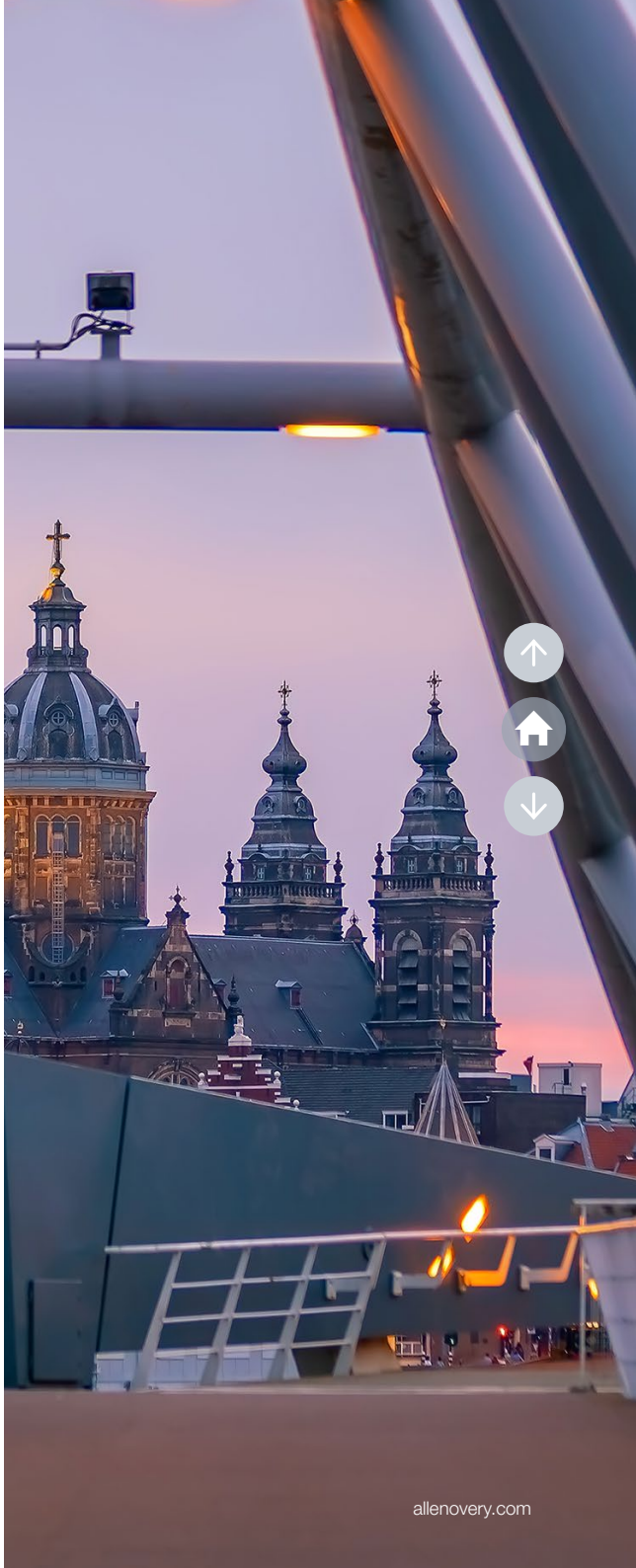
The seller/buyer must inform and consult their respective works council regarding a proposed share sale. They must also inform and consult the relevant trade unions under the SEC Merger Code 2015 (if applicable). The timing requirements and penalties are similar to those on business sales (see **section 2 – Process on business sales**).

These rules regarding works council participation apply equally to branch offices and subsidiaries in the Netherlands that satisfy the definition of "enterprise" in the works council legislation.

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)?

In principle, the Dutch Works Councils Act only grants information and consultation rights to the works council with regard to intended decisions of the Dutch company at the level at which it is placed. Therefore, indirect share transfers do not, in principle, trigger information and consultation rights of the works council.

