ALLEN & OVERY

Employment Reorganisation Roadmap

Spain

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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:

– trade union representatives

– the works council (in companies with 50 or more employees), or

– personal delegates (in companies with ten to 50 employees, or in companies with six to ten employees if they decide by a majority).

1.2. Is there a system of employee participation rights?

Employees have no right to management or board-level representation.

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 by operation of law on a transfer of an undertaking. In broad terms, to determine whether or not there is a transfer of undertaking, it is necessary that a change of ownership of the company, work centre or autonomous production unit takes place and that the transfer concerns an economic entity that maintains its identity after the acquisition by the buyer.

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

Employees who are assigned to the transferred economic entity 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 on a temporary basis only.

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

In principle, the employee may not refuse the automatic transfer of their employment, since a transfer of undertaking involves a guarantee that all existing employment contracts will continue. Therefore, if an employee wants to refuse and to terminate their contract (solely because of the transfer), they will not receive any severance compensation.

Furthermore, it should be noted that if a transfer of an undertaking entails a change of control, employees hired under Royal Decree 1382/1985 (so-called "top executives") who are among the affected employees may be entitled to terminate their employment contract and receive severance compensation as agreed in their employment contract or, in its absence, to receive an amount equal to seven days' salary per year of service subject to a maximum of six months' salary.

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

In general terms, there is a duty to provide information but no duty to consult (unless there are measures envisaged that affect employees such as changes to terms and conditions or geographical mobility, or dismissals in the context of the sale). If the sale qualifies as a transfer of an undertaking, the seller and buyer will need to provide their employee representatives (or, in their absence, the affected employees directly) with information "in good time" before the transfer.

In the event that measures affecting employees are envisaged, consultation is required. A specific consultation process is prescribed by law for certain measures only. In that event, prior to starting the consultation, employees would need to appoint a negotiation committee within seven days (or within 15 days if no employee representatives are appointed).

The consultation timetable would depend on the measures to be taken. The maximum consultation period is 15 days for a collective geographical move or for a substantial amendment of employment conditions. Once the 15-day period has ended:

– where a collective geographical move is envisaged, 30 days' notice must be given before the move is effective, and

– where a substantial modification of employment conditions is envisaged (and no agreement has been reached during the consultation period), seven days' notice must be given before the measures become effective.

Where a collective dismissal is envisaged, specific consultation requirements are triggered (which include a requirement to consult for a maximum period of 30 days in companies with 50 or more employees, or for a maximum of 15 days in companies with fewer than 50 employees (see **section 5 – Process on collective dismissals** for more information).

Employee representatives will also be entitled to issue a non-binding report if measures are to be taken affecting job numbers, or which could involve a total or partial move of facilities. This report must be issued no later than 15 days from the date on which it was requested.

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

Failure to inform/consult employee representatives may result in a fine for the employer of up to EUR7,500. Employee representatives could file a claim for damages for similar amounts.

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)?

There is no specific obligation to inform/consult employee representatives on a share sale to the extent the employer remains the same. However, as the Spanish Workers' Statute establishes that employee representatives are entitled to be informed about the same matters as company shareholders, our view is that they should be informed about the change in corporate ownership.

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)?

As the Spanish Workers' Statute establishes that employee representatives are entitled to be informed about the same matters as company shareholders, our view is that they should be informed about the change in corporate ownership, even if this takes place at parent company level.

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?

On an initial outsourcing of processes/services, there could be a transfer of an undertaking if the relevant processes/services transferred constitute an autonomous production unit capable of being exploited economically. If so, employees assigned to the processes/services will be transferred automatically to the supplier by operation of law (see answers to **2.1** and **2.2**).

On a change of supplier, the new supplier's obligation to assume the workforce will depend on the facts of each case (eg whether there is an applicable collective bargaining agreement between the company and employee representatives and, if so, whether it provides for this).

On an insourcing of processes/services, in broad terms, significant assets would have to be transferred back to the customer in order for there to be a transfer of an undertaking (and of the relevant employees) back to the customer. The mere continuation of the activity is not in itself enough to confirm that the economic entity has maintained its identity without other elements being transferred (eg the personnel assigned to it, its managers, the organisation of work, its methods and/or means of exploitation, etc).

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

The law provides for employee representatives to be informed and consulted on all company decisions that could lead to relevant changes in the organisation of work and employment contracts.

