

# Quoted



**Pension upon the transfer of an undertaking**

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## 1 Introduction

Over the past few years the pension rights of employees have been regarded as one of the most important employment benefits.<sup>1</sup> For this reason, a regularly asked question concerns the consequences and implications for the employer and employee in the event of a merger or acquisition on the pension scheme and the administration thereof. The way in which a transfer of undertaking takes place is essential for clarifying the consequences for the pension scheme.

In the event of a share transaction, the shares in the company to be sold are transferred. In fact nothing actually changes at the level of the company to be sold, and no change is caused in the employment relationship between the company and the employee. The pension agreement concluded with the employees therefore remains in full force as a result of the share transaction.

The situation is different in case the assets and liabilities are transferred (company merger) or, for instance activities are outsourced. Typical of this takeover is that the assets and liabilities of the transferor (the seller) are transferred to the party taking over these assets and liabilities (the transferee). The tenet of the transfer of undertaking plays a major role in this context. A specific provision concerning pensions is included in the statutory provisions that regulate the transfer of undertaking.

This contribution to Quoted provides an explanation of what is and is not possible, as well as the implications for pensions in the event of a transfer of undertaking. For the sake of convenience, a distinction is made between the various situations that may arise regarding pensions in the event of a transfer of undertaking, so that in practice this can provide the transferee with insight and help on the (im)possibilities of harmonising the employment conditions, including the pension scheme, i.e. how to apply its own pension scheme to the employees who have transferred.

## 2 Transfer of undertaking

The term 'transfer of undertaking' has its origins in the EU Directive<sup>2</sup> and is now implemented in Sections 7:662 to 7:666 DCC. The Transfer of Undertakings Act (*Wet overgang van onderneming*) provides for the safeguarding of employees' rights in the event of a transfer of an undertaking, business or part of an undertaking or business to another undertaking from a deterioration in terms of employment and redundancy. In short, this statutory protection means that all rights and obligations arising out of the employment agreement are transferred by operation of law to the transferee.

If the employee is to enjoy the protection as stated above, an economic entity must be transferred as a consequence of an agreement, merger or demerger while retaining its identity.<sup>3</sup> In assessing whether or not there is a transfer of undertaking, the following three key elements are important:

- i. an economic entity;
- ii. retention of identity; and
- iii. agreement, merger or division.

### 2.1 (i) Economic entity

An economic entity in fact refers to an 'undertaking', a term that is interpreted broadly. This should include all organisations engaged in delivering goods or supplying services, regardless of whether the pursuit of profit plays a role.<sup>4</sup> It is not required that a commercial undertaking is transferred; a non-profit organisation can also be an undertaking within the meaning of Section 7:662 DCC. The term 'undertaking' is therefore not bound to a certain legal entity, such as a private or public limited company. Needless to say, under the Act a business or a part of an undertaking or business can also be regarded as an undertaking (or: economic entity).<sup>5</sup>

1 *Parliamentary Papers II* 2000/01, 27469, no. 3, p. 2-3.

2 EU Directive 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfer of undertakings, businesses or parts of undertakings or businesses.

3 Section 7:662 (2)(a) DCC and see T&C to Section 7:662 DCC.

4 *Parliamentary Papers II* 1980/81, 15 940, no. 3 p. 4/5. In defining 'undertaking', the legislator intentionally did not wish to follow the definition used in the Works Councils Act (*Wet op de ondernemingsraden*). It is therefore not required that there is an organisational link acting as an independent entity in society.

5 Section 7:662 (3) DCC.

## 2.2 (ii) Retention of identity

With the 'transfer' of the undertaking, it is important that an ongoing business is transferred while retaining its identity, whether or not with a short interruption in its activities. In assessing whether the identity is retained, the actual circumstances of the transfer concerned are examined according to the criteria of the *Spijkers* ruling<sup>6</sup>, more specifically (i) the nature of the business, (ii) the transfer of tangible assets, (iii) the value of intangible assets, (iv) the transfer of personnel in terms of numbers and expertise, (v) the clientele and (vi) the extent to which the activities are continued after the transfer, including any interruption of the activities.<sup>7</sup> These circumstances must always be assessed in their interrelationship.