However, in certain circumstances indirect share transfers may trigger consultation rights at a lower level within a corporate group. This can occur where the works council has contractually agreed information and/or consultation rights, or in the event of a so-called "attribution of decision-making" whereby the decision to sell is attributed to the Dutch subsidiary where the works council is located. Such attribution could arise if: (i) the local management of that Dutch subsidiary is closely involved in the transaction process itself; or (ii) a so-called "personal union" (*personele unie*) exists between the target company and the Dutch subsidiary where the works council is located, which can be the case if these companies have (nearly) identical management boards. In addition, if the parent/holding company qualifies as a co-entrepreneur (*medeondernemer*) of the Dutch subsidiary where the works council is located, works council consultation rights can also – in addition to applying at the Dutch subsidiary where the works council is located – be claimed against such parent directly.



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 in any of these scenarios if certain conditions are met, *inter alia*:

– there must be a stable economic entity that retains its identity. A stable economic entity is a sufficiently structured and autonomous undertaking with characteristics such as its own workforce, management, organisation of work, operating methods and operational resources;

– in respect of an asset-reliant business, a transfer of the majority of relevant assets will generally be required; and

– in respect of a labour-reliant business, a major part of the business in terms of the number and skills of the employees assigned to it, must be taken over by the buyer.

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

An employer must seek the works council's advice if the intended decision in any of these scenarios involves (among other factors);

– a transfer of control over the company or parts of the company;

– a discontinuation of the activities, or of a major part of the activities, of the enterprise;

– a substantial change in the activities of the enterprise;

– a substantial change in the organisation of the enterprise, or in the allocation of responsibility within the enterprise; and/or

– the recruitment or hiring of groups of workers.

5. Process on collective dismissals

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

A collective dismissal arises where 20 or more dismissals are proposed within a three-month period within the same working area as defined by the Employee Insurance Agency (UWV).

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

The employer must inform and consult the relevant trade unions (if any) on the collective dismissal as defined by law. The employer must do so at the same time as informing the UWV on the collective dismissal (see answer to **5.3**).

In addition, the employer must seek the works council's advice regarding a collective dismissal as defined by law, if these intended dismissals qualify as an important organisational change (which comprise situations where there is a closure of a company or a substantial reduction in business resulting in redundancies). The employer must do so in sufficient time to enable the works council to substantially influence the decision whether to proceed. The works council must give an opinion within a reasonable time. There must be at least one consultation meeting. It is usual for a "social plan" to be negotiated, as this is important in seeking a positive opinion from the works council. In practice, the consultation period may take between one and five months.

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

The employer must inform the UWV of proposed collective dismissals as defined by law. The employer must also apply for permission to dismiss each employee upon completion of consultation with the works council if no mutual termination agreement has been, or will be, entered into with the affected employee. Dismissals based on business economic grounds can be effected either by giving notice after permission has been granted by the UWV, or by signing a mutual termination agreement with the employee.

There is a minimum one-month waiting period from the date of notification to the UWV before the employer can proceed with the dismissals (unless the trade unions agree to the application). The UWV will expect proper negotiations to take place with trade unions and works councils before permission is granted.
The UWV no longer reviews the commercial grounds for the dismissal of 20 or more employees if the employer and relevant trade unions reach agreement on the number of jobs to disappear. If, however, an employee presents new facts (that have arisen after an application for permission to dismiss is filed with the UWV) in relation to commercial grounds, the UWV may still review the commercial grounds. The UWV will check that the employees to be dismissed have been properly selected.

5.4. When are these obligations triggered?

An employer must inform and consult the works council (and if the collective dismissal threshold is met, the relevant trade unions) regarding a proposed collective dismissal early enough to enable it to substantially influence the decision whether to collectively dismiss or not. This means that no binding decision can yet have been taken before informing and consulting these bodies and, at the same time, the employer must have a concrete plan on the form of the restructuring in order to commence the information and consultation process with these bodies. The employer must also inform the UWV at the same time as informing and consulting the relevant trade unions (if any).

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

Failure to comply with the required collective dismissal notification towards the UWV, and the collective dismissal information and consultation requirements towards the works council and the relevant trade unions (if any), will put relevant dismissals and mutual termination agreements at risk of possible nullification by the affected employee (subject to certain time limits). Alternatively, the affected employee could claim reasonable compensation (*billijke vergoeding*).