In these cases, the law provides for specific information to be given to employee representatives (ie the name, address and tax identification number of the supplier or subcontractor, the purpose and duration of the contract, the place of execution of the contract, the number of employees employed by the supplier or subcontractor who will provide services in the customer's workplace and occupational risk prevention measures).

Moreover, if these scenarios trigger a transfer of an undertaking, obligations to inform/consult on a business sale apply additionally (please see answer to **2.4**).

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 90-day period affecting:

– ten or more employees in an undertaking with fewer than 100 employees

– at least 10% of employees in an undertaking with 100 to 300 employees, or

– 30 or more employees in an undertaking with more than 300 employees.

A collective dismissal also arises when all employees are to be dismissed due to closure of activities in an undertaking with five or more employees.

According to the European Court of Justice ruling in case C-392/13, a collective dismissal will also arise where the number of redundancies is:

(i) over a period of 30 days:

– ten or more employees in work centres with 20 to 100 employees

– at least 10% of employees in work centres with 100-300 employees

– 30 or more employees in work centres with more than 300 employees, or

(ii) over a period of 90 days, at least 20 employees in a work centre.

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

Prior to the formal start of the consultation period, the employer must serve written notification on employee representatives (or, in their absence, on the employees directly) informing them of its intention to start a consultation period to implement a collective dismissal and asking the employee representatives to appoint a negotiation committee within seven days (or 15 days if no employee representatives are appointed). Where there are no employee representatives, the employees must elect their representatives to the negotiation committee, subject to having a maximum of three representatives per work centre and 13 in total. Where the negotiation committee has not been constituted, this will not delay or invalidate the consultation process.

The employer must then commence the consultation process and inform the negotiation committee of the proposed dismissals and of the commencement of the consultation period with a view to reaching an agreement with them. There is a maximum consultation period of 30 days or, if the employer has fewer than 50 employees, 15 days. Unless otherwise agreed, three meetings must take place, separated by a minimum of four calendar days and a maximum of nine calendar days (or if the employer has less than 50 employees, there will be two meetings separated by a minimum of three calendar days and a maximum of six calendar days). A social plan must be implemented if the employer has 50 or more employees and, in any event, the parties must seek to negotiate a social plan. In addition, there are obligations to inform the labour authorities (see answer to **5.3**).

Once the negotiation process has been concluded, with or without an agreement, the final decision lies with the employer, who must communicate it to the employee representatives and the labour authority.

Where the collective dismissal affects more than 50 employees, the employer will be obliged to offer outplacement for a minimum six-month period.

Companies which are profitable (based on certain criteria), and which carry out a collective dismissal process that includes employees aged 50 or over, must pay a contribution to the Public Treasury if the percentage of employees affected who are aged 50 or over exceeds the number of employees in the company who, at the time the collective redundancy started, were aged 50 or over.

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

Although there is no requirement to apply for labour authority approval of collective dismissals, the labour authority must be informed of the start and the end of the collective dismissal process. A copy of the written communication to employee representatives opening the consultation period, together with certain mandatory documentation, must be sent to the labour authority which must obtain a mandatory report from the labour inspectorate on the content of: (i) the communication and the development of the negotiation process; and (ii) the existence of the specific grounds used by the company to justify the dismissal.

Employers that plan to close one or more workplaces, resulting in the permanent cessation of activity and the redundancy of 50 or more employees in Spain, must notify the labour authority about this six months before sending the communication on the start of the consultation period; if giving this minimum period of notice is not feasible, they must notify the labour authority as soon as possible and explain why the deadline could not be met.

The labour authority may challenge the agreements reached during the consultation period if it believes they have been reached in circumstances of fraud, coercion or abuse of law, or if the body which supervises the unemployment benefit system in Spain reports that the purpose of the agreement is to enable employees to unduly and fraudulently obtain unemployment benefits where there are no real grounds justifying the dismissal.

5.4. When are these obligations triggered?

The obligation to notify and consult employee representatives and to notify the authorities arises whenever companies plan to implement a collective dismissal (ie if the thresholds mentioned above are met when dismissing employees based on objective grounds).

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

Where the formal collective process is not followed properly or where the grounds for collective dismissal are completely unfounded, there is a risk that dismissals could be declared void, with an obligation for the employer to reinstate the affected employees and to pay them salary until reinstatement. The employer's decision on the collective dismissals can be challenged by the employees individually or collectively.

For failure to inform/consult on a collective dismissal, the fine for an employer is up to EUR225,018. A failure to comply with the obligation to provide outplacement or with the social measures assumed by the employer in a collective dismissal process can also be sanctioned with a penalty of up to EUR225,018.

