



Transfer of Undertakings and its impact on employees

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Düsseldorf · München · Berlin · Brüssel
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Topics

- Legal framework
- Consequences
- Harmonizing terms of employment
- Crossborder transfers and the applicable law





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Legislative Framework

- Council Directive 2001/23/EC of 12/03/2001
- Sec 613a BGB (German Civil Code)
- *interpretation by the ECJ and BAG (Federal Labour Court)*





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German Law

Section 613a

Rights and duties in the case of transfer of business

- (1) If a business or part of a business **passes** to another owner by legal transaction, then the latter **succeeds to the rights and duties under the employment relationships existing at the time of transfer.**

- (4) The **termination** of the employment relationship of an employee by the previous employer or by the new owner due to transfer of a business or a part of a business **is ineffective.**

- (5) The previous employer or the new owner must **notify** employees affected by a transfer in text form prior to transfer ...

- (6) The employee may **object** in writing to the transfer of the employment relationship within one month of receipt of notification under subsection 5.





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Defintion of a transfer

ECJ:

- autonomous economic entity (organised grouping of resources that has the objective of pursuing an economic activity)
- a transfer of this entity must take place
- following the transfer, the transferee must carry on the same or similar activities with the personnel and/or the business assets without substantial interruption (a going concern)

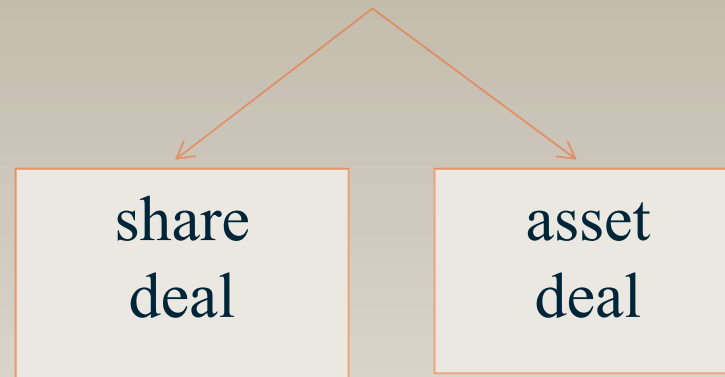




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The German law perspective



- the mere change of ownership of a company does not qualify as a transfer
- merger or transfer of assets is required
- sec 613a BGB applies to public and private undertakings
- a transfer of a business unit or part of the undertaking is sufficient



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- legal nature of the transaction is irrelevant
 - sale and purchase agreements
 - gifts
 - legacies
 - partnership agreements

- basic rule: a fact-sensitive assessment of the **individual case**

- disposal of assets not sufficient in itself





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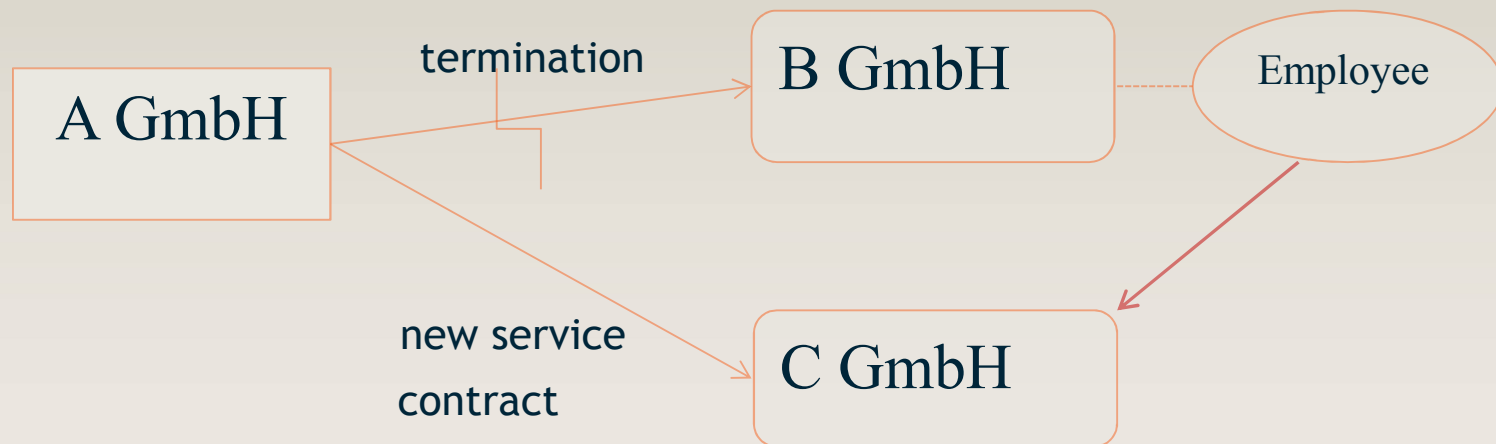
Criteria for the assessment:

- type of business or undertaking
 - labour-intensive: transfer of the majority of employees (in terms of number and qualification, transfer of key employees?)
 - assets: tangible assets (buildings and moveables property) and intangible assets are to be transferred (value, important for the production process?)
- transfer of customers and contracts
- degree of similarity of activities carried out before and after the transfer (use of same premises, equipment?)





- the period for which the activities were suspended
↔ closure ?
- sec 613a BGB might even apply in a case of insolvency
- a service provision change might qualify as a transfer





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Consequences of a transfer

- rights and obligations relating to the employment relationship existing on the date of transfer pass across by **operation of law**
 - employment contract
 - collective agreement
 - works council agreement
- the termination of the employment due to the transfer is **ineffective** (no avoidance by fixed term employment contracts or cancellation agreements due to the transfer)





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- right of information and consultation
 - the date or planned date of transfer
 - the reason for the transfer
 - the legal, economic and social consequences of the transfer for the employees, and
 - measures that are being considered with regard to employees (high demands)
- right of the employee to raise objection
 - period of one month following the completion of the information procedures
 - right of reemployment (but maybe enforced redundancy)
 - liable for any severance payments





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Harmonizing the terms of employment

Sec 613a BGB:

“If these rights and duties are governed by the legal provisions of a collective agreement or by a works agreement, then they **become part of the employment relationship** between the new owner and the employee and **may not be changed to the disadvantage of the employee before the end of the year after the date of transfer.**”





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- basic rule: changes to the terms of employment are void
- transferee shall continue to observe the terms and condition of the collective agreements and works council agreements
 - untill the date of termination or expiry of the collective or works council agreements
 - can not be amended within one year of the transfer





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Exceptions (modification possible):

- the collective or works council agreement expires within the one-year period
- the purchaser and the employee agree that the relationship should be governed by another collective agreement substituting the former one (and both, employee and purchaser are not party to the old agreement)
- a new and different collective or works council agreement applies to the purchaser business by operation of law





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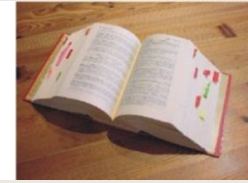


- after the one-year period, the implementation of changes is possible:
 - with the consent of the employee
 - dismissal with the option of altered terms of employment (if possible)





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Crossborder Transfer

Germany

A GmbH

Business
unit

Netherlands

B B.V.

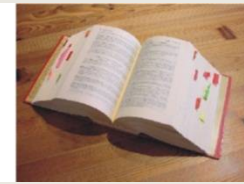
transfer of the business unit

Employee E: termination of
the employment contract prior to transfer





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- which law does apply?
- does sec 613a BGB apply?

Federal Labour Court: in principle yes (if it is transfer being close to the border)

no closure, only a dislocation of assets
if the distance between the old and the
new location of the business is too big:
sec 613a BGB does not apply (e.g. a
transfer from Germany to Portugal)

Result: termination is legally void





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What happens if the business is transferred within Germany (the operation stays in Germany?)

➤ Sec 613a BGB applies





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- the German Civil Code is not restricted to the territory of Germany
- different in Italy and other states. UK: TUPE does not deal with a physical transfer into the UK of an entity previously located elsewhere
- different approach: the interpretation of a transfer in the different jurisdictions





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- a uniform application of national law on cross border transfers is not guaranteed
- no clarity which law applies
- this conflicts with the EU's principle of uniform treatment





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- Transfer outside the EU?

does the directive cover this transfer ??????????





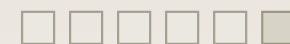
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Thank you for your kind attention

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