The UWV will not process any requests for dismissal until such time as the employer can evidence that it has complied with the required collective dismissal notification towards the UWV and the collective dismissal information and consultation requirements towards the works council and the relevant trade unions (if any).

Furthermore, the employer must not proceed with the dismissals until the permission of the UWV is granted. If no information, or insufficient information, is provided to the UWV, the application to dismiss will not be considered by the UWV until all relevant information has been provided to it.

Penalties for failure to inform and consult the works council are similar to those applicable to business sales (see answer to **2.5**). In relation to penalties for failing to reach agreement with employee representatives, please see answer to **5.7**.

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?

An employer must inform and consult the works council regarding multiple intended dismissals, even if these do not qualify as a collective dismissal as defined by law, if such dismissals qualify as an important organisational change (which comprise situations such as the closure of company or a substantial reduction in business resulting in redundancies). The employer must do so in sufficient time to enable the works council to substantially influence the decision whether to proceed. The works council must give its advice within a reasonable time. There must be at least one consultation meeting. In practice, the consultation period may take between one and five months.

In addition, collective labour agreements may impose additional consultation obligations on headcount reductions that fall below the collective dismissal threshold.

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

There is no obligation to reach agreement with the trade unions.

With respect to works councils, the works council process usually takes at least several weeks or months, with no statutory timelines applying. If the works council advises against the intended decision, or if it gives conditional advice and such conditions are not taken into account in the final decision by the employer, the implementation of the decision must be suspended for a one-month period. During this one-month period the works council can appeal to the Amsterdam Court of Appeal on the ground that management could not have reasonably reached its decision had it taken into account all circumstances involved. If the appeal is successful, remedies given by the court may include a court order requiring that the decision must be withdrawn (wholly or partly) and that the consequences of the decision must be reversed.

6. Process on individual dismissals

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

The minimum notice period depends on the length of service:

– Up to five years' service – one month

– Five to ten years' service – two months

– 10+ to 15 years' service – three months, or

– 15+ years' service – four months.

Under certain circumstances, these statutory notice periods may be varied by collective agreement or extended by written contract.

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

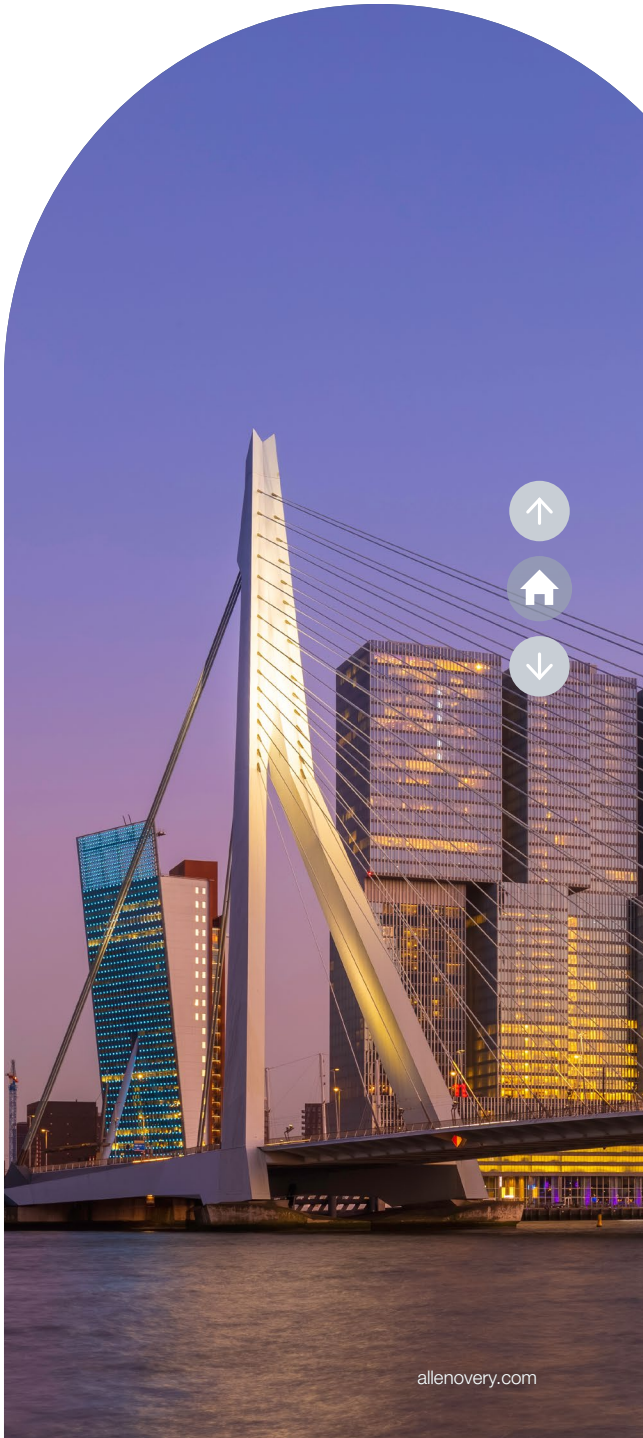
Dismissal can be effected either by giving notice after permission has been granted by the UWV or by signing a mutual termination agreement with the employee. Sufficient justification for each dismissal must be given. Generally, the UWV dismissal procedure takes about four to seven weeks.