Additionally, in the case of a claim from the employees or their representatives, the dismissals would be considered invalid and the employer would have to reinstate the dismissed employees (see answer to **6.5**).

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?

There are no such obligations, but a copy of the dismissal letter given to each employee must be given to employee representatives (see answer to **6.2**).

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

The fact of not reaching an agreement in the consultation period does not prevent the employer from proceeding with its decision to make the collective dismissals. However, where the consultation period ends with an agreement, it is presumed that the legal grounds justifying the collective dismissal procedure exist; the procedure can only be challenged before the competent court if the agreement has been reached in circumstances of fraud, coercion or abuse of law.

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 entitlement is 15 days (according to the Spanish Workers' Statute) for dismissals for objective reasons.

Notice may be varied by contract or collective agreement.

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

There must be a legitimate dismissal for economic, technical, organisational or production reasons. If the decision is on economic grounds, those grounds will be deemed sufficient where the company's results show that it is in a negative economic situation. The company is considered in a "negative economic situation" when it has actual or expected losses or is experiencing a persistent decrease in the level of income. A "persistent decrease in the level of income" is understood to exist when it continues for three consecutive quarters in comparison with the same period in the previous financial year.

If the decision is on organisational grounds, these will be understood to exist, inter alia, where there are changes in the method of organising production and, if the decision is on production grounds, where there are changes in the demand for products or services provided by the company.

There are no statutory selection criteria, but employee representatives have priority to remain employed in a redundancy situation. Other groups of employees with special protection against termination include those:

– who are on sick leave

– exercising maternity/paternity-related rights (ie pregnant employees

– working reduced hours to take care of a child or a disabled person

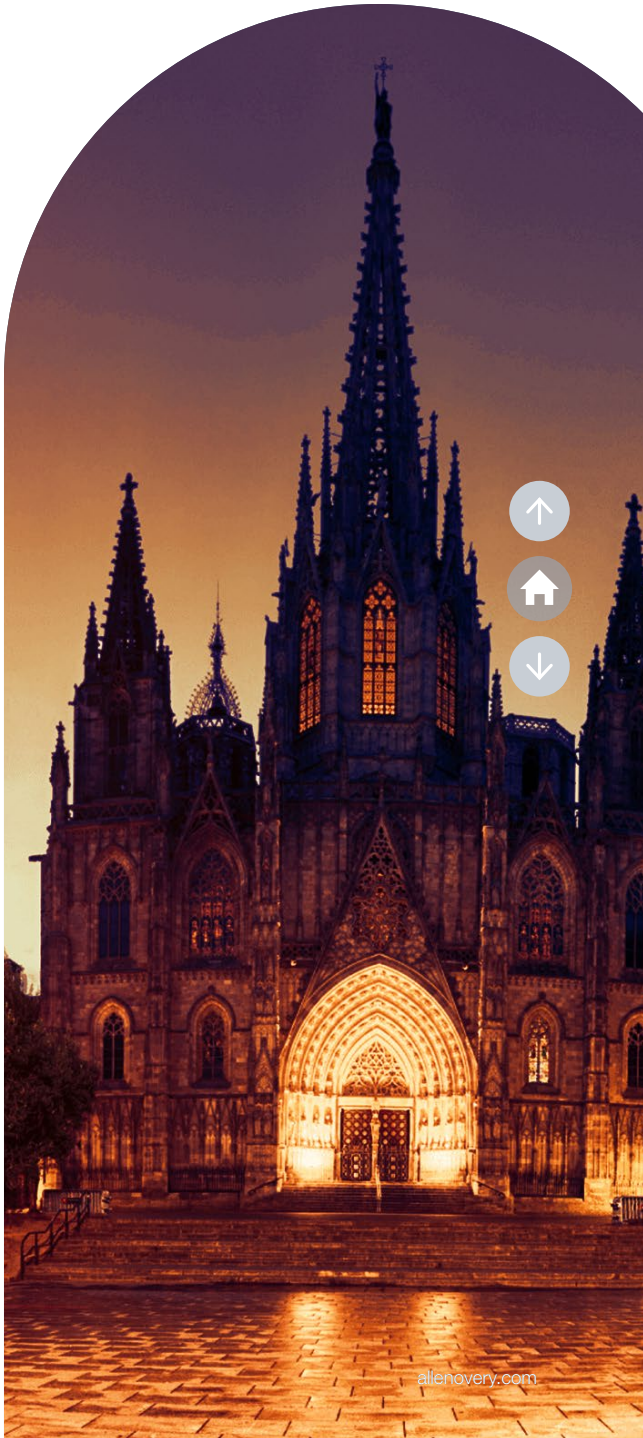
– on maternity leave, in maternity/paternity-related situations or whose employment contract has been suspended due to maternity issues)

– who are victims of domestic violence, or

– who have filed a claim against their employer,

meaning that, in general terms, they have priority to remain employed (see answer to **6.6**).