As regards retention of identity, more and more emphasis has been given to the nature of the business in the past couple of years, namely labour-intensive or capital-intensive. This distinction is made in order to establish the principal activity of the undertaking: assets or people. In the event a business qualifies as labour intensive a transfer only qualifies as a transfer of undertaking in the event a major part of the workforce is transferred. The transfer of the tangible assets are in such event less important in establishing the retention of the entity's identity. If, however, the nature of the business means that the tangible assets are characteristic of the undertaking, this undertaking cannot retain its identity if it is transferred without or only some of the (tangible and/or intangible) assets.

## 2.3 (iii) The legal basis for transfer of undertaking

Finally, there must be a legal basis for the transfer of an undertaking. The act refers to a merger, demerger or agreement, however it is apparent from case law that a direct contractual relationship between parties is not required; it is sufficient for the transfer to take place within the context of a contractual relationship, even an indirect one.<sup>8</sup> Such can, for instance, be the case if the transfer of undertaking takes place through a court rescission, or withdrawal from subsidy or concession and the

subsequent grant of such subsidy or concession to a third party.<sup>9</sup> Hence, the term 'agreement' has a (very) broad scope.

## 3 What pension rights and obligations are transferred?

### 3.1 Statutory framework

The Dutch Civil Code (**DCC**) and the Pensions Act (*Pensioenwet*) provide the statutory framework for the rights and obligations of the employer, the employee and the pension provider in the event of a transfer of undertaking.

Section 7:663 DCC contains the essence of safeguarding employees upon the transfer of undertaking. This Section stipulates that '*in the event of a transfer of an undertaking the employer's rights and obligations arising from an employment agreement related to that undertaking and existing between it and the employees working in that undertaking on the date of the transfer, will pass by law to the transferee. Nevertheless, for at least one year after the transfer the former employer will remain, in addition to the transferee, jointly and severally responsible for compliance with the obligations under the employment agreement that had arisen before that time.*'

### 3.2 The general rule

The *first sentence* sets out the general rule in the event of a transfer of undertaking, namely that all rights and obligations under an employment agreement are transferred by operation of law to the transferee. This is a broad concept. Both written and oral agreements under the employment agreement with the employee are transferred. This also includes the arrangements made between an employer and an employee concerning pension (the pension agreement).<sup>10</sup>

### 3.3 Scope of the pension agreement

The Dutch pensions system has three pillars. The first pillar provides for the statutory social security schemes for

6 CJEU 18 March 1986, C-24/85, *NJ* 1987, 502 (*Spijkers/Benedik*).

7 CJEU 6 September 2011, C-108/10, *JAR* 2011/262 (*Scattolon*); CJEU 18 March 1986, C-24/85, *NJ* 1987, 502 (*Spijkers/Benedik*); CJEU 11 March 1997, C-13-95 (*Suzen*); CJEU 25 January 2001, C-172/99, *JAR* 2001/68 (*Finse Bussen*).

8 CJEU, *JAR* 2002/47 (*Temco*).

9 CJEU 19 May 1992, *NJ* 1992/476 (*Sophie Redmond Stichting*).

10 *Parliamentary Papers II* 2000/01, 27469, no. 3, p. 2-3.

pensions, such as the state pension (AOW). The second pension pillar comprises the (collective) pension schemes in which an employee participates on the basis of an employment relationship. In this context, an employer may conclude a pension agreement with an employee. The third and last pillar concerns the individual pension arrangements that an individual can arrange for on its own initiative.