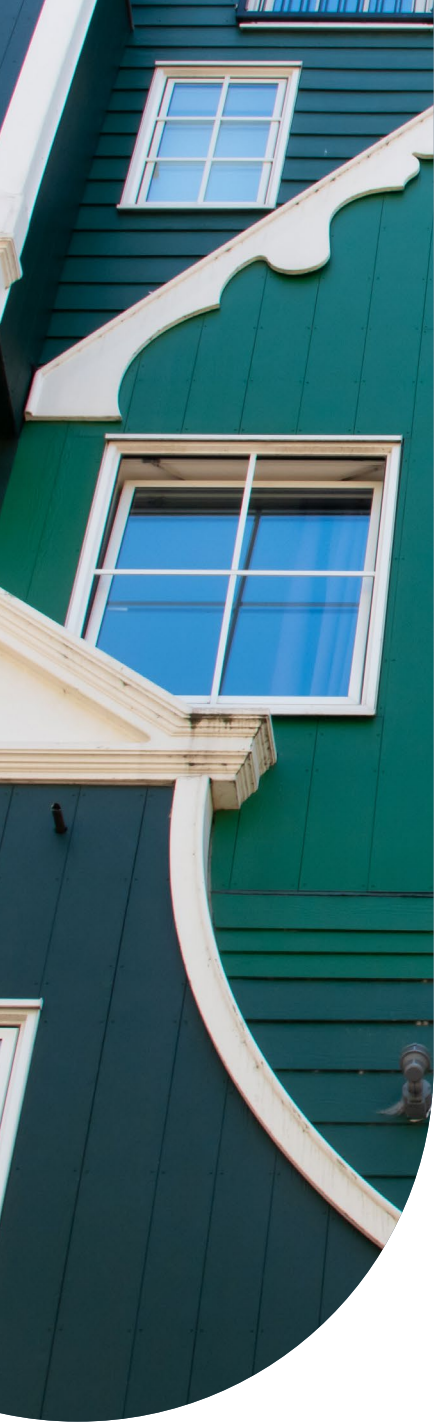
As the main selection criterion, a balancing principle is used, regardless of the number of employees to be dismissed. This means that employees with comparable jobs are put together in age groups and that, from each age group, the employee who was "last in" is the first proposed for dismissal. In principle, it is not possible to agree different selection criteria in a social plan.

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

There is a prohibition on dismissal prior to, in anticipation of, or following a business transfer (that qualifies as a transfer of undertaking) as a result of such transfer. An exemption may apply in case of economic, technical or organisational reasons ("ETO reasons") entailing changes in the workforce.

Mutual termination agreements concluded because of a relevant business transfer may be at risk of nullification, subject to stringent exceptions set out under Dutch case law.





