

August 2019

TRANSFER OF UNDERTAKINGS GERMANY

The Acquired Rights Directive (and its successor, the Transfer of Undertakings Directive) required all EU member states to implement laws protecting employees who are affected by a transfer of a business. These protections apply when a business is transferred (although generally do not apply to pure share sales). Although the member states have implemented the Directives with some minor variations (and some offer enhanced protections beyond the minimum requirements of the Directives), all require the transferor (typically the seller of the transferring business) and the transferee (the buyer) to share information and consult with affected employees, and provide protections for the affected employees against being dismissed or having their terms of employment altered as a result of the transfer. In some member states, these requirements are relaxed in insolvency scenarios.

1. **WHAT IS THE DEFINITION OF A RELEVANT TRANSFER / WHEN DOES THE TUPE STATUTE APPLY?**

1.1 The Directives have been implemented in Germany in § 613a of the German Civil Code (herein referred to as the "TUPE Statute"). The TUPE Statute applies in the following scenarios:

1.1.1 **A business transfer:**

A transfer of a business or undertaking (or part of a business or undertaking) where there is a transfer of an economic entity that retains its identity – typically a transfer of the business and its assets.

1.1.2 **A service provision change ("SPC"):**

This applies (with limited exceptions) to outsourcings, insourcings and changes of service provider where there was an organised grouping of employees and/or assets (organised group) carrying out the relevant activity pre-transfer and the transferee takes over the activity and - at least a material part of - the organised group.

In both scenarios, the transfer does not need to be agreed between transferor and transferee. The TUPE Statute also applies where the transfer is the consequence of other transactions, or of agreements involving third parties, e.g. a customer awarding a service contract to a new supplier, or a shop or office reverting to the owner upon expiry of a lease.

1.2 The TUPE Statute applies in cross border issues where the "economic entity" is situated in Germany immediately before the transfer and, in the case of a service provision change, where there is an organised group situated in Germany immediately before the change.

1.3 The TUPE Statute generally doesn't apply to transfers of shares, as the identity of the employer must change for there to be a relevant transfer. However, it *would* apply to an

asset transfer carried out as a precursor to or following a share sale. The TUPE Statute also applies, subject to certain modifications, to transfers in the context of mergers and other changes of legal form.

2. **WHAT ARE THE MANDATORY INFORMATION AND CONSULTATION REQUIREMENTS?**

2.1 German law provides that a Works Council, i.e. a body designed to represent the interests of the employees vis-à-vis the management, may be set up in an establishment with at least five regular employees. Works Councils are established only upon the initiative of the employees or a trade union and many German companies, even if employing significant numbers of employees, do not have Works Councils. If a Works Council has been established, it must be formally consulted in certain matters affecting the employees.

2.2 In businesses with more than 20 employees, the management must advise the Works Council in advance of the implementation of any business decisions which would bring about a “Significant Change” (*Betriebsänderung*, also referred to as an alteration). A transfer of undertakings will regularly constitute a Significant Change for the transferor, and possibly also for the transferee. In the event of a Significant Change, the Works Council may require the management to negotiate a Reconciliation of Interests (*Interessenausgleich*, a document providing for measures to avoid or mitigate effects on employees) and a Social Plan (*Sozialplan*, a document providing for financial compensation for unavoidable negative effects). If the management and Works Council cannot agree, the Social Plan may be forced onto the employer through a statutory mediation process. Implementing Significant Changes without having completed the consultation process may draw fines or other negative consequences. As there is no fixed statutory time period for attempting to come to an agreement, the consultation process requires diligent advance planning or it may delay the implementation of Significant Changes by months.

2.3 Where the parties to the transfer envisage taking measures in respect of affected employees, e.g. making redundancies, additional consultation obligations may apply. In particular, in the event of a “Mass Dismissal” (which may require as few as five employees to be made redundant), the management must again consult with the Works Council and notify in advance the local labor agency before commencing the redundancy process.

2.4 The TUPE Statute does *not* require prior consultation with individual affected employees. The TUPE Statute does require that individual affected employees are formally notified in text form of (a) the (intended) effective date of the transfer, (b) the legal basis of the transfer, (c) the legal, economic and social consequences of the transfer, and (d) any measures with respect to employees intended to be taken in the context of the transfer. The notification must be complete and correct - but also sufficiently transparent to be understood by the employee - in order to trigger the one month period for objecting to the transfer (see below). It is fairly difficult to meet the strict standards applied by German courts to the notification, and it is therefore a regular occurrence for German employees to object to transfers months, or even years, after they have taken place, e.g. when the transferee has become insolvent, and to claim reinstatement by the transferor.

3. **CAN EMPLOYEES OBJECT TO THE TRANSFER AND, IF SO, WHAT ARE THE CONSEQUENCES?**

3.1 Although they cannot prevent the transfer going ahead, individual employees can object to their employment being transferred. If they do so, they remain employees of the transferor.

3.2 If the transferor no longer has a position for them, it will need to make them redundant observing the consultation procedures described above and the fairly strict requirements of the German Unfair Termination Act (*Kündigungsschutzgesetz*).

3.3 The objection can be declared vis-à-vis the transferor or the transferee within one month of having received a complete and correct notification on the transfer (see above). If the notification was incomplete or incorrect, employees may object and claim reinstatement by the transferor months or even years after the transfer (unless they may be considered to have waived the objection right, e.g. by agreeing on material amendments of employment terms with the transferee).