In the case of a transfer of undertaking, only the pension accrued in the second pillar within the context of the employment agreement is relevant. It should be noted that in principle membership of a pension scheme is not compulsory in the Netherlands. Generally speaking the employer is free to decide whether or not to offer its employees participation in a pension scheme. If the employer has offered the employee participation in a pension scheme, a pension agreement will be concluded. This agreement will set out what has been agreed between the employer and the employee regarding pension.<sup>11</sup> The same applies if the employer falls within the scope of a mandatory industry-wide pension fund (*bedrijfstakpensioenfond*s, **Bpf**), with the proviso that the employer does not have the freedom not to offer the employee participation in the (mandatory) pension scheme.<sup>12</sup> This has been confirmed in case law.<sup>13</sup>

When concluding a pension agreement, an agreement is made on, amongst other things, the types of pension, the character of the pension scheme, the accrual percentage and/or the amount of the pension contribution. These are rights which the employee may claim under the terms of the pension agreement. On the other hand, when entering into a pension agreement the employer must abide by all kinds of obligations, such as placing the pension agreement with an (external) pension provider<sup>14</sup> and the obligation to pay pension contributions. On the basis of the general rule, the aforementioned rights and obligations are transferred from the transferring employer

to the transferee, unless one of the pension exceptions as referred to in Section 7:664 DCC is applicable.

Within the framework of participation in the employer's pension scheme, the employee may have provisional entitlements to a retirement pension and a partner's pension (known as the *VPL-regeling*)<sup>15</sup>. Under Dutch law these provisional pension entitlements do not qualify as 'pension' within the meaning of the Dutch Pensions Act as long as these entitlements have not yet been funded.<sup>16</sup> Case law has determined that the *VPL-regeling* does not fall under the definition of a pension agreement, but is an employment condition arising from the employment agreement. In other words, the rights and obligations of such provisional entitlements pass to the transferee by operation of law, without the pension exceptions as referred to in Section 7:664 DCC being applicable (please see below).<sup>17</sup>

### 3.4 Joint and several liability of the transferor and the transferee

It follows from the *second sentence* of Section 7:663 DCC that the transferor remains jointly and severally liable (together with the transferee) for the rights and obligations arising in the period until the transfer, for a further year following the transfer. The liability of the transferor is therefore limited to those obligations that exist at the moment of transfer of the undertaking.

The transferee is liable for all that arises from the employment agreement as from the moment of the transfer. In addition, however, the transferee is obliged to comply with the obligations that arose prior to the moment of the transfer. The employee who is transferred can therefore choose, in fact, for one year after the transfer whether he wishes to claim his entitlement from his former or new employer.

11 Article 1 in conjunction with Article 2(2) of the Pensions Act.

12 This follows from Article 2(2) of the Pensions Act. The legal relationship arising from the employment relationship between an employer and an employee with regard to pension in the event of participation in an industry-wide pension fund on the basis of an obligation is treated as equivalent to that arising from the pension agreement.

13 Supreme Court 14 October 2016, PJ 2016/156 (*Bpf Schoonmaak/GOM Schoonhouden*).

14 The obligation to place a pension scheme with a pension provider under Article 23 of the Pensions Act.

15 This concerns provisional pensions as referred to in the Implementation Decree for pension aspects under the Social Agreement 2004 (*Uitvoeringsbesluit pensioenaspecten Sociaal Akkoord 2004*). Such schemes on the adjustment of tax treatment of early retirement, pre-pension and life-course savings schemes (VPL schemes) occur mainly in pension schemes administered by industry-wide pension funds.

16 Article 65 of the Act implementing and amending the Pensions Act (*Invoerings- en aanpassingswet Pensioenwet*) in conjunction with Article 4 of the Implementation Decree for pension aspects under the Social Agreement 2004.