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

In the case of a unilateral dismissal (following the permission of the UWV), an employee is entitled to a statutory severance payment. The severance payment is equal to one-third of the monthly gross salary for each full year of service (pro-rata for each part of a year), subject to a maximum of either: (i) EUR94,000 gross; or (ii) their annual salary if higher than EUR94,000 gross. These maximums apply for the year 2024 and are updated each calendar year.

In the case of a mutual settlement agreement, the employer and employee are free to negotiate the amount of severance (no minimum severance payment applies, unless such has been agreed upon in a social plan). In practice, however, the statutory severance payment is often used as a parameter in settlement negotiations.

In addition, in the case of serious culpable behaviour on the part of the employer, additional compensation *(billijke vergoeding)* may be due. There is no fixed method for calculating the additional compensation as its purpose is to compensate the employee for damage suffered as a result of the employer's actions. The court will take into account all relevant circumstances of the case, the main element being the value of the employment contract.

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

Notice of termination given by the employer requires a permit from the UWV. Until this permit is obtained, any notice is voidable, which means that the employee can go to court to nullify such notice as a result of which it will be treated as having no effect and will not have terminated the employment. Note, however, that the employee must exercise their right to nullify within two months after notice is given, after which this right will lapse.

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

Yes. Particular dismissal protection may apply to, among others, members of a works council, pregnant employees and sick employees during the first two (or three) years of their illness.

7. Process when implementing alternatives to redundancy

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

In principle, an employer cannot unilaterally change the employee's employment terms unless: (i) a unilateral amendment clause is included in the employment agreement (or in the collective labour agreement, if applicable); and (ii) the employer has a substantial interest in making the change whereby the interest of the employer outweighs the employee's interests that are harmed by the change – in practice, this threshold is high.

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

In principle, this is not required. However, prior consultation is generally recommended as otherwise a unilateral change may be considered unreasonable and invalid. The employer can try to obtain the employees' consent to amend the employment terms in individual cases.

Approval by the works council in relation to collective changes to employment terms can be (further) evidence of the substantial interest required.

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

A change to employment terms is ineffective following a business transfer that qualifies as a transfer of undertaking, if the transfer itself is the reason for the change. This is the case even where the change is consensual and the less favourable terms are offset by other benefits so that the contract of employment as a whole is no less favourable.

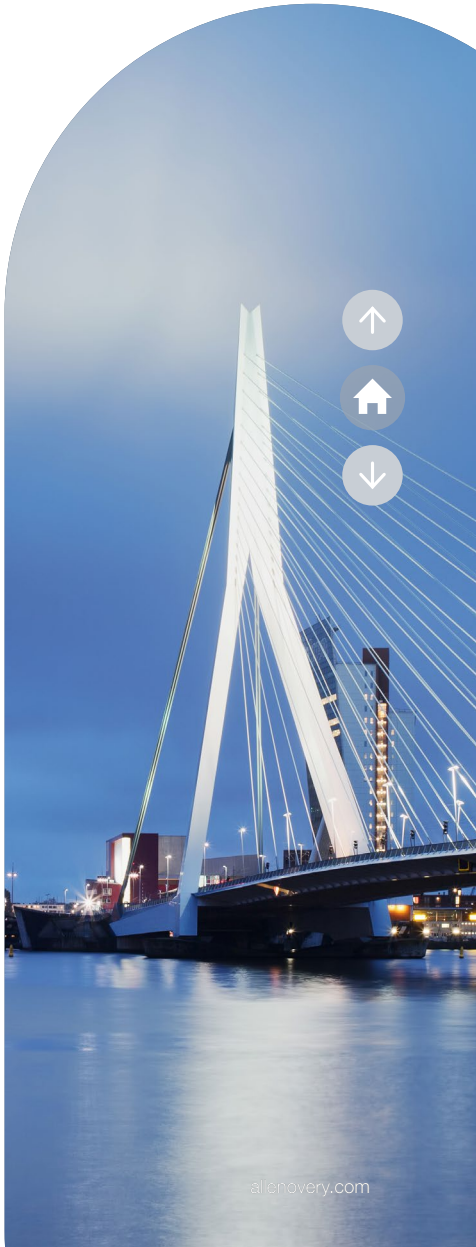
If harmonisation of contractual employment terms and conditions is essential post-transfer, possible practical options in light of the effect of Dutch legislation include:

– obtaining the consent of each individual employee post-transfer to the contractual changes and, if the changes are more beneficial to the transferred employee as a whole, with the aim of avoiding any legal challenge

– agreeing with the relevant trade unions a new collective labour agreement to be effective post-transfer and aimed at harmonising (collective) employment terms and conditions, or

– unilaterally imposing the contractual changes post-transfer for a reason that qualifies as an economic, technical or organisational reason entailing changes in the workforce (ETO reason).

