

August 2019

TRANSFER OF BUSINESS SWITZERLAND

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). **Switzerland** however is not an EU member state so that the Directives are not applicable on business transfers in Switzerland. Switzerland implemented its own specific provisions in the Swiss Code of Obligations ("CO", in particular Articles 333 CO et seq.) which are applicable to such business transfers. They have in common with the Directives, that the transferor (typically the seller of the transferring business) and the transferee (the buyer) have 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. As well as in some EU member states, these requirements are relaxed in insolvency scenarios.

1. **WHAT IS THE DEFINITION OF A RELEVANT TRANSFER / WHEN DO ART. 333 CO ET SEQ. APPLY?**

1.1 The Articles 333 CO et seq. (as amended) apply in the following scenarios:

1.1.1 **A business transfer:**

A transfer of a business in the sense of transferring a company (or part thereof) that retains its identity – typically a transfer of the business and its assets.

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

It has to be expected that Swiss courts, in their interpretation of Article 333 CO (in order to achieve alignment with the European legal situation), will take into consideration that according to EU case law, outsourcings, insourcings and changes of service provider are qualified as business transfers where there was an organised grouping of employees carrying out the relevant activity pre-transfer and the transferor intends that the transferee will take over the activity on a continuous rather than one-off basis.

1.2 Articles 333 CO et seq. apply in cross border issues where the "economic entity" (including e.g. a branch) is operating in Switzerland immediately before the transfer.

1.3 Articles 333 CO et seq. generally do not apply to transfers of shares, as the identity of the employer must change for there to be a relevant transfer. However, they *would* apply to an asset transfer carried out as a precursor to or following a share sale.

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

- 2.1 Different to the EU – Directive's intention, Articles 333 CO et seq. do not regulate that the transferor must provide prescribed information about the employees to be transferred (the 'employee liability information') to the transferee.
- 2.2 Only the transferor must inform the elected employee representatives or - where there is no such representative body - the employees affected by the transfer. If there is a need to consult, the transferor as well as the transferee have to do so with the elected employee representatives or - where there is no such representative body - the employees affected by the transfer (on the transferor side) respectively the existing employees (on the transferee side). There is prescribed information that the transferor (and also the transferee in case of required consultation) must provide. Such has to be done in due time before the transfer is taking place. However, affected employees do not have to be informed before the decision of such transfer but just in due time before execution of the transfer unless there is a legal need for consultation.
- 2.3 The duty to consult only arises where an employer envisages taking measures in respect of affected employees, e.g. upcoming restructurings, salary reductions, dismissals and redundancies, changes of workplaces etc. The transferor must consult about such measures with elected employee representatives or - where there is no such representative body - the employees affected by the transfer. In addition, transferee must consult with its employees if planned measures would also affect such employees.
- 2.4 If the employer plans a mass dismissal, he must inform in writing and consult about with elected employee representatives or - where there is no such representative body - the employees affected by the transfer in due time before such decision. The definition of a mass dismissal depends on the number of employees affected in relation to the persons employed by the company. Swiss CO does not provide for a mandatory time period to be observed but 20 to 30 days seem to be reasonable.
- 2.5 If the transferor fails to comply with the information and consultation duties, the employees or their representative body may request the court to prohibit the entry of the transfer in the Commercial Register (where the Swiss Merger Act applies on the transfer).
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 within a time period defined by law. If they do so, their employment will end on the date according to the statutory notice period given by CO, but on the day of the transfer at the earliest.
- 3.2 If the new employer seeks to impose new terms or working arrangements, he must seek for the consent of the employees (or enter into consultation proceedings). Dismissals of employees who do not give their consent can be considered as an abusive dismissal with the consequence that the employer might have to pay an indemnity (up to 6-month salary max.). Nevertheless, the employment remains terminated.
4. **CAN THE EMPLOYER CHANGE TERMS AND CONDITIONS OF EMPLOYMENT FOLLOWING THE TRANSFER?**
- 4.1 The transferee takes on the transferring employees on their existing terms of employment, and can only make changes to their terms in limited circumstances (e.g. general directives and specific instructions regarding the performance of work). Changes to terms and conditions of employment must either be agreed upon with the employee or tried to be

implemented by way of dismissal with the option of altered conditions of employment ("Änderungskündigung"). Otherwise, if the employee does not accept and is therefore dismissed, the termination bears the risk to be abusive, unless the reason for the variation is a valid Economic, Technical or Organisational reason (an 'ETO Reason').

4.2 An employee who has entered into a varied contract with the transferee will not be able to choose whichever pre-transfer or post-transfer terms are more beneficial to them. Only the varied contract will then apply.

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

5.1 Several articles of the CO provides employees with protection against dismissal, e.g. in case of unfair or abusive termination or termination at an improper time.

5.2 Specific protection exists in the event of a mass dismissal without prior consultation. For those employees that qualify, their dismissal will be deemed abusive with an indemnity sentence of 2 month' salary.

5.3 However, the employment relationship remains terminated and will end according to the contractual or legal notice period. The termination will only be considered as invalid and the employment only remains in force under specific circumstances.

5.4 If an employer normally employs at least 250 employees and intends to make at least 30 employees redundant within 30 days for reasons that have no connection with their persons, the employer must enter into negotiations with the employees with the aim of preparing a social plan.

6. **WHAT IS THE EFFECT OF THE TRANSFER ON THE COLLECTIVE STATUS OF EMPLOYEES (COLLECTIVE AGREEMENTS AND COMMON PRACTICES)?**

6.1 If a collective employment contract applies to the employment relationship transferred, the transferee shall comply with it.

6.2 The transferee shall comply with the collective employment contract for one year after the transfer unless it expires earlier or is terminated by notice.

7. **WHAT IS THE IMPACT OF THE TRANSFER ON STAFF REPRESENTATIVES?**

7.1 Swiss CO provides for a provision with regard to the dismissal of a staff representative.

7.2 The staff representatives are granted protection rights, if they are dismissed and the dismissal is chiefly related to their role as representative, then that dismissal will be deemed to be abusive.

7.3 The general provisions about the representatives are and have to be defined in the participation act.

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

For more information regarding employment law in Switzerland:

**Rolf Hartmann, GHR Rechtsanwälte AG, at rolfhartmann@ghr.ch
Patrizia Lorenzi, GHR Rechtsanwälte AG, at patrizialorenzi@ghr.ch
Markus Brühlhart, GHR Rechtsanwälte AG, at markusbruelhart@ghr.ch**