4. **CAN THE EMPLOYER CHANGE TERMS AND CONDITIONS OF EMPLOYMENT FOLLOWING THE TRANSFER?**

4.1 The TUPE Statute provides that employment is transferred by virtue of the transfer of undertakings to the transferee “as is”, i.e. including all employment terms, regardless of their legal basis, and the transferor is liable to the employees for consummation of all obligations under such terms including unsettled claims or liabilities having accrued prior to the transfer.

4.2 Under the TUPE Statute applicable employment terms can in principle not be amended in a manner prejudicing the employee within the first 12 months following the transfer (the Cooling-Off Period).

4.3 Under German law, employment terms may be determined on three separate levels: collective agreements agreed between trade unions and employer associations, works agreements agreed between the management and the works council and the individual employment agreement. Where there is an overlap between those three levels, the employee may, as a general rule, always rely on the most favourable provision.

4.4 For the effects of transfers on collective agreements and work agreements see below.

4.5 The Cooling-Of Period does not prevent changes favourable to the employee. Neither does it automatically allow changes after expiry of the Cooling-Off Period. In fact, it is fairly difficult for employers to unilaterally enforce changes even after expiry of the Cooling-Off Period as such changes are subject to the same strict standards of the German Unfair Termination Act (*Kündigungsschutzgesetz*) as apply to redundancies.

5. **WHAT PROTECTIONS DO AFFECTED EMPLOYEES HAVE AGAINST DISMISSAL?**

5.1 The TUPE Statute prohibits termination of employment for reasons of the transfer but expressly allows termination of employment (in connection with the transfer) for other legitimate reasons. What this means is that under the TUPE Statute all employees associated with the undertaking are transferred and the transferor cannot terminate employment in order to let the transferee pick only certain employees (or re-hire employees on amended terms). However, both the transferor and the transferee can terminate employment for other legitimate reasons in accordance with the German Unfair Termination Act (*Kündigungsschutzgesetz*).

5.2 The German Unfair Termination Act (*Kündigungsschutzgesetz*) - which grosso modo applies to all employees having been employed for more than 6 months in establishments with more than 10 employees – provides that employment may be validly terminated only if the employer’s notice is “Socially Justified”.

- 5.3 Social Justification can be based on either personal or business reasons. Personal reasons will not normally be relevant in this context. Business reasons require (a) redundancy of a specific position and (b) that the employer has not simply terminated the employee holding the position but has conducted a selection process (*Sozialauswahl*) among all employees who would qualify for the redundant position for purely social criteria such as length of service or age. In principle the German Unfair Termination Act (*Kündigungsschutzgesetz*) requires employers to retain the old and infirm and dismiss the young and fit. Some groups of employees such as works council members, disabled employees, pregnant employees etc. are subject to additional special protection and will need to be excluded from the selection process.
- 5.4 Employees may challenge termination in labor court and, if the court finds that the termination lacked Social Justification, the employee will be reinstated.
- 5.5 In addition to the individual requirements for termination, employers will need to comply with the consultation procedures for Significant Changes and Mass Dismissals described above.
6. **WHAT IS THE EFFECT OF THE TRANSFER ON THE COLLECTIVE STATUS OF EMPLOYEES (COLLECTIVE AGREEMENTS AND COMMON PRACTICES)?**
- 6.1 Following a transfer, collective agreements and work agreements may or may not apply to the transferor depending on individual circumstances. Collective agreements will continue to apply grosso modo only where the transferee is a member of the same employers' association as the transferor. Work agreements will continue to apply only if the transferred unit retains its identity as an establishment (see below).
- 6.2 The TUPE Statute provides that any provisions in collective agreements and work agreements which no longer apply based on the foregoing, are, from the date of the transfer, incorporated into the individual agreement and subject to the Cooling-Off Period. If the transferee is already bound by collective agreements and work agreements different from those applicable to the transferor, this can lead to highly complex legal situations. Therefore the TUPE Statute allows the transferee and the employee to agree to switch to a different collective agreement even prior to expiry of the Cooling-Off Period.
- 6.3 The difference between direct application under Sec. 6.1 and application as part of the individual agreement under Sec. 6.2 is that, when applied as part of the individual agreement, the terms of collective agreements and work agreements are "frozen" in the sense that future amendments no longer apply. However, the legal situation is further complicated by the fact that German employment agreements often contain clauses incorporating the terms of collective agreements "as amended" which again may override the freezing principle.
7. **WHAT IS THE IMPACT OF THE TRANSFER ON STAFF REPRESENTATIVES?**
- 7.1 In Germany Staff Representation takes place by the Works Council. Works Councils are established at the level of the individual establishment (*Betrieb*). For matters affecting the company or even a group of companies as a whole, additional works councils may be established also at higher levels within the company or group.
- 7.2 If the transfer of undertaking encompasses one or more complete establishments, and these retain their identity, i.e. are not dissolved following the transfer, the respective

Works Councils remain in office and Staff Representation remains unchanged (except possibly at higher levels).

- 7.3 If the transfer of undertaking encompasses only parts of one or more establishments, the mandate of the original Works Council ends. However, in this case the original Works Council has a “transitional mandate” for up to 6 months to continue to conduct its day-to-day business with respect to the transferred employees and to initiate elections for a new Works Council in the new establishment.

This material is for general information only and is not intended to provide legal advice

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