

Ireland

Employment protection in relation to business transfers

Phase	The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003; S.I. No. 15/2018 - European Communities (Seafarers) Regulations 2018
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Article

The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003; S.I. No. 15/2018 - European Communities (Seafarers) Regulations 2018. Citation 1. These Regulations may be cited as the European Communities (Seafarers) Regulations 2018. Interpretation 2. (1) In these Regulations— “Act of 1977” means the Protection of Employment Act 1977 (No. 7 of 1977); “Directive” means Directive 2015/1794 of the European Parliament and of the Council of 6 October 2015. (2) A word or expression which is used in these Regulations and which is also used in the Directive has, unless the context otherwise requires, the same meaning in these Regulations as it has in the Directive. Amendment of section 17 of Transnational Information and Consultation of Employees Act 1996 3. Section 17 of the Transnational Information and Consultation of Employees Act 1996 (No. 20 of 1996) is amended by the insertion of the following subsections after subsection (4): “(4A) An employees’ representative, or an alternate of that representative, who is a member of the crew of a seagoing vessel, shall be entitled to participate in— (a) a meeting of the Special Negotiating Body or of the European Works Council, or (b) any other meeting within the framework of an agreement referred to in section 11(1), where that employees’ representative, or that alternate, is not at sea or in a port in a country other than that in which the shipping company is domiciled, when the meeting takes place. (4B) A meeting referred to in subsection (4A) shall, where practicable,

be scheduled to facilitate the participation of an employees' representative, or an alternate of that representative, who is a member of the crew of a seagoing vessel. (4C) Where an employees' representative, or an alternate of that representative, who is a member of the crew of a seagoing vessel, is unable to attend a meeting, the possibility of using, where possible, new information and communications technologies shall be considered."

Amendment of Act of 1977 4. (1) Section 7 of the Act of 1977 is amended in subsection (2) by the deletion of paragraph (d) . (2) Section 12 of the Act of 1977 is amended by the insertion of the following subsection after subsection (4): "(5)Where the proposal to create collective redundancies concerns members of the crew of a seagoing vessel, the employer shall— (a) where the vessel flies the Irish flag, notify the Minister in accordance with subsection (1), or (b) where the vessel flies the flag of another State, notify the competent authority of that other State.". Amendment of European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 5. Regulation 3 of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (S.I. No. 131 of 2003) is amended— (a) by the substitution of the following paragraph for paragraph (5): "(5) These Regulations shall, subject to paragraph (6), apply to a transfer of a seagoing vessel that is part of a transfer of an undertaking, business, or part of an undertaking or business within the meaning of this Regulation, if the transferee is situated, or the transferred undertaking, business, or part of an undertaking or business remains, within the territorial scope of the Treaty.", and (b) by the insertion of the following paragraph after paragraph (5): "(6)These Regulations shall not apply to a transfer which consists exclusively of one or more seagoing vessels."

Description

Irish law has defined transfers of undertakings as defined by the European Court of Justice and requires the transfer of an economic entity which retains its identity after transfer. The term 'economic entity' is defined as 'an organised grouping of resources which has the objective of pursuing an economic activity whether or not that activity is for profit or whether it is central or ancillary to another economic or administrative entity'. The central question as to whether a transfer of undertakings has occurred will be to establish what the principle or most significant assets in the operation of a business are, and to establish whether they have been transferred. In deciding whether or not the business has retained its identity, only large-scale changes should be taken into account. Small changes (or changes which do not amount to a change in the entire operations) are not considered sufficient to constitute a change in identity. The regulations do not apply to businesses which are purely transient.

The regulation may also not be applicable in cases where the transferee refuses to take on contracted services because they already have enough personnel or assets to fulfil the

contracted services on their own. However, in such cases all other factors would be examined to determine whether such is sufficient to be considered a transfer.

Employees (both permanent and fixed-term staff) who are employed by, or working in the affected department or business at the date of the transfer will be subject to employment protection. Employees partially employed by the affected department may also be covered, depending on the percentage of their work life spent in such a role.

Employees are entitled to object to the transfer. In such cases the transferor must provide alternative employment, and if no such employment is available, the employee would be made redundant.

The provisions laid out in the employment contract agreed upon by the transferor and employee will be transferred as stated to the transferee. This includes salary and accumulated benefits. The exception to this rule is the case of pension rights. In general, these are occupational pension schemes which are tax exempt and are usually characterised as defined benefit or defined contribution. Personal Retirement Savings Accounts are also regulated by the Pensions Acts 1990-2008.

All obligations arising from a contract of employment will transfer, including accrued service. Moreover, the transferee must continue to observe the terms and conditions of any collective agreement on the same terms applicable to the transferor until the date of termination or expiry, or until another collective agreement is entered into force.

For the employer to make changes to individual contracts or the transferred workforce (through dismissals), they must be able to prove that such changes were not in relation to the transfer itself, and must not decrease the employees' overall benefits or position within the company. Such changes must be explicitly agreed upon by the new employer and employee as stipulated in a normal employment relationship.

Any changes or dismissals which do not meet these criteria will be deemed to be invalid.

Trade unions are generally involved in the transfer process at firms that have collective agreements in place. Works councils can have a consultative role during the transfer process. Trade union involvement is more common.

In 2018, secondary legislation (Statutory Instrument 15 of 2018) removed the exclusion of seafarers from the TUPE Regulations. Seafarers on fishing vessels that fly the Irish flag are now within the scope of the TUPE protections.

Commentary

Though it is not explicit in the Regulations, TUPE (transfer of undertakings under the EC Regulations 2003) can apply in outsourcing scenarios: the McDowell Purcell law firm note that the Court of Justice of the EU and the Employment Appeals Tribunal have determined in several cases that the regulations can apply where there is a change in the provider of a service.

Two tests for whether a TUPE applies are:

- a transfer of significant tangible or intangible assets; or
- the taking over of the majority of the workforce in terms of numbers and skills.

Additional metadata

Cost covered by	None
Involved actors other than national government	Trade union
Involvement (others)	None
Thresholds	Affected employees: No, applicable in all circumstances Company size: No, applicable in all circumstances Additional information: No, applicable in all circumstances

Sources

- [Statutory Instrument 15 of 2018](#)~~~ [S.I. No. 131/2003 - European Communities \(Protection of Employees on Transfer of Undertakings\) Regulations 2003](#)~~~ [S.I. No. 15/2018 - European Communities \(Seafarers\) Regulations 2018](#)~~~ [McDowell Purcell: What is TUPE?](#)~~~ A lus Laboris Publication (2009) 'Transfers of Undertakings Guide'~~~

Citation

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