However, unilateral adverse changes to fundamental contractual employment terms (such as contractual remuneration arrangements) are strictly and narrowly construed by the Dutch courts and are rarely upheld as enforceable if challenged. These options do not preclude the risk of an employee bringing a legal challenge.



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

Employees could challenge the unilateral changes to their employment terms in court proceedings. A Dutch court may also – at the employee's request – rescind the employment contract, entitling the transferring employee to a severance payment, the amount of which will reflect and attribute the degree of the employer's blame.

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

Dutch law does not promote or permit any alternatives to redundancy, such as temporary layoffs, short-time working, mandatory shorter working hours or leave. However, shorter working hours or leave (eg using vacation days or unpaid leave) can be agreed with the employees, although this is uncommon. In addition, employees can in certain circumstances claim a reduction in hours, also to avert redundancy. If certain conditions are met, the employee may be entitled to a partial statutory severance payment relating to the reduction in hours.

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)?

In principle, in both “terminal” proceedings (ie bankruptcy) and “non-terminal” proceedings (ie a suspension of payments or “moratorium” procedure, the purpose of which is to rescue the company) an obligation exists to inform and consult the works council.

Although the Dutch Works Councils Act formally applies in a bankruptcy situation, it follows from case law that the trustee may deviate from certain formal requirements in connection with the works council’s right to advice, where deemed reasonable.

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

The Dutch Civil Code explicitly states that the Dutch transfer of undertakings law does not apply in “terminal” proceedings (ie bankruptcy), nor does it apply, in principle, where a company (or part of a company) resumes business immediately after the company has been declared bankrupt. As a result, the buyer of the insolvent business does not inherit the employees or the employee liabilities by operation of law. Where the business is continued as part of a pre-pack, however, this may be different. A pre-pack is a Dutch national practice derived from case law. It is essentially a pre-negotiated restart immediately following the bankruptcy, aimed at liquidation of the undertaking as a going concern which satisfies the claims of all the creditors to the greatest extent possible and preserves employment as far as possible. In response to preliminary questions of the Dutch Supreme Court, the Court of Justice of the European Union ruled in April 2022 in the Heiploeg case (case 237/20) that the pre-pack procedure may fall under the bankruptcy exception described above, provided that that the pre-pack procedure is governed by statutory or regulatory provisions. As the latter is not yet the case in the Netherlands (a draft bill to this effect is expected in the near future), the pre-pack procedure is not yet exempted from the Dutch transfer of undertakings law, meaning that the buyer in a pre-pack procedure will, in principle, inherit the employees and employee liabilities.

If the Dutch transfer of undertakings law does not apply and the buyer of the insolvent business wants to continue the employment of the relevant employees, the (fixed-term) employment contracts in existence until the bankruptcy date may need to be taken into account to establish the seniority (tenure) and nature of the employment contracts of these employees post-bankruptcy.

In the case of a business subject to “non-terminal” proceedings, Dutch transfer of undertakings law applies in full, meaning that the buyer will, in principle, inherit the employees and employee liabilities by operation of law.

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

Obligations to inform and consult employee representatives are, in principle, similar to those applicable to collective dismissals in a solvent business. One minor variation applies in the event of bankruptcy; it is only necessary to inform the UWV of the collective dismissals if the employer is requested to do so by the UWV.

In addition, implementing collective dismissals in the case of bankruptcy is only subject to the works council's right of advice if such a decision is aimed at continuation of the business. This follows from Dutch case law. The dismissal of all employees will not, in principle, trigger the works council's right of advice, as such a decision is generally aimed at liquidation of the business.

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