The European Rules on Transfer of Undertakings in Germany

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Right to Transfer

- German law implementing ARD: Section 613a German Civil Code ("German ARD")

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. 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. Sentence 2 does not apply if the rights and duties with the new owner are governed by the legal provisions of another collective agreement or by another works agreement. Prior to expiry of the period of time under sentence 2, the rights and duties may be changed if the collective agreement or the works agreement no longer applies or, where it is not the case that both parties are bound by a collective agreement in the scope of applicability of another collective agreement, the application of that collective agreement is agreed between the new owner and the employee.

(2) The previous employer is jointly and severally liable with the new owner for duties under subsection (1) to the extent that they arose prior to the date of transfer and are due before the end of one year after that date. If such duties are due after the date of transfer, however, the previous employer is only liable for them to the extent that corresponds to the part of their assessment period that ended on the date of transfer.
Right to Transfer

(3) Subsection (2) does not apply if a legal person or a commercial partnership ceases to exist through conversion.

(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. The right to terminate the employment relationship for other reasons is unaffected.

(5) The previous employer or the new owner must notify employees affected by a transfer in text form prior to transfer:
   1. of the date or planned date of transfer,
   2. of the reason for the transfer,
   3. of the legal, economic and social consequences of the transfer for the employees, and
   4. of measures that are being considered with regard to employees.

(6) The employee may object in writing to the transfer of the employment relationship within one month of receipt of notification under subsection (5). The objection may be addressed to the previous employer or to the new owner.
Right to Transfer

- Transfer of business
  - (partial) transfer of business requires an organizational unit at transferor which transfers to transferee with continuing operational identity.
  - Re "business": an undertaking, a business or a part of a business is defined for this purpose by the European Court of Justice and the German Federal Labour Court as an economic entity which retains its identity irrespective of the transfer.
  - German courts (in line with ECJ) apply an overall assessment on a case-by-case basis
  - German ARD applies also in the case of mergers, splits and asset transfers
  - No “service provision change” under German ARD
  - German ARD in outsourcing transactions
  - Pension liabilities particularly tricky in Germany
Right to Transfer

• Right to object
  – Individual employee may effectively obstruct “automatic” transfer pursuant to German ARD
  – In case of an objection, the employment will continue with the transferor. If the transferor is no longer in the position to offer a job to the employee, a dismissal for operational reasons may be socially justified.

• Legal consequence
  – Full assumption of employer’s obligations by “new owner” of the business
  – Limited liability of “old employer” for “past service”
Information and Consultation Obligations

• Statutory obligation to inform individual "affected employees"
  – Prior to transfer and in writing
  – Information about:
    • Date of transfer
    • Reason of transfer
    • Legal, economic and social consequences of transfer
    • Prospective measures in respect of employees
Information and Consultation Obligations

- Consultation obligations vis-a-vis employee representatives
  - Complex works council consultation requirements (including statutory arbitration procedures) to the extent the transfer coincides with an “operational change”.
  - Interest reconciliation/social plan
  - Considerable impact on timing, procedure and costs (but no legal right to effectively obstruct the transfer)
Protection of Employees

- Full continuation of rights and entitlements under the employment agreement
- Full continuation of rights and entitlements under collective agreements
  - continuation on collective level
  - Transformation to individual employment agreements (with one year “freeze”)
- Dismissal on the (sole) grounds of the transfer are void
- Mutual termination agreements subject to judicial review. Courts likely to protect the individual – even against his/her “own free will”
Changing Terms of Employment

Subject to legal basis of “original” terms of employment

- Individual employment contract
  - Mutual agreement vs. circumvention of German ARD
  - Unilateral termination vs. special protection under German ARD

- Works council agreement (similarly collective bargaining agreements on union level)
  - If transferred “collectively”: mutual termination, unilateral termination or substitution by collective agreements applicable at “new employer”
  - If transformed into individual employment agreement: mutual or unilateral termination without prejudice to statutory “freeze” period
Questions & Answers

For an European overview see Ius Labories' Transfer of Undertakings Guide (December 2009):

Thank you for your attention

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