There is no obligation to consult an employee individually prior to redundancy. The letter of dismissal must be delivered personally to each person affected, and a copy of the dismissal letter must be given to employee representatives. A 15-day notice period must be given to the employee although payment of salary in lieu of such notice period can be made. Notice (or payment in lieu) must be accompanied by payment of statutory severance.



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

Employees could file a judicial claim requesting their dismissal be annulled and/or claiming that their dismissal was unfair, on the basis that there was a fraud in the business transfer transaction, arguing that they were actually part of the transferred economic entity and should therefore have been transferred with the rest of the employees. Only if the relevant employees' work is substantially reduced after the business transfer might it be possible to dismiss them on objective grounds.

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

Employees are entitled to 20 days' salary pay per year of service, up to a maximum of 12 months' salary in the case of dismissals for objective reasons.

Payments may be enhanced by individual employment contract, social plan or collective agreement.

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

If the procedure is not followed, a court could declare the dismissal unfair. The employer is given an option, either:

(i) to pay the employee compensation equal to 33 days' salary per year of service (subject to a limit of 24 months' salary) for the period of service accrued as from 12 February 2012, and equal to 45 days' salary per year of service (subject to a limit of 42 months' salary) for the period of service up to 12 February 2012 – the resulting severance amount cannot be higher than the amount equal to 720 days' salary unless the severance corresponding to the period from the start date to 12 February 2012 is higher, in which case that amount will apply provided that it does not exceed the 42 months' salary limit, or

(ii) to reinstate the employee, which involves paying to the employee salary accrued from the date of the dismissal up to the date of reinstatement (the "procedural salary").

Should the relevant employee be an employee representative, they would have the right to choose between options (i) and (ii). Statutory severance already paid for redundancy should be deducted from this compensation.

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

Some categories of employees have special protection against dismissal, or the employer is required to comply with specific requirements before deciding to dismiss them, due to their personal circumstances and regardless of the activities they carry out. They include employees:

– who are on sick leave

– who are pregnant

– with a suspended contract due to chilbirth

– enjoying family leave rights

– affiliated with a trade union

– who are foreign and in an irregular situation

– who are employee representatives, and/or

– who are victims of gender violence.

Except in those cases in which the dismissals are based on circumstances completely unrelated to the personal situation of these employees, or the specific legal requirements contemplated in their particular case are met, their dismissal will be classified, for the most part, as null (and, in certain specific situations, as unfair).

7. Process when implementing alternatives to redundancy

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

As part of the employer's rights to organise work and to manage its business, the law recognises that working conditions can be modified in two ways:

(i) by introducing non-substantial modifications, and

(ii) by adopting substantial modifications to working conditions as an extraordinary exercise of its management power where there are proven economic, technical, organisational or production grounds for those modifications.

Please note that the right to make substantial modifications referred to in (ii) can only be exercised in the cases, and on the grounds, provided for by the law, and in compliance with the requirements and procedures established by the law.

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

An obligation to consult can only arise where the employer adopts a substantial modification of working conditions.

In this regard, please note that substantial modifications to working conditions can be individual or collective in nature, and that this will impact on the procedure to be followed. Whether modifications have a collective or individual impact depends upon the number of employees affected by them in a 90-day period.

Please note the following:

(i) Individual substantial modifications

There is no need for the employer to consult the employee about the change, nor to obtain their consent to it, provided that there is an objective ground (ie economic, technical, organisational and/or production) that justifies the implementation of the change as a business measure.

If an objective ground exists, the employer may implement the change unilaterally by notifying the affected employees in writing at least 15 days before the effective date of the change. The notification should explain the nature of the change, the grounds justifiying it and and its effective date.

In the event that the employer does not have an objective ground to rely on, it must always consult and seek the consent of the affected employees if it wishes to implement the change.

(ii) Collective substantial modifications

Obtaining employees' consent would not be considered a valid basis for implementing the change, as collective measures trigger consultation obligations that must be fulfilled.

The relevant consultation process to be followed in these collective situations requires a negotiation period of 15 days with the employees' representatives (or, if there are none, with an ad hoc negotiation committee), which can start at any time provided there are current economic, technical, organisational and/or production grounds that justify the change.

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

Substantial changes to transferring employees' terms and conditions of employment will be void if they are solely or principally because of the transfer itself and not for an objective reason provided by the law (ie economic, technical, organisational and/or production).

Substantial changes are permitted, however, if they are unconnected with the transfer, or if they are by reason of the transfer but are for an objective reason provided by the law (ie economic, technical, organisational and/or production) and the required legal process is followed.

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

Employees could bring claims for constructive or unfair dismissal, breach of contract and/or unlawful deduction from wages.

Substantial modifications will be void if they are made without following the established legal procedure (see answers to **7.2** and **7.3**).

Making substantial modifications to working conditions unilaterally, without following the established legal procedure, is considered a serious offence, which may result in a fine for the employer of up to EUR7.500. Employee representatives could file a claim for damages for similar amounts.

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

Spanish regulations provide for several alternative measures to dismissal, such as: (i) substantial modifications of working conditions; (ii) implementation of opt-out clauses contained in the applicable collective bargaining agreement; (iii) functional mobility; (iv) geographic mobility; (v) the irregular distribution of working hours; or (vi) the temporary suspension of employment contracts or a reduction in working hours.

The most popular measure used in Spain in response to the Covid-19 pandemic has been (vi) which makes it possible to suspend employment contracts or reduce the working hours of employees. This is because it is a measure that can be promoted, in cases (among others) where the lack of occupation of employees results from an economic, production, technical or organisational situation in which the company, due to the effects of Covid-19 on commercial and labour relations, finds it impossible to maintain its production.

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)?

Under the Insolvency Act (as amended in 2020 and 2022), employee representatives have a right to be heard for at least 15 days if a proposed agreement with creditors contains a proposal to sell assets which relate to the business activity of the insolvent company or to sell autonomous economic business units to third parties (Articles 220.1 and 342). Obligations to inform/consult employee representatives would therefore arise as on the sale of a solvent business (see **section 2 – Process on business sales** for further information). In addition, in order to ensure the future viability of the company, employee representatives and the new employer can agree to amend working conditions.

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

The Insolvency Act (Articles 221 and 222) states that if an economic entity maintains its identity (as an autonomous economic entity) during insolvency proceedings and is sold, this will be regarded as the transfer of an undertaking. Under transfer of undertakings regulations, employees and most employee liabilities would therefore transfer to the buyer. However, the insolvency judge (this exclusive authority is provided in Articles 221.2 and 224) can agree that a buyer does not take on liability for the part of outstanding salary and severance payments (payable prior to the sale) guaranteed by the Guarantee Salary Fund.

This is a complex area, and advice should be obtained if contemplating a sale in an insolvency or potential insolvency situation.

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

Although the same obligations apply as in the case of collective dismissals in a solvent business (see **section 5 – Process on collective dismissals** for further information), the procedure is adapted for an insolvent business. In general terms, once the insolvency petition has been filed with the Commercial Court and admitted by the insolvency judge, the insolvency administrator, the insolvent company or the employees are entitled to apply for the termination (or suspension or modification) of their employment (under Article 171.1). However, the adoption of such measures may only be requested from the bankruptcy judge after the insolvency administrator's report has been submitted (Article 172). If the delay in implementing such measures could seriously affect the viability of the company, an application can be made before the report on the state of the insolvency is issued.

In these situations, the insolvency judge opens a period of consultation between the employee representatives and the administrator. This consultation period can last no more than 30 calendar day; in companies with fewer than 50 employees this period can last no more than 15 days (Article 174.1). Moreover, the consultation period will not be required if will be prior agreement of the employee representatives and the insolvency administrator. The result of the consultation is notified to the insolvency judge. The judge will then apply for a report from the labour authorities, to be given within a 15-day time period (this is a non-binding report).

Once these requirements have been met, the insolvency judge will issue a resolution within five days, either accepting any agreement reached between the employee representatives and the administrator, or giving the judge's own decision (only if there is an agreement but the judge detects fraud, deceit, coercion or abuse of right) which is enforceable.

If no agreement has been reached during the consultation period, the insolvency judge will hear from those participating in the consultation period before ruling on the terminations and their conditions. For these purposes, the judge will schedule a hearing which can be replaced by written representations.

9. Contacts

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