17 Rotterdam District Court, 26 February 2014, PJ 2014/67 (*Smit/Boskalis*).

### 3.5 The transfer of funding shortfalls

On the basis of the statutory provisions of transfer of undertaking, funding shortfalls that have arisen at the transferor during the period up to the transfer shall pass by operation of law to the transferee, with the result that the transferee is liable for these towards the pension provider, unless the transferee can successfully rely on one of the pension exceptions as referred to in Section 7:664 DCC. Such funding shortfalls may concern pension contribution payment arrears<sup>18</sup>, but also back-service obligations that were not yet fully paid up by the transferor.<sup>19</sup> The Supreme Court confirmed this recently in the GOM-ruling, where the transferor had incurred payment arrears for pension contributions at the moment of the transfer.<sup>20</sup>

## 4 Exceptional situations regarding pensions

The legislator has created an exception for pension to the general rule. This means that the rights and obligations under the pension agreement are not transferred in cases as referred to in Section 7:664 (1) a, b and c and (2) DCC. The third paragraph also includes an exception for the transfer of the savings scheme<sup>21</sup>, but this will not be taken into consideration in this contribution.<sup>22</sup>

### 4.1 Scope of the exceptions

The exceptions that have been made with regard to pension only provide for the rights and obligations arising from the pension agreement (as concluded between the transferring employer and its employee). This means that the exceptions do not apply to any provisional pension entitlements, such as a *VPL-regeling*. After all, as already explained above, on the basis of Dutch law these provisional entitlements do not qualify as pension as long as they have not yet been funded. The result is that for such provisional entitlements the general rule is applicable, and on this basis the transferee is required to continue a *VPL-regeling* following the transfer.<sup>23</sup>

### 4.2 Three exception situations considered in greater detail

In the following three situations, the rights and obligations under the pension agreement are not transferred to the transferee:

- a. The transferee makes the same offer for concluding a pension agreement as it had already done to its own employees prior to the moment of the transfer.
- b. The transferee is obliged to participate in an industry-wide pension fund and the transferred employee will also participate in that industry-wide pension fund after the transfer.
- c. A deviation from the pension commitment is made by a collective labour agreement (cao).

#### 4.2.1 (a) – offer of a pension agreement

An important exception exists, also for practical purposes, in the situation where the transferee makes the same pension offer to the transferring employees as which it has already made to existing employees prior to the transfer (paragraph 1.a). Merely making the offer is sufficient in this case, even if the transferring employees do not accept the offer. The quality – better or worse – of the transferee's pension scheme is not relevant either. This ground for exception is often considered to be a solid solution for the transferee not to be confronted with the (possibly more expensive) transferor's pension scheme.

In practice, it also occurs that the transferor has not concluded a pension agreement with its employees, but the transferee has done so. In that case, Section 9 of the Dutch Pensions Act applies, based on which the transferee is expected to offer the transferring employees the same pension scheme as that offered to its own employees.<sup>24</sup>

#### 4.2.2 (b) – employees participate in an industry-wide pension fund

The general rule (paragraph 1.b) also does not apply if by law the transferee is obliged to participate in an industry-wide pension fund. In that case, assuming that this

18 Supreme Court 14 October 2016, PJ 2016/156 (*Bpf Schoonmaak/GOM Schoonhouden*) and see since then: Rotterdam District Court, 31 August 2017, PJ 2018/10, Appeal Court of The Hague, 3 October 2017, PJ 2018/9 and Rotterdam District Court, 27 June 2018, ECLI:NL:RBROT:2018:6205.

19 *Parliamentary Papers II* 2000/01, 27469, no. 3, p.11.

20 Supreme Court 14 October 2016, PJ 2016/156 (*Bpf Schoonmaak/GOM Schoonhouden*).

21 As referred to in Article 3 (1) of the Pensions and Savings Funds Act (as it applied on 31 December 2006).

22 In practice it appears that there are less savings schemes.

23 See in this respect the deviating judgment of the District Court of Oost-Brabant, 27 September 2018, PJ 2018/82.

24 The assumption of making an offer to conclude a pension agreement.

obligation continues to apply following the transfer of the employees, the transferred employees will automatically participate in the transferee's industry-wide pension fund. Further thereto, the rights and obligations arising from the employment agreement with the transferor shall not transfer to the transferee by operation of law.

It is quite possible with the transfer of undertaking that the transferee's main activity will change. This may have consequences for any obligation there may be to participate in an industry-wide pension fund. For example, the situation may arise where, following the transfer, the transferee (i) no longer is no longer subject to the obligation of the industry-wide pension fund concerned, or (ii) will in fact come under a different industry-wide pension fund, such as that of the transferor.

#### 4.2.3 (c) – deviations in a collective labour agreement

Another exception to the general rule applies if a deviation is made from the pension agreement by way of a collective labour agreement (or: scheme by an administrative body authorised for such purpose) (paragraph 1.c). The idea behind this exception is that the social partners must have the option of reaching alternative arrangements on the matter of pension.

### 4.3 The exception to the exception – Section 7:664 paragraph 2 DCC

The exceptions referred to above from a. to c. cannot be used if the transferor and the transferee fall under the scope of the same industry-wide pension fund both prior to and after the transfer, and for that reason the employees remain to be a participant in this pension scheme.

In that case the general rule applies, namely that all rights and obligations under the employment agreement, including the pension agreement, are transferred by law to the transferee. In this situation, any overdue pension contributions by the transferor under the industry-wide pension fund will transfer to the transferee. Until recently it was unclear from whom the industry-wide pension fund could claim the overdue payments after the transfer of undertaking had taken place. Based on the ruling of the Supreme Court (the GOM-ruling), a pension fund has the option of claiming the overdue payments from both the transferor and the transferee independently for the arrears that have arisen at the transferor prior the transfer if both

the transferor and the transferee are obliged to participate in the same industry-wide pension fund.<sup>25</sup>

## 5 Overview of the different situations upon transfer of undertaking

It is clear that several situations may arise upon the transfer of the rights and obligations relating to pension. No single situation is the guiding principle; for example, the transferor and the transferee may have different pension schemes, only the transferor may have a pension scheme and the transferee does not, or vice-versa, or a situation exists where participation in an industry-wide pension fund is compulsory for one or both parties. The various situations, including the legal consequences, are shown below in the chart.<sup>26</sup>

25 Supreme Court 14 October 2016, *PJ* 2016/156 (*Bpf Schoonmaak/GOM Schoonhouden*).

26 Asser/Lutjens, Chapter 15, no. 825.



Pension scheme of transferor (A)	Pension scheme of transferee (B)	Legal consequence
Pension agreement	No pension agreement	The rights and obligations under the pension agreement are transferred by law to (B)
Pension agreement	Pension agreement	The rights and obligations under the pension agreement with (A) are transferred by law to (B), unless (B) makes an offer for participation in the pension scheme of (B)
No pension agreement	Pension agreement	(B) is expected to make an offer for participation in the pension scheme (Section 9 of the Pensions Act).
Pension agreement	Mandatory participation in industry-wide pension fund	The rights and obligations under the pension agreement are not transferred by law to (B). The employees will participate in the industry-wide pension fund of (B).
Mandatory participation in industry-wide pension fund	Pension agreement	The rights and obligations under the pension agreement are not transferred by law to (B). <sup>27</sup>
Mandatory participation in industry-wide pension fund	Mandatory participation in <i>the same</i> industry-wide pension fund	The rights and obligations under the pension agreement are transferred by law to (B)
Mandatory participation in industry-wide pension fund	Mandatory participation in <i>another</i> industry-wide pension fund	The rights and obligations under the pension agreement are not transferred by law. The industry-wide pension fund of (B) becomes applicable to the employees.
No pension scheme	Mandatory participation in industry-wide pension fund	The employees are obliged to participate in the industry-wide pension fund of (B)
Mandatory participation in industry-wide pension fund	No pension scheme	No transfer of the rights and obligations regarding pensions.

<sup>27</sup> In this situation the transferor falls under the scope of a mandatory industry-wide pension fund, whilst the transferee does not have the obligation to participate in any mandatory industry-wide pension fund. No explicit legal provisions exist for this situation. Pursuant to Section 2 of the Sectoral Pension Fund (Obligatory Membership) Act 2000 the transferor had the obligation to participate in the industry-wide pension fund based on the determined scope and in relation thereto to conclude a pension agreement with the employees. Dutch law does not provide for any legal basis for the transferee to comply with the Sectoral Pension Fund (Obligatory Membership) Act 2000 in the event he does not fall under the scope of that specific industry-wide pension fund. Consequently, the rights and obligations following from the mandatory participation in the mandatory industry-wide pension fund do not transfer by operation of law to the transferee. The fact that the transferee has arranged for a pension scheme does not make any difference in this regard. Section 9 of the Dutch Pensions Act is in fact not applicable for this situation, as this Section purely refers to the situation that the transferor had not arranged for any pension scheme at all prior to the transfer, whilst the transferee did.



## 6 Administration of the pension scheme following transfer of undertaking

When applying the general rule, the transferee is obliged to abide by all rights and obligations, including those of the pension agreement. This also include placing the pension agreement with an external pension provider. In the context of the transfer of undertaking, the administration agreement between the transferor and the pension provider and the rights and obligations attached thereto will not automatically be transferred to the transferee. Consequently, the transferee (i) will have to take over the administration agreement from the transferor by means of a transfer of contract (*contractsoverneming*) within the meaning of Article 6:159 DCC, or (ii) will have to conclude a new agreement for administering the pension agreement that has been transferred.

In practice, often additional agreements are needed regarding the administration of the pension agreement. If an administration agreement is in place with an insurer, a general pension fund or a pension premium institution, there will be little standing in the way of such a transfer of contract, except the fact that those pension providers often reserve the option of renegotiating the terms and conditions.

### 6.1 Industry-wide and company pension fund

For an industry-wide and a company pension fund the situation is different. With an industry-wide pension fund, the employer must be part of that specific business sector in order to participate or continue its participation; if this is no longer the case following the transfer, the transferee will then have the obligation to place the pension agreement immediately with another pension provider.<sup>28</sup>

Certain restrictions also apply to company pension funds. After all, it may be that the transferred employees no longer fall within a particular group for which the company pension fund has been set up, and therefore fall outside its scope. In that case too, the transferee will must in principle place the pension agreement immediately with another pension provider. In practice, efforts may still be made in these specific cases to continue participation in a company pension fund for a certain period of time, but this

is purely at the discretion of the management board and will therefore depend on any willingness for the transferred employees to participate a little longer in such a company pension fund.

## 7 Conclusion and practical recommendations

This contribution to Quoted has discussed the pension aspects upon the transfer of undertaking. From a practical point of view, it is important to make a distinction between the various situations that arise regarding pensions upon the transfer of undertaking, so that businesses can make the right analysis and judgment of what is or is not possible, but also the greater or lesser financial consequences and liability risks in that respect. In order to prevent the transferee being subsequently confronted with various pension schemes and/or liability claims from a pension provider for funding arrears that have arisen at the transferring employer prior to the moment of transfer, the following recommendations are made:

- Clarify what rights and obligations under the pension agreement are transferred.
- Ask if the transferring employer still has any funding arrears towards a pension provider at the moment of the transfer, and have this settled in the agreement.
- Analyse what situation applies to the specific takeover, and examine which of the three exceptional situations as referred to in Section 7:664 DCC could provide a solution.
- Examine the options for a potential harmonisation of the various pension schemes following the transfer.
- Monitor closely what action still needs to be taken following the transfer of undertaking, particularly with regard to the pension provider.

<sup>28</sup> On the grounds of Article 23 of the Pensions